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ANN. CAS. 1917 D.

ANNOTATED CASES AMERICAN AND ENGLISH

CONTAINING THE IMPORTANT CASES SELECTED FROM
THE CURRENT AMERICAN, CANADIAN,
AND ENGLISH REPORTS

THOROUGHLY ANNOTATED

EDITORS

WILLIAM M. MCKINNEY AND H. NOYES GREENE

ANN. CAS. 1917 D

EDWARD THOMPSON COMPANY
NORTHPORT, L. I., N. Y.
1917

BANCROFT-WHITNEY COMPANY
SAN FRANCISCO
1917

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UPHOFF

v.

**INDUSTRIAL BOARD OF ILLINOIS
ET AL.**

Illinois Supreme Court—December 22, 1915.

271 Ill. 312; 111 N. E. 128.

**Statutes — Construction — Effectuating
Legislative Intent.**

In considering a statute, effect should be given to the intent of the lawmakers.

Disregarding Inconsistent Words.

In construing a statute, the courts are not confined to the literal meaning of the words, but may disregard words inconsistent with the general intent.

Avoiding Injustice or Absurdity.

A construction of a statute which will result in great inconvenience or absurd consequences should be avoided.

Same.

The courts are bound to presume that the legislature did not intend absurd consequences, leading to great injustice.

Effectuating All Provisions of Statute.

A statute being passed as a whole, that construction giving effect to all sections should be adopted.

**Workmen's Compensation Act — Em-
ployments Included — Farmer Erect-
ing Building.**

The Workmen's Compensation Act (Hurd's Rev. St. 1913, c. 48, §§ 126-152h; Laws 1913, p. 335), by section 1, provides that any employer may elect to provide and pay compensation for accidental injuries and thereby relieve himself from all further liability. Section 3, par. "b," declares that the section shall apply only to an employer engaged in the occupations, enterprises, or businesses of building, maintaining, repairing, or demolishing any structure, of construction, of excavation or electrical work, of carriage by land or water and loading and unloading in connection therewith, of

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warehousing, of mining, of enterprises in which explosives are manufactured or handled, of enterprises wherein molten metal or explosive or injurious gases, etc., are manufactured or used, and of enterprises in which statutory or municipal ordinance regulations shall be imposed for the guarding of machinery, each of which occupations, enterprises, or businesses is declared to be extrahazardous. Section 5 defines an employee as every person in the service of another under any contract of hire, but not including any person whose employment is but casual, or is not engaged in the usual course of the trade, business, profession, or occupation of his employer. A farmer engaged a carpenter to build a cornerib, and the carpenter was injured by a metal splinter which flew off of his hammer. The carpenter was engaged for no particular time, but it appeared that he was to continue work until the building was fully completed. It is held that as the farmer was not engaged in the business or occupation of building, and as the construction of the cornerib could not be classed as an enterprise which is an undertaking of hazard, nor could it be considered as an extrahazardous business, the statute is not applicable; the farmer not having elected to come within its provisions, which did not include the occupation of farming.

[See note at end of this case.]

**Review of Industrial Board — Conclu-
siveness of Decision — Want of Juris-
diction.**

Decision of the Industrial Board under the Workmen's Compensation Act is conclusive only when it is within its jurisdiction.

[See Ann. Cas. 1916B 475.]

Error to Superior Court, Cook county:
BRENTANO, Judge.

Claim for compensation under Workmen's Compensation Act. B. C. Bruner, claimant, and Frank Uphoff, defendant. Claim allowed by Industrial Board of Illinois. Decision affirmed by Superior Court. Defendant brings error. The facts are stated in the opinion.

REVERSED.

Emery Andrews, Raymond G. Real and John H. Marshall for plaintiff in error.
Bryan H. Tivnen for defendant in error Bruner.

[313] CARTER, J.—In August, 1913, the plaintiff in error, Frank Uphoff, employed the defendant in error B. C. Bruner to help build a broom-corn shed on Uphoff's farm near Mattoon, Illinois. While Bruner was working on this structure a piece of metal flew from the hammer he was using and struck his eye, destroying its sight. He filed a petition with the Industrial Board of Illinois asking that damages be awarded him for the loss of his eye under the Workmen's Compensation Law of 1913. The arbitration committee appointed by the Industrial Board under that act awarded him \$1442 for his injury, and this award was affirmed by the majority of the Industrial Board. Uphoff thereafter filed a petition in the superior court of Cook county for a writ of *certiorari*. Under that writ the proceedings of the Industrial Board were reviewed and an order entered sustaining said proceedings. This writ of error was then sued out.

Counsel for plaintiff in error contend that the Industrial Board was without jurisdiction as to an injury of the character of the one here in question. The evidence shows that Uphoff has been engaged in farming for the past eighteen years; that Bruner had worked as a carpenter for about thirty years; that the building that he was working on was [314] a broom-corn shed, 32 by 24 feet and 17½ feet high, requiring for its construction the services of four men for about ten days. Bruner had been employed by Uphoff for no certain time but apparently to continue the work until the building was constructed. The accident happened during the seventh day of his employment. He received thirty cents an hour for ten hours a day and was expected only to do carpenter work. He had never worked for Uphoff before.

Section 1 of the workmen's compensation act provides that any employer may elect to provide and pay compensation for accidental injuries sustained by employees arising in the course of employment and thereby relieve himself from all other liability. It is conceded here that plaintiff in error had given no notice to the Industrial Board of his acceptance of the provisions of said act. He therefore can not be held liable thereunder unless it can be shown that he is one of the class of employers who are held liable under the act even though they have not elected to come under it. While the entire act must be read in order to understand its intent and meaning, certain sections must be particularly considered and construed in order to reach a proper conclusion in this case. Paragraph (b) of section 3 of said act reads:

"(b) The provisions of paragraph (a) of this section shall only apply to an employer engaged in any of the following occupations, enterprises or business, namely:

"1. The building, maintaining, repairing or demolishing of any structure;

"2. Construction, excavating or electrical work;

"3. Carriage by land or water and loading and unloading in connection therewith;

"4. The operation of any warehouse or general or terminal storehouses;

"5. Mining, surface mining or quarrying;

[315] "6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities;

"7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors or inflammable vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities:

"8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous."

Section 4 defines what shall be understood by the term "employer" in said act. There is nothing in said section which will throw especial light on the question herein involved. If that section were construed alone, Uphoff might be considered an employer coming within the provisions of said act. Section 5 provides that "the term 'employee' as used in the act shall be construed to mean: . . . Second—Every person in the service of another under any contract of hire, express or implied, oral or written, . . . but not including any person whose employment is but casual or who is not engaged in the usual course of the trade, business, profession or occupation of his employer."

The intention of the law-makers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute though not within the letter. A thing within the letter is not within the statute if not also within the intention. When the intention can be collected from the statute, words may be modified or altered so as to obviate all inconsistency with such intention. (*Hoyne v. Danisch*, 264 [316] Ill. 467, 106 N. E. 341.) When great inconvenience or absurd consequences will result from a particular construction that construction should be avoided, unless

the meaning of the legislature be so plain and manifest that avoidance is impossible. (*People v. Wren*, 4 Scam. Ill. 269.) The courts are bound to presume that absurd consequences leading to great injustice were not contemplated by the legislature, and a construction should be adopted that it may be reasonable to presume was contemplated. (2 *Lewis' Sutherland on Stat. Const.* sec. 489; *People v. Chicago*, 152 Ill. 546, 38 N. E. 744; *People v. Chicago Sanitary Dist.* 184 Ill. 597, 56 N. E. 953.) A statute is passed as a whole and not in parts or sections, hence each part or section should be construed in connection with every other part or section. In order to get the real intention of the legislature, attention must not be confined to the one section to be construed. *Warner v. King*, 267 Ill. 82, 107 N. E. 837, and cited cases.

Numerous authorities from other jurisdictions construing workmen's compensation acts have been cited and frequent references have been made to acts in other jurisdictions. Both counsel have cited authorities which, it is argued, support the conclusion contended for. The wording of our statute is so different on the question here under consideration that the other acts or decisions could have very little weight as to the proper construction to be here given and further reference to them is unnecessary.

Manifestly, from the reading of the above quoted sections of the act, some employers were not intended to be included in the act unless they elected so to be. Clearly, under the quoted sections, read in connection with the remainder of the act, farm laborers engaged in general farming would not be covered by the act unless the farmer elected to accept the act under the provisions of section 1.

It is contended by counsel for defendants in error that plaintiff in error must be held to come under the provisions of the act under subdivision 1 of paragraph (b) of section [317] 3, as the broom-corn shed would be included in the provisions of that section in the building "of any structure." This could only be true if it were held that in so building such broom-corn shed the farmer was engaged in an occupation, enterprise or business and was engaged in the usual course of his "trade, business, profession or occupation," and that the employment was not casual. It is also plain that the legislature only intended to include under paragraph (b) any such occupations, enterprises or businesses of the employer where they were properly considered to be "extra-hazardous." It is true that the clause in subdivision 8 of said paragraph (b) calling all of these trades, businesses, enterprises or occupations extra-hazardous was inserted for the purpose of making clear what was considered extra-

hazardous, but it is also clear that the legislature did not intend to include work that everyone knows is not extra-hazardous or even hazardous.

It is not seriously contended by counsel that the mere building of this crib could be properly classed as the business or occupation of plaintiff in error, but it is earnestly urged that it could properly be considered under the term "enterprise." An enterprise is "an undertaking of hazard; an arduous attempt." (15 *Cyc.* 1053, and cited cases.) Lexicographers define an enterprise as "an undertaking; something projected and attempted; an attempt or project, particularly an undertaking of some importance or one requiring boldness, energy or perseverance; an arduous or hazardous attempt, as, a warlike enterprise." The building of this shed might be classed under the head of something projected or attempted, but hardly as an important undertaking requiring courage or energy or one that was arduous or hazardous. To say that the word "enterprise" covered the building of any structure, however small, would lead, in some instances, to absurd consequences. A chicken coop or dog kennel ten feet square and four or five feet high would be a "structure" in a technical sense of the term, but [318] it would hardly be contended that such a structure was within the meaning of this act, according to the intent of the legislature. "Carriage by land," under subdivision 3 of said paragraph (b), in the strict, literal meaning of the term might require that it include the hauling of grain by team and wagon from the farm to the elevator. Surely that was not within the legislative intention. The word "excavating," under subdivision 2 of said paragraph (b), might cover, technically, the digging of a post-hole on a farm, but it was certainly never so intended. It is plain from the use of the word "enterprise" in other subdivisions of said paragraph (b) that it was intended to mean a work of some importance that might properly be considered arduous or hazardous. The building of this sort of a structure was hardly more hazardous than the building of a dog kennel or chicken coop or the building of an ordinary board fence for the farm. From any fair construction of the act the legislature never intended to call working on every farm structure, no matter how small, as extra-hazardous.

In the oral argument of this case it was suggested that in 1915 the legislature amended the workmen's compensation act so as to make it absolutely clear that none of the employees of farmers should be included in the act unless the farmer so elected. Each counsel argued that the fact that the legislature so amended the original act tended to support the construction contended for by

him as to the original act. We do not think any fair argument can be drawn from this amendment in support of either construction contended for, and nothing we have said here is intended to have any bearing on the construction that should be given to the act as thus amended.

Counsel for defendant in error Bruner contends that the decision of the Industrial Board under this statute is decisive of this question and cannot be inquired into by the courts. This contention cannot be supported. The decision of the Industrial Board is only binding when it is acting [319] within its powers. This court said in *Courter v. Simpson Constr. Co.* 264 Ill. 488, 106 N. E. 350, that "the Industrial Board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions nor to an accident not within the provisions of the act," and that if it did so the remedy was in the courts. (See also to the same effect, *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209, 37 L.R.A. (N.S.) 489.) In view of what we have already said, it is clear that the Industrial Board was without jurisdiction in this matter.

The judgment of the superior court is reversed and the cause remanded, with directions to set aside and hold for naught the finding of the Industrial Board.

Reversed and remanded, with directions.

Rehearing denied February 2, 1916.

NOTE.

Occupations or Employments within Purview of Workmen's Compensation Acts.

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I. General Scope of Compensation Acts.

With reference to the employments covered, workmen's compensation acts may be divided into four classes:

First may be mentioned acts that apply generally and do not limit their scope by reference to particular employments. Thus the Federal Act of September 7, 1916 (ch. 458, 38 Stat. L. 742; Fed. St. Ann. Pamph. Supp. No. 8, p. 141) applies to an "employee" of the United States without any restriction as to occupation and makes the term "employee" include "all civil employees of the United States and of the Panama Railroad Company."

Acts of the second class apply generally but specify certain exceptions. Agricultural and domestic service are usually excepted from the compulsory clause of the American Statutes. For examples, see the statutes of California (ch. 176, 1913, as amended by chs. 541, 607, & 662, Laws 1915) and Indiana (ch. 106, Laws 1915). The English Act of 1908 embraces all employments except those which are in terms excluded from the operation of the act. See *Laws of Eng. (Halsbury)* vol. 20, p. 154.

The third class is composed of the large number of compensation acts that include only certain enumerated employments. See, for examples, the New York Act (ch. 67, Consol. Laws as amended by chs. 167, 168, 615, and 674, Laws 1915, and by ch. 622, Laws 1916), the English Acts of 1897 and 1900 (superseded by the Act of 1906), and the Federal Act of 1908 (superseded by the Act of 1916).

Occasionally where the act applies only to a limited number of employments, the basis of the scope is some general term, such as "extrahazardous," and although the statute enumerates certain occupations which shall be included, yet others also are included if they are embraced by the general classification. For example, see the Washington Act, which is discussed in the succeeding paragraph.

The Washington statute provides as follows: "If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4." Laws 1911, p. 346. That statute came before the court in *State v. Powles* (Wash.) 162 Pac. 569, wherein it was claimed that the effect of the provision was to delegate to the industrial insurance commission the power to bring within the purview of the act employments not named by the legislature as extrahazardous. But the court said: "The legislature may have the power to delegate such power to the commission accompanied by some legislative prescribed standard by which such determination shall be made; but that it could constitutionally delegate such power to the commission without prescribing some such standard suggests, to say the least, grave doubt. . . . By the determination of the commission, if it has the power here claimed, all right of the employee to seek redress in the courts from his employer by reason of the latter's negligence is taken away, and at the same time the employer is compelled to contribute to the accident fund from which employees, other than his own, may be compensated when injured; and all this regardless of the fault of any one save as to the very few exceptions specified in the act. More, for want of a prescribed standard, it might well be argued that the commission, if its power exists as here claimed, has delegated to it the power of determination as to what occupation or work is extrahazardous to the same extent that such determination might be made by the legislature itself. These considerations sug-

gest grave caution on the part of the courts to attribute to the legislature an intent to delegate such far-reaching power to the commission in the absence of language in the act expressly so declaring. . . . If there be or arise any such plainly hazardous occupation as to bring it under the act, we apprehend that it would come under the act regardless of whether the commission so determined or not. In other words, it would be the fact of the existence of such extrahazardous occupation, and not the determination of such fact by the commission, that would bring it under the act. In view then of the extraordinary nature and possible far-reaching effect of this assumed power on the part of the commission, the failure of the legislature to prescribe a standard by which it may be exercised, and the failure of the legislature to confer the power upon the commission by plain and unequivocal language in the act, we are constrained to hold that such power is not possessed by the commission, in any event not in the sense that it can be exercised and have the force of a legislative determination upon the question of occupations other than those specifically enumerated being extrahazardous."

The acts are sometimes limited to work in employments carried on for pecuniary gain. See *Griswold v. Wichita*, reported in full, post, this volume, at page 31. *Matter of Allen*, 173 App. Div. 455, 160 N. Y. S. 85; *Coleman v. Bartholomew*, 175 App. Div. 122, 161 N. Y. S. 560. Where the word "business" is used, it has been said that the word means "an undertaking carried on for the purpose of a livelihood or a profit." *Trudeau v. Montreal* 17 Quebec Pr. 216, 49 Quebec Super. Ct. 62.

II. Construction of Compensation Acts.

1. IN GENERAL.

In cases passing on the question whether a certain employment is within the purview of a workmen's compensation act, the courts have laid particular emphasis on their duty to ascertain the actual intention of the legislature, and to regard the various rules of construction as only subsidiary to the accomplishment of that purpose. Thus in *Armour v. Illinois Industrial Board*, 275 Ill. 328, 114 N. E. 173, the court said: "Counsel on the one hand argue at some length that this statute, being in derogation of the common law, should be strictly construed, while, on the other hand, it is argued that the statute, being remedial in its character, should be liberally construed. The rules as to strict or liberal construction are of value only as assisting in finding the real meaning of the statute. They are not considered as

important in recent years as formerly, for it has become more and more recognized that: 'The paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object.' Endlich on Interpretation of Statutes, sec. 329. The intention of the law-makers is the law, to be gathered from the reading of the statute, having in mind all the rules of construction which may apply. *Warner v. King*, 267 Ill. 82, 107 N. E. 837, and authorities cited." See also the reported case; and see *Griswold v. Wichita*, reported in full, post, this volume, at page 31.

It has frequently been declared that a workmen's compensation act should be liberally construed. *McQueeney v. Sutphen*, 167 App. Div. 528, 153 N. Y. S. 554; *Wendt v. Industrial Ins. Commission*, 80 Wash. 111, 141 Pac. 311; *In re Kearney*, Op. Sol. Dept. of Labor 147. But the act cannot be given a meaning plainly repugnant to its terms. *Lizotte v. Nashua Mfg. Co.* (N. H.) 100 Atl. 757; *In re Mackay* Op. Sol. Dept. of Labor 136. *In Law v. Graham* (1901) 2 K. B. (Eng.) 327, the court refused to give the words of the statutory definition "a very wide interpretation."

The *New York* act provides for a presumption that the claim is within the statute, in the absence of substantial evidence to the contrary. *Larsen v. Paine Drug Co.* 218 N. Y. 252, 112 N. E. 725; *McQueeney v. Sutphen*, 167 App. Div. 528, 153 N. Y. S. 554. However, it has been said: "The presumption raised by section 21 of the act that the case comes within the act does not permit the words of the statute to be warped from their usual and ordinary meaning. It relates more to the facts; so far as it affects the construction of the statute itself, it can only be material as indicating that the statute is a remedial one, and should be given a liberal construction in order to carry out the beneficial purposes intended to be accomplished by the law. . . . We cannot give to the language employed a strained or unusual meaning for the purpose of bringing within the act an employment not intended by the legislature to be embraced within it." *Tomassi v. Christensen*, 171 App. Div. 284, 156 N. Y. S. 905. To the same effect see *Sickles v. Ballston Refrigerating Storage Co.* 171 App. Div. 108, 156 N. Y. S. 864; *Matter of Grassell*, 175 App. Div. 874, 162 N. Y. S. 421.

In the case of *In re Jerman*, Op. Sol. Dept. of Labor 152, it was said: "Attention is invited to the fact, however unfortunate it may be, that because the work or duties performed in an establishment not expressly included in the act are similar to those performed in an establishment which is expressly included

does not of itself bring the former place within its provisions."

To determine the scope of the statutory enumeration the solicitor in the case of *In re Kearney*, Op. Sol. Dept. of Labor 147, adverted to the following consideration: "What reason could Congress have had in mind to include the employees of one class of forts and to exclude those of the other class? Surely no reason can be attributed to Congress for a discrimination of this character, and while it is not the province of this office to read into the act something extraneous, yet it is incumbent upon those construing acts of Congress to give such acts a reasonable instead of an unreasonable construction, so that the same may be read in the manner which Congress intended." Conversely in *Nash v. Hollinshead* (1901) 1 K. B. (Eng.) 700, 70 L. J. K. B. 700, 70 L. J. K. B. 571, *Collins, L. J.*, said: "I think that, even if the words of s. 93 were wide enough to embrace the present case, the result of holding that it comes within the act is so inconsistent with the general purview of its provisions as inevitably to lead to the inference that the legislature never intended that the act should embrace such a case. It was on a ground similar to this that the case of *Ferrand v. Hallas Land, etc., Co.* [1893] 2 Q. B. (Eng.) 135, was decided." And see the reported case. But on the other hand it is reported in *Belsey v. Sadler*, 1 W. C. C. 141, that His Honor, Judge Addison, Q. C., being of the opinion that the English act was a "complicated combination of compromises" made up of "patchwork, and most puzzling," said that the act was so finely drawn and was so difficult and led to so many absurdities that one could not argue from reason or analogy, but must take the strict words of the act. And, as pointed out in *Wilson v. Dorfinger*, reported in full, post, this volume, at page 38, the reasoning indicated in the case of *In re Kearney*, supra, cannot be effective further than to ascertain the true intent of the lawmakers.

Words are to be construed in their ordinary and commonly accepted sense. *Matter of Pietha*, 174 App. Div. 764, 161 N. Y. S. 661; *In re Arnold*, Op. Sol. Dept. of Labor, 158. See also *Haddock v. Humphrey*, (1900) 1 Q. B. (Eng.) 609; *Adams v. Great Western R. Co.* 6 W. C. C. 87; *Rochester v. Whiting*, 6 W. C. C. 91; *In re Olson* Op. Sol. Dept. of Labor 136. Nevertheless, where the statute itself defines its terms, those definitions must prevail. Thus in *Doswell v. Cowell*, 95 L. T. N. S. (Eng.) 38, wherein it was held that a place for the preparation of tripe was a "factory," the court said: "I do not suppose that any ordinary man in the street would ever have thought that these premises were a 'factory'; and one of the dif-

sculties that continually confront the court in construing the act is this extension of meanings productive of results which were, of course, not contemplated by the framers of the act. But it is our duty to construe the act to the best of our ability; and when we consider the process whereby the tripe is prepared for market—or 'adapted for sale,' to quote the statutory expression—we find that there is a use of steam power."

In *Fletcher v. London United Tramways*, (1902) 2 K. B. 269, 71 L. J. K. B. 653, 66 J. P. 596, 50 W. R. 597, the court, construing certain words in the English Act, said: "There is no vehement presumption that this act, when it uses different words, always means the same thing. Indeed, I think the framers of the act may be entitled to the presumption that when it uses different words different things are meant. The act uses the word 'railroad,' and that word is certainly capable of expressing a tramway. If one carries one's mind back to older times, railroad was apparently the usual word to describe a road used as a tramway where horsepower or some power other than steam was used; and it seems to me that 'railroad' taken by itself is a good English word descriptive of what is now usually known as a tramway. That being so, why is it not, when used in this act, to embrace a tramway upon which some work of construction, alteration, or repair is being done? A tramway can only be excluded by assuming that the legislature must be taken to have meant by the word 'railroad' the same thing as that which they had previously defined as 'railway.' I can see nothing whatever to ground that presumption. I can see nothing to rebut the natural inference that the word railroad was used as a term having a larger meaning than railway, being in fact the genus of which railway is a species. The legislature, to my mind, intended to embrace something outside a railway proper, because in the first place, as I have already said, they used the word 'railroad,' and in the second place because they placed a railroad in the same category with harbour, dock, canal, and sewer. It seems to me that the presumption is that the legislature intended to embrace a larger ambit than is embraced by the word railway."

In recent *New York* cases, applying the law as it stood before the amendment of 1916, frequent reference has been made to the broadening effect of that amendment as tending to show that employments apparently thereby included were formerly excluded. *Matter of Pietha*, 174 App. Div. 764, 161 N. Y. 661; *Matter of Grasell*, 175 App. Div. 874, 162 N. Y. S. 421; *Matter of Holtz*, 175 App. Div. 878, 162 N. Y. S. 359; *Pardy v. Boomhower Grocery Co.* 164 N. Y. S. 775.

English decisions are useful as guides to

the meaning of American acts which are similar to the English act. Thus in *Armour v. Illinois Industrial Board*, 275 Ill. 328, 114 N. E. 173, the court said: "The Illinois compensation laws were taken, with certain modifications, from the workmen's compensation act theretofore enacted in Great Britain. *Lust on Workmen's Compensation Law of Illinois*, 2. The decisions of the courts of that country are therefore of assistance on subjects in our act that are also covered by the workmen's compensation act of Great Britain."

The probability of danger to employees by reason of the nature of the work in which they are engaged is recognized as influencing the classification of the occupations. *McGrath v. Neill* [1902] 1 K. B. (Eng.) 211; *Tullock v. Waygood* [1906] 2 K. B. (Eng.) 261, 8 W. C. C. 72; *Armour v. Illinois Industrial Board*, 275 Ill. 328, 114 N. E. 173; *Menke v. Hauber*, 99 Kan. 171, 160 Pac. 1017; *Lizotte v. Nashua Mfg. Co.* (N. H.) 100 Atl. 757; *Matter of Brown*, 173 App. Div. 432, 159 N. Y. S. 1047; *Matter of Mandel*, 173 App. Div. 515, 160 N. Y. S. 2. As was well said in *Benton v. Fraser*, 219 N. Y. 210, 114 N. E. 43, concerning employment as a salesman and inspector of machinery: "The manufacture of machinery is classified as a hazardous employment under group 21 in the Workmen's Compensation Law. It may well be that a salesman employed by a manufacturer of machinery simply and solely to sell his products, and who never had anything to do with the machinery in operation or the process of manufacture, would not be entitled to the benefits of the act; but when such an employee performs functions which bring him into direct contact with the machinery itself, even when in operation, he may be as much exposed to danger as any workman, and I think his case falls within the letter and spirit of the statute." And in *Smithers v. Wallis* [1903] 1 K. B. (Eng.) 200, 72 L. J. K. B. 57, 87 L. T. N. S. 556, 51 W. R. 261, 67 J. P. 381, 19 Times L. Rep. 111, the following more historic phraseology was used: "Such a case as the one before us is within the mischief intended to be remedied."

2. "EJUSDEM GENERIS."

The rule of construction, whereby the meaning of a general term following particular terms is limited to the same kind of things as those particularly designated, has aided the courts in the following cases to determine the scope of compensation acts: *Willmott v. Paton* [1902] 1 K. B. (Eng.) 237; *Bennett v. Aird*, 1 W. C. C. 138; *Wilson v. C. Dorflinger & Sons*, reported in full post, this volume, at page 38; *Aylesworth*

v. Phoenix Cheese Co. 170 App. Div. 34, 155 N. Y. S. 916; Matter of Holtz, 175 App. Div. 878, 162 N. Y. S. 359 (see quotation, *infra*, this note, subsection V. 26); Maloney v. Levy, etc. Co. 176 App. Div. 470, 163 N. Y. S. 505. In Willmott v. Paton, *supra*, it was said: "The first contention on behalf of the applicants was that the premises were a factory by reason of the definition which constitutes premises a factory where machinery driven by steam, water, or other mechanical power is used. It was said, and the county court judge so held, that the machinery in this case was driven by mechanical power, although it was in fact kept in motion by hand-power, and that it was not necessary that the 'other mechanical power' contemplated by s. 93 of the Factory and Workshop Act, 1878, should be *ejusdem generis* with steam-power or water-power. With that part of the judgment of the county court judge I cannot agree."

Apparently, the rule under consideration was not followed in McGregor v. Wright, 3 W. C. C. 121, cited, *infra*, this note, subsection V. 8.

The rule *ejusdem generis* is discussed at length in relation to the subject of this note in American Ice Co. v. Fitzhugh, reported in full, *post*, this volume, at page 33.

3. "EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS."

The express mention of employments to which the act applies excludes those not mentioned. Aylesworth v. Phoenix Cheese Co. 170 App. Div. 34, 155 N. Y. S. 916; Maloney v. Levy, etc. Co. 176 App. Div. 470, 163 N. Y. S. 505. See also *In re Morgan*, Op. Sol. Dept. of Labor 177; *In re Lawrence*, Op. Sol. Dept. of Labor 178; *In re Fowler*, Op. Sol. Dept. of Labor 180; *In re Cassidy*, Op. Sol. Dept. of Labor 180; *In re Washington*, Op. Sol. Dept. of Labor 181; *In re Cadwalader*, Op. Sol. Dept. of Labor 182; *In re Jewell*, Op. Sol. Dept. of Labor 182; *In re Eaton*, Op. Sol. Dept. of Labor 183; *In re Cowan*, Op. Sol. Dept. of Labor 184; *In re Johnson*, Op. Sol. Dept. of Labor 185; *In re Smith*, Op. Sol. Dept. of Labor 186; *In re McCormick*, Op. Sol. Dept. of Labor 186; *In re Fernandez*, Op. Sol. Dept. of Labor 187; *In re Evenson*, Op. Sol. Dept. of Labor 187.

Especially is this true of an important state industry. Pardy v. Boomhower Grocery Co. 164 N. Y. S. 775, wherein it was said: "Butter making is one of the great industries of the state. It would seem that had the legislature intended to include it as a hazardous employment, it would not have left the matter to conjecture or argument. In *Wilson v. Dorfinger*, 218 N. Y. 84, 112 N. E. 567, it was said by Chief Judge Bart-

lett: 'The character of the Workmen's Compensation Law indicates that it was prepared with the utmost care, and it is only fair to its authors to assume that nothing was inadvertently omitted therefrom.'"

III. Test of Employment.

"Regardless of the contractual or colloquial designation of the duties or position of an injured employee, the question remains in every instance as to the work which he was in fact doing and the extent to which his work came within the category of the enumerated. The actuality, rather than the appellation, is the sound basis for the commission's action in determining whether an employee met with mishap in the course of an enumerated employment." *Gleisner v. Gross*, 170 App. Div. 37, 155 N. Y. S. 946.

The occupation of a workman is within the act where it is fairly incidental to an operation undertaken by the employer which is specified by the act as being included; and it is not necessary that the occupation in which the workman is engaged should be wholly embraced in the characteristic process which has been made the basis of the classification. *Matter of Fogarty*, 221 N. Y. 20, 116 N. E. 346, *reversing* 175 App. Div. 729, 161 N. Y. S. 937. See also *Sorge v. Aldebaran Co.* 218 N. Y. 636, 112 N. E. 1077, *affirming* 171 App. Div. 959, 155 N. Y. S. 1142 (facts set forth in *Matter of Fogarty*, 175 App. Div. 729, 161 N. Y. S. 937). In *Matter of Fogarty*, 221 N. Y. 20, 116 N. E. 346, the court said: "The defendant, National Biscuit Company, is engaged in the bakery business, designated as 'hazardous' under Workmen's Compensation Law (Laws 1914, c. 41; Consol. Laws, c. 67), § 2, group 34. William Fogarty was employed by the biscuit company as a night watchman. As such his principal duty was to patrol the buildings every hour, passing through every department, and ring up the clocks, 35 in number. October 2, 1915, soon after midnight, the body of Mr. Fogarty was found at the bottom of the well under the stairway in one of the buildings of the company. Application was thereafter made by his widow to the industrial commission for compensation under the Workmen's Compensation Law, and after a hearing had the commission made an award. Upon appeal therefrom by the company and insurance carrier, the appellate division, by a divided court, held in effect, 'The position of night watchman is not a hazardous employment, and, performing the duties of that position, Fogarty was not exposed to the dangers of the bakery business, which is a hazardous occupation,' reversed the award, and dismissed the claim. This court has given a more

liberal construction to the compensation law, and held that: 'Where . . . an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.' *Matter of Larsen v. Paine Drug Co.* 218 N. Y. 252, 256, 112 N. E. 725, 727. The deceased was therefore within the compensation law."

The character of the work, rather than its locality, is to be considered. *Matter of Oberg*, 175 App. Div. 1, 161 N. Y. S. 934.

The test is not the ordinary business of the master but the kind of work the servant is employed to do. *Shafer v. Parke* (Mich.) 159 N. W. 304; *Aylesworth v. Phoenix Cheese Co.* 170 App. Div. 34, 155 N. Y. S. 916. Thus, a traveling salesman is not engaged in the hazardous business of the manufacturer by whom he is employed. *Matter of Mandel*, 173 App. Div. 515, 160 N. Y. S. 2. Similarly, a claim adjuster is not subjected to the hazards of the operation of the railway run by his employer. *Matter of Brown*, 173 App. Div. 432, 159 N. Y. S. 1047. Likewise, although the employer's ordinary business is not within the act, yet if, as an incident to that business, a workman is employed to undertake a service which is within the act, the act applies. *Mulford v. Pettit*, 220 N. Y. 540, 116 N. E. 344. See also *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053. In *Mulford v. Pettit*, supra, the court said: "Deceased was a salesman for A. S. Pettit & Sons, Incorporated, a corporation engaged in the business of dealing in lumber, coal, and feed, a nonhazardous occupation not covered by the Workmen's Compensation Law. His employer furnished him with a motorcycle on which to ride about the country for the purpose of taking orders and collecting accounts. While he was engaged in this occupation he was struck by a railroad train and killed. An award has been made to his widow and minor child for compensation. . . . In *Matter of Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053, I stated in a memorandum on page 75 my views of the application of the statute where an employer's business is not classified as hazardous, although the employee's occupation is hazardous. The prevailing opinion in that case is to the effect that driving a delivery wagon for a florist is a hazardous employment, and that, if injuries arise out of and in the course of that employment, a case is made out, although the business of a florist is not a hazardous employment under the act. If

this rule, which, however, is dictum in the *Glatzl* case, is correct, this award should be upheld. In the *Bargey* case there is a suggestion (218 N. Y. 410, at page 413, 113 N. E. 407) that the test is whether the employer is carrying on a hazardous business for profit, which may seem not wholly consistent with the reasoning in the prevailing opinion in the *Glatzl* case. Of course, the employer in this case was not in the business of operating a motorcycle for gain. Its business was not the operation of motorcycles in any sense. I think, however, that 'pecuniary gain,' as used in the statute, merely means that the employer must be carrying on a trade, business, or occupation for gain in order to come within the act. If, in that connection, the purpose of using the motorcycle is profit, that is enough. *Herbert v. Shanley Co.* 242 U. S. 591, 37 S. Ct. 232. The deceased in this case operated the motorcycle as an incident to his employer's business. In the *Bargey* case we held that deceased, a carpenter making repairs on a building used in the manufacture of macaroni, was not covered by the act, because the employer's occupation was the preparation of macaroni, and that the employee was not engaged therein. The question presented in this case was not considered in the opinion, although it was said that the macaroni company was not engaged in the repair of buildings for pecuniary gain. The order should be affirmed."

In *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053, the opinion of a majority of the court, on a point not necessary to the disposition of the case, was as follows: "It has been said that the employer of Franz Glatzl was engaged in carrying on the business of a florist, which is not a hazardous employment, under the act, and that Glatzl, his employee, was not, therefore, protected in any degree by the statute. We do not accept that view. It is true that the business of florist is not mentioned in the act as a hazardous employment; but in this case, as incident to his business, the florist undertook to deliver to his customers the flowers which they purchased, and in carrying on that branch of the business he operated a wagon on the streets and highways of the city. That was within the words of the statute a hazardous employment, and Glatzl was hired to drive the wagon. If the injury which he received had arisen out of and in the course of that employment, it would seem plain that a case under the statute was made out."

Under the *New York* statute before the amendment of 1916, there was authority for the proposition that a workman engaged in one of the occupations to which the act applied could not claim compensation if his employer was not engaged in such occupation

for pecuniary gain. *Bargey v. Massaro Macaroni Co.* 218 N. Y. 410, 113 N. E. 407; *McNally v. Diamond Mills Paper Co.* 164 N. Y. S. 793. *Compare Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053. In *McNally v. Diamond Mills Paper Co.* supra, it appeared that the claimant had been injured while employed by a paper company to install an engine. The court said: "Nor can the claimant avail himself of the provisions of group 42, which specifically includes the installation of 'engines or heavy machinery.' The case of *Bargey v. Massaro Macaroni Co.* 218 N. Y. 410, 113 N. E. 407, is directly opposed to this contention. In that case it was held that the employee, who was a carpenter by occupation and had been repairing the building wherein a hazardous business was conducted, was not himself engaged in that business or entitled to the protection of the law on that account. It was further contended that he was within group 42. The court said: 'The appellant invokes also the part of the language creating group 42 as follows: "Construction, repair and demolition of buildings." It is answered by the fact that the company did not carry on the occupation of constructing, repairing and demolishing buildings for pecuniary gain. This conclusion is obvious beyond the need of discussion.' See also *Matter of Coleman*, 175 App. Div. 122, 161 N. Y. S. 560. In the present case the paper company did not carry on the occupation of installing engines or heavy machinery for pecuniary gain (section 3, subdivision 5). The award should be reversed, and the claim dismissed." But under the *New York* statute of 1916 there would seem to be no doubt that the occupation of the employee is sufficient to make the act applicable. For in *Glatzl v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053, quoted supra, Pound, J., differing from the majority of the court as to the state of the law before 1916, said: "I am decidedly of the opinion that under the Workmen's Compensation Law (Laws 1914, c. 41) as it was at the time of the accident, unless the employer was engaged in an enumerated hazardous trade, business, or occupation, his employees did not have the benefit of the law. Compensation was provided for injuries sustained or death incurred 'by employees engaged in the following [42 enumerated] hazardous employments.' Section 2. But 'employee' meant 'a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same.' Section 3, subd. 4. 'Employer' meant a person . . . employing workmen in hazardous employments.' Section 3, subd. 3. 'Employment' included 'employment only in a trade, business or occupation carried on by the employer for pecuniary gain.' Section 3, subd.

5. If employment means employment only in a hazardous trade, business, or occupation carried on by the employer, the test of liability for compensation is the trade, business, or occupation of the employer. . . . While I think that the law originally did not contemplate the occupation of the employee as a test, it does so now, for by Laws 1916, c. 622, 'employee' is defined to mean either a person engaged in one of the occupations specified or who is in the service of an employer whose principal business is that of carrying on a specified hazardous employment."

Under the *English* Act of 1895 the rule was that in order to hold an employer liable it must be shown that he was engaged in an employment covered by the act and that he employed the workman therein, it being immaterial what particular service the workman was called on to do. Thus in *Mason v. Dean* [1900] 1 Q. B. 770, it was said: "Here the deceased man was employed in painting, and it was this fact which misled the county court judge; the particular work which the man is doing has nothing to do with the question of his employment by the undertakers within the meaning of the act. He must be in the employment of the undertakers on, in or about a building over thirty feet high which is being constructed or repaired by means of a scaffolding or is being demolished; if that is the case, it does not matter in what particular department of the work the man is employed, for he is employed by the undertakers who themselves are within the definition in the act. Therefore, in order to found the liability of the respondents, it must be shown that they were the persons undertaking the construction, repair or demolition of the building." To the same effect see *Hardy v. Moss*, 6 W. C. C. 68.

IV. Significance of "Hazardous" or "Extrahazardous."

Since the purpose of a workmen's compensation act which does not extend to all employments is to assist those workmen who are principally exposed to danger inherent in their occupations, the legislators have frequently used the word "hazardous," or, by a refinement of terminology, "extrahazardous." Sometimes the meaning of the term is supplied by a statutory enumeration of employments. Thus the *New York* statute declares that "'Hazardous employment' means a work or occupation described in section two of this chapter." In such case the task of the court is to decide whether a given occupation comes within one of the statutory provisions. "It is the duty of the legislature, and not of the commission or of this

court, to determine what employments are hazardous. With reference to the act an employment is either hazardous or nonhazardous, and no employment can be treated as hazardous unless the act, fairly construed, declares it such." *Tomassi v. Christensen*, 171 App. Div. 284, 156 N. Y. S. 905. For a discussion of the danger in an employment as a consideration in the construction of the statute, see *supra*, this note, subsection II. 1.

But under some statutes, the question of the applicability of the act to a certain employment has depended on whether the employment is hazardous, without a particular legislative definition. And where that question has arisen the courts have regarded the term "hazardous" or "extrahazardous" as a relative one, and, in view of all occupations that would have been included but for the restriction contained in that term, they have held the act to be applicable only to occupations attended by a greater risk. See *State v. Powles* (Wash.) 162 Pac. 569; *In re Arnold*, Op. Sol. Dept. of Labor 158; *In re Inniss*, Op. Sol. Dept. of Labor 160; *In re Price*, Op. Sol. Dept. of Labor 163.

The Federal Act of 1908 applied to persons employed by the United States, *inter alia*, "in hazardous employment on construction work in the reclamation of arid lands or the management or control of the same, or in hazardous employment under the Isthmian Canal Commission." In the case of *In re Arnold*, Op. Sol. Dept. of Labor 158, it was said: "'Hazardous' is defined by the Standard Dictionary as 'exposed to, or exposing to, or involving danger, risk or loss, or calamity; perilous, risky.' The word should probably be taken in its ordinary or popular meaning of dangerous. It may be contended that the conditions in the Reclamation Service make the work more hazardous than the same class of work elsewhere, and that all work done should be classed as hazardous. However this may be, Congress has limited the beneficiaries of this act under the Reclamation Service to those engaged in hazardous employment, and must have had in mind a distinction between hazardous and nonhazardous employment in that service. Hazard or risk in this case must be looked at relatively. There are, besides, a certain class of employees who take little or no risk, are exposed to a minimum amount of danger in the pursuit of their daily work, and a clerk in a storeroom seems to me to be pre-eminently one of this class. From a consideration of the nature of the work performed by claimant I am unable to ascertain wherein any part of the same exposes him to any special danger. (See the cases of *Pedro Traviso* [C 938] and *Jose Migeles* [C 1240].) I am therefore of the opinion,

as above indicated, that the claimant was not engaged in 'hazardous employment.'" For a complete list of the opinions of the solicitor applying this rule to particular cases, see *infra*, this note, subsections V. 2, and V. 5.

The Washington statute reads as follows: "There is a hazard in all employment, but certain employments have come to be and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' wherever used in this act," etc. See *State v. Powles* (Wash.) 162 Pac. 569. Whether the business of a commission merchant comes within the act, as being extrahazardous although not expressly named by the legislature, was considered in *State v. Powles* (Wash.) 162 Pac. 569, wherein the court said: "Appellant is engaged in the commission business in the city of Seattle, dealing in fruit and produce, selling the same to retailers. Its goods are handled in boxes, crates, and sacks, none of which weigh over 150 pounds. It operates no warehouse, unless its storeroom where it holds all its goods for sale and distribution to its customers might be considered as such. All of its goods are held in its storeroom for immediate sale in such manner as to all be accessible to its salesmen with a view of readily exhibiting them to its customers as occasion may require. Its goods are brought to its store and delivered therefrom by its own teamsters to a considerable extent as is more or less commonly done in mercantile business. A list of its employees before us in this record shows that it has two receiving clerks, one order clerk, one teamster, two potato sorters, three shipping clerks, and three porters. If these employees be engaged in extrahazardous occupation, then the employees of practically every mercantile business, even apart from any of the occupations connected therewith which might fall within the specifically enumerated classes, would be engaged in extrahazardous occupations within the meaning of the act. We cannot believe that it is within the contemplated power of the commission to recognize a business of this nature as being one whose employees are engaged in extrahazardous occupation or work. To do so would be, it seems to us, to lose sight of the distinction which the act itself makes between occupations attended with ordinary hazards and those attended with extra hazards. It is only 'extrahazardous' occupations which are under the act. It seems quite clear to us that appellant's

employees are not engaged in such an occupation."

In *Remsnider v. Union Sav. etc. Co.* reported in full, post, this volume, at page 40, it was held that the work of a janitor, in cleaning an elevator shaft, is not one which has "come to be, and to be recognized as being, inherently and constantly dangerous."

V. Particular Occupations or Employments.

1. AGRICULTURE.

a. In United States.

Although agricultural employment is ordinarily excluded from the compulsory feature of the American compensation acts, it is frequently provided that a farmer may elect to take insurance under the act. See *In re Keaney*, 217 Mass. 5, 104 N. E. 438; *Shafer v. Parke* (Mich.) 159 N. W. 304. It has been held that a farmer may elect to provide insurance for a limited number of his employees. In *re Keaney*, 217 Mass. 5, 104 N. E. 438.

The test of farm employment is the work of the laborer, not the ordinary business of the employer or the uses for which the produce of the farm is designed. *Shafer v. Parke* (Mich.) 159 N. W. 304.

Farm labor includes cutting and burning trees in clearing land for farming purposes, *Whitney v. Peterson*, 1 Dec. Ind. Acc. Com. (Cal.) p. 306, *reviewed* in *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031. It included operating a saw, on land cleared for agriculture, to cut the wood into suitable lengths for sale, *Miller v. Algar*, 2 Ind. Acc. Dec. (Cal.) p. 584, *reviewed* in *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031. And it included the repairing of a dairy barn by a farm laborer, *Matter of Coleman*, 175 App. Div. 122, 161 N. Y. S. 500. In that case the court said: "The common hired man on a farm is required to perform a great variety of work. His duties are not confined to plowing, planting, and harvesting. Tilling the soil and garnering the crops may be the principal work of the farm laborer, but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harnesses, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is a part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new

point on a plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market, and innumerable other familiar duties. Is the hired man, who pounds his finger while shingling the pigpen, any the less a 'farm laborer' than when he pounds his finger while building a fence? It is the duty of the farm laborer to build a load of hay; it is likewise his duty to help shingle the barn to protect the hay from the elements. Both processes are necessary in order to preserve the hay. Both are essentially within the scope of the duties of the farm laborer, and it makes no difference, in principle, whether he breaks his leg by falling from the roof of the barn or the load of hay. Many of the employments on the farm are as hazardous in fact as shingling a roof; breaking a fractious colt, for instance; handling an ugly bull; ringing an adult boar; harnessing a vicious horse. But all these are incidents which go with the work of the farm laborer, although they are not, strictly speaking, the process of tilling the soil."

But farm labor does not include employment as a carpenter and foreman in charge of the construction of a large cottage on a ranch. *Miller v. Industrial Acc. Commission* (Cal.) 162 Pac. 651. And it has been held not to include the business of traveling through the country with a threshing machine and stopping from place to place to thresh out the grain and beans of the farmers for compensation. *White v. Loades*, 164 N. Y. S. 1023. Compare *Proctor v. Cumisky*, Sc. Ct. Sess. 6 F. 832, set forth, *infra*, this note, subsection V. 1, c.

"Farm or other laborer engaged in agricultural pursuits" includes the operation of a corn shredder by one employed as engineer and laborer. *Slycord v. Horn* (Ia.) 162 N. W. 249, wherein the court said: "The petition alleges that at the time of his injury he was engaged as an engineer and laborer in defendant's employ, operating a piece of farm machinery, a corn shredder. In 2 Corpus Juris 982, and Century Dictionary, we find this definition of agricultural, 'Pertaining to, connected with, or engaged in agriculture.' We also find at page 988, 2 Corpus Juris, that the term 'agriculture' has been defined to be the art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock; tillage, husbandry, and farming. In the last citation the note cites *Dillard v. Webb*, 55 Ala. 468, 474, where it is held as to the comprehensiveness of the term 'agriculture': 'The variety of products of the earth, of agricultural

implements, and of domestic animals, invited and put on exhibition at agricultural fairs, attests the comprehensiveness of the term "agriculture." It refers to the field, or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied products.' The note also cites *Simons v. Levell*, 7 Heisk. (Tenn.) 510, 516, as holding: 'It is equivalent to husbandry, and husbandry Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces.' In *Shafer v. Parke* (Mich.) 159 N. W. 304, it was held that the employee of a company manufacturing drugs, serums, and other pharmaceutical preparations, maintaining a farm and stock, in the preparation of serums, but from which it sold surplus grains, etc., who was employed on the farm to perform ordinary farm labor, and was injured by being kicked by a horse, was a farm laborer within the Workmen's Compensation Act. There can be no doubt but that shredding corn is a part of carrying on a farm."

b. In Canada.

Special legislation has been passed in Canada for the protection of homesteaders and by the Workmen's Compensation Act (s. 10), special protection has been afforded to farmers and homesteaders by excluding from the operation of the act the employment of agriculture and inter alia any work performed about a farm or homestead for farm purposes or for the purposes of improving such farm or homestead. *Smid v. Townsend*, 8 West. W. Rep. 474. See also *Garment v. Charles Austin Co.* 34 Ont. L. Rep. 417, 25 Dominion L. Rep. 833, 9 Ont. W. N. 47. The decision in *Smid v. Townsend*, supra, was as follows: "The applicant, who was engaged by the respondent to paint his house or homestead on his farm at or near Inver Lake, while so engaged on April 3, 1914, slipped off the roof, fell to the ground, and broke his leg. There is no dispute about the facts of the case, but the provisions of s. 10 of the Workmen's Compensation Act, as I stated at the hearing, precludes the applicant from recovering under the provisions of the act, inasmuch as the building which the applicant was painting was the dwelling house or homestead of the respondent, and was used for 'farm purposes;' the fact that the building was of rather a more substantial character than homesteaders usually erect makes no difference in this regard."

A company which cuts timber and rafts it to its saw mill, where it is turned into

lumber, is not engaged in an agricultural industry, but is a commercial and manufacturing undertaking, and its raftsmen come within the provisions of the law respecting accidents to workmen. *Baie St. Paul Lumber Co. v. Tremblay*, 25 Quebec K. B. 1, affirming 46 Quebec Super. Ct. 203.

c. In England.

The present English act applies generally, without an exception as to agriculture. In 1900 the earlier act was extended to include agriculture, section 1, subsection 3, providing that "where any workman is employed by the same employer mainly in agricultural but partly or occasionally in other work, this act shall apply also to the employment of the workman in such other work," and that "the expression 'agriculture' includes horticulture, forestry, and the use of any land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry or bees, and the growth of fruit and vegetables.'" See *Smith v. Coles* (1905) 2 K. B. 827, 93 L. T. N. S. 754, 75 L. J. K. B. 16, 54 W. R. 81, 22 Times L. Rep. 5. The words "inclusive of," appearing in the act, were held to refer to "use of land for any purposes of husbandry," so that the mere keeping of horses and cutting up hay by a hotel proprietor was not within the definition. *Bolt v. Heywood*, 5 W. C. C. 151. The word "land" was not used in its wide meaning, but in the popular sense. With reference to the keeping of live stock, it meant the keeping of flocks on open land; and the act did not include the occupation of a groom who looked after horses kept in stables in an enclosed yard except when at exercise. *Grant v. Ward*, 7 W. C. C. 128.

In *Smith v. Coles* [1905] 2 K. B. 827, 93 L. T. N. S. 754, 75 L. J. K. B. 16, 54 W. R. 81, 22 Times L. Rep. 5, the court said: "The evidence with regard to the applicant's occupations was that he was undoubtedly a skilled carpenter, but he appears to have acted as a handy man about the farm. He certainly did a great deal of work which could only be described as agricultural work. His own evidence was that he was acting as keeper for three months in the year, but that he lent a hand at hay harvest and at corn harvest, and made corn ricks and straw ricks, but that he did no ploughing. Another witness who worked on the farm said that the applicant had helped him with the threshing, and that he had seen the applicant rick-making, game-keeping, harvesting, and mangel-carting, and doing work like other laborers. On this evidence the county court judge held that the applicant was engaged in agricultural employment within the act. There certainly was evidence that this man's

work embraced purely agricultural work without taking into consideration the nature of the carpentering work that he did. In these circumstances it is not, in my opinion, necessary to decide whether work which is ancillary to the agricultural work of a farm can itself be treated as agricultural work. I am far from saying that employment in work ancillary to agricultural operations is incapable of being classed as agricultural employment."

In *Proctor v. Cumisky*, Sc. Ct. Sess. 6 Fed. 832, it appeared that a workman in the employment of the owner of a portable threshing mill, driven by a traction engine, in the capacities of assistant thresher and traction-engine driver, was injured while the threshing mill was being drawn by the traction engine from a farm on which threshing had been finished to another farm where his employer had contracted to thresh on the following day. It was held that the workman was entitled to compensation, inasmuch as he was a person employed mainly in agricultural work—that is, threshing—and partly or occasionally in other work, within the meaning of section 1, subsection 3 of the act of 1900. And it was held by Lord Trayner that, apart from subsection 3, the workman was entitled to compensation, as he was injured in the course of his employment as a thresher, the transit between one farm and another not forming any break in the course of that employment.

Agricultural employment need not of necessity be on the premises of the master. Thus it has been said: "Having regard to the necessity of a workman engaged in agricultural employment performing part of his work elsewhere than on his employer's premises, as, for example, when he drives cattle to market, it would be an anomaly to limit the act as is suggested. There is no justification, in my opinion, for saying that the act applies to a field in which a man is working, but that directly he leaves it a line is to be drawn excluding him from the operation of the act." *Smithers v. Wallis* [1903] 1 K. B. 200, 87 L. T. N. S. 556, 72 L. J. K. B. 57, 51 W. R. 261, 67 J. P. 381, 19 Times L. Rep. 111.

2. ARID LAND—RECLAMATION OF.

The Federal Act of 1908 applied to persons employed by the United States "in hazardous employment on construction work in the reclamation of arid lands or the management and control of the same." It was held that the provision included the occupation of a ditch rider who was required to ride at night and discover and attend to breaks in a canal, *In re Redburn*, Op. Sol. Dept. of Labor 154; tending a machine at an ice plant in the rec-

lamation service, *In re Riggs*, Op. Sol. Dept. of Labor 155; the construction of a reservoir for irrigation, *In re Arnold*, Op. Sol. Dept. of Labor 156; and work in a quarry to obtain rock for damming a river to protect a valley and supply water for irrigation, *In re Skill*, Op. Sol. Dept. of Labor 157.

But it did not include employment at a soda fountain in a store under the Reclamation Service, *In re Arnold*, Op. Sol. Dept. of Labor 158; nor did it include employment as a cook's helper, *In re Jones*, Op. Sol. Dept. of Labor 155.

3. ARSENAL—EMPLOYMENT IN.

The Federal Act of 1908 applied to persons employed by the United States in any of its "arsenals." "The word 'arsenal' has a common and well understood meaning. Certain establishments are regularly appropriated for and easily recognized under that designation. It is presumed that Congress in using the word 'arsenals' in the compensation act intended it to cover only such establishments. A fort or military post does not become an arsenal by reason of the mere keeping of the arms and ammunition needed for current operations. Therefore it cannot work to sanction the designation of such a place as an arsenal." *In re Olson*, Op. Sol. Dept. of Labor 136.

In the case of *In re Mackay*, Op. Sol. Dept. of Labor 136, it was held that a carpenter employed in the construction of an arch bridge in connection with improvements in the water supply system at the West Point Military Academy was not within the act. The solicitor said: "The Military Academy is in no sense an 'arsenal,' even though arms and ammunition may be kept there. It is not a place for their storage. It cannot be regarded as an arsenal any more than any military camp where arms and ammunition are kept may be so regarded."

Painting at army barracks was held not to be employment in an arsenal. *In re Posey*, Op. Sol. Dept. of Labor 183.

4. BUILDING—CONSTRUCTION, REPAIR, OR DEMOLITION OF.

a. In General.

Where an act applies to the "construction, repair, and demolition of buildings," it has been held that those terms do not include planing a door in the course of looking after a building. *Schmidt v. Berger*, 221 N. Y. 26, 116 N. E. 382.

The "repair of buildings" includes the occupation of a company which manages business properties and employs carpenters, painters, and electricians in the care of the

buildings. *State v. Business Property Security Co.* 87 Wash. 627, 152 Pac. 334.

In *Sanders v. Frick Co.* 22 British Columbia 472, 34 West. L. Rep. 65, 26 Dominion L. Rep. 685, it was held that installing the piping for a cold storage plant in a building in the course of construction was a part of the construction.

An electric company which erects a building as part of its general plant becomes subject to the act. *Clayton v. Montreal Light, etc. Co.* 13 Que. Pr. 100.

The English Act of 1897 applied to employment "on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding," or being demolished. See *Mason v. Dean* [1900] 1 Q. B. 770; *Knight v. Cubitt* [1902] 1 K. B. 31, 71 L. J. K. B. 65, 85 L. T. N. S. 526, 50 W. R. 113; *McCabe v. Jopling, etc. Travelling Cradle* [1904] 1 K. B. 222; *Hartley v. Quick* [1905] 1 K. B. 359, 74 L. J. K. B. 257. The English Act applied to employment on, in, or about a building on which machinery driven by steam, water, or other mechanical power was used for the construction, repair, or demolition thereof, although the building did not exceed thirty feet in height. *Mellor v. Tompkinson* (1899) 1 Q. B. 374. In determining the height of a building, the time when the workman was injured was the time to be taken into account. *Billings v. Holloway*, (1899) 1 Q. B. 70 ("building which exceeds thirty feet" does not mean "or which thereafter may exceed thirty feet"); *McGrath v. Neill* [1902] 1 K. B. 211 (building measured from its lowest point, which was below level of ground). "Construction" was held not to be limited to original construction; and "construction and repair" were held not to be limited to the construction and repair of a building "as a whole." *Hoddinott v. Newton*, [1901] A. C. 49, reversing [1899] 1 Q. B. 1018, and overruling *Wood v. Walsh* [1899] 1 Q. B. 1009 (as explained in *Dredge v. Conway* [1901] 2 K. B. 42). The word "repair" was given a wide meaning; and it was held to include stencil work in decorating a church. *Hardy v. Moss*, 6 W. C. C. 68. The English statute included the following occupations: decorating a ceiling, *Wardoper v. Tawse*, 7 W. C. C. 67; whitewashing a ceiling, *Dredge v. Conway* [1901] 2 K. B. 42; measuring up of plumbing work, *Plant v. Wright* [1905] 1 K. B. 353; removing a scaffolding, *Frid v. Fenton*, 82 L. T. N. S. 193, 69 L. J. Q. B. 436, 16 Times L. Rep. 267. A structure substantially built to form the platform for an engine and crane was held to be a building, within the meaning of the act, although it was built of wood and was intended to be temporary only. *Aylward v. Matthews* [1905] 1 K. B. 343. And a pit six

feet deep, being constructed for the condenser chamber of a gasworks, and connected by pipes with the boiler house having a tall chimney, was held to be part of a building over thirty feet high. *McGregor v. Wright*, 3 W. C. C. 121, *distinguishing* *Rixsom v. Pritchard* [1900] 1 Q. B. 800, 82 L. T. N. S. 186. "Demolition of a building exceeding thirty feet in height" did not include the demolition of a smaller building having internal communication with a larger, the same business being conducted in both. *Rixsom v. Pritchard* [1900] 1 Q. B. 800.

b. Meaning of "Scaffolding."

What is a "scaffolding" is a question of fact. *Ferguson v. Green* [1901] 1 K. B. (Eng.) 25, 70 L. J. K. B. 21, 83 L. T. N. S. 461, 49 W. R. 105, 64 J. P. 819, 17 Times L. Rep. 41.

In *Stack v. Counsell*, 1 W. C. C. 133, the court reasoned that every building over thirty feet high must be constructed by some arrangement of trestles and boards, and therefore that the legislature must have intended the words "a scaffolding" to be restricted to mean a secure and fixed, though temporary, arrangement of posts and planks, and not a mere erection of two pairs of trestles with boards laid across, unfixed and unsecured. The court in that case was of the opinion that the presence of the article "a" required a stricter interpretation than if the statute had read "by means of scaffolding." However, it seems that in some of the following cases the restricted meaning was not observed.

"Scaffolding" may be external or internal; and it includes an internal staging arranged with planks and trestles and without poles. *Hoddinott v. Newton* [1901] A. C. (Eng.) 49. The scaffolding need not be thirty feet high; and trestles and boards used in plastering may be scaffolding. *Maude v. Brook* [1900] 1 Q. B. (Eng.) 575. Planks laid across the top of a pit and used as a gangway may be "a scaffolding." *McGregor v. Wright*, 3 W. C. C. (Eng.) 121.

A ladder may be a scaffolding. *Veazy v. Chattle* [1902] 1 K. B. (Eng.) 494; *O'Brien v. Dobbie* [1905] 1 K. B. (Eng.) 346. Or it may not be a scaffolding. *Marshall v. Rutherford* [1902] 2 K. B. (Eng.) 175; *Campbell v. Sellars*, Sc. Ct. Sess. 5 F. 900; *Crowther v. West Riding Window Cleaning Co.* [1904] 1 K. B. (Eng.) 232.

Painter's steps may properly be found to be a scaffolding. *Elvin v. Woodward* [1903] 1 K. B. (Eng.) 838. Compare *McDonald v. Hobbs*, Sc. Ct. Sess. 2 F. 3.

In *Fletcher v. Hawley*, 21 Times L. Rep. (Eng.) 191, it appeared that certain work of construction was being done under contract

to a building exceeding thirty feet in height by means of a scaffolding which the contractor erected. Another contractor was doing certain woodwork alterations in the building under an independent contract with the owner which did not require the use of a scaffolding, and none was supplied by him. A workman in the employment of the woodwork contractor was injured by an accident while engaged on the woodwork of the building. It further appeared that the workman had previously made some use of the scaffolding as a matter of convenience, but it was in no way necessary for his work, and at the time of the accident he was not using it. It was held that it was not necessary that the scaffolding should have been put up by the undertaker in whose employment the workman was; that it was sufficient if the building was being constructed or repaired by means of a scaffolding; and that the workman was entitled to compensation.

5. CANAL COMMISSION—HAZARDOUS EMPLOYMENT UNDER.

The Federal Act of 1908 applied to persons employed by the United States "in any hazardous employment under the Isthmian Canal Commission." That provision embraced a policeman, *In re Golden*, Op. Sol. Dept. of Labor 159; a hospital orderly in attendance on persons violently insane, *In re Small*, Op. Sol. Dept. of Labor 164; an ambulance teamster, *In re Thompson*, Op. Sol. Dept. of Labor 165; a time inspector required to attend men occupied in actual construction work on the canal, *In re Sittert*, Op. Sol. Dept. of Labor 169; a water boy serving men employed in construction of canal, *In re Garsia*, Op. Sol. Dept. of Labor 166; a plumber and tinner working on roofs and stacks, *In re Thennard*, Op. Sol. Dept. of Labor 167; a machine printer operating a roller press, *In re Rawlins*, Op. Sol. Dept. of Labor 170; and a workman engaged in clearing ground, using a machete in cutting trees, *In re Pedez*, Op. Sol. Dept. of Labor 171.

Under that statute it was held that the following were not engaged in hazardous employments: a hospital attendant performing manual service, *In re Renwick*, Op. Sol. Dept. of Labor 172; a water boy serving a grass cutting gang, *In re Price*, Op. Sol. Dept. of Labor 163; a telephone operator, *In re Etienne*, Op. Sol. Dept. of Labor 163; a janitor, *In re Jarvis*, Op. Sol. Dept. of Labor 174; a cemetery laborer, wheeling stone in a barrow, *In re Carney*, Op. Sol. Dept. of Labor 173; a laborer on a delivery wagon, *In re Palacios*, Op. Sol. Dept. of Labor 162; a scytheman in a grass cutting gang, *In re Migeles*, Op. Sol. Dept. of Labor 162; a

laborer in a mess hall, *In re Traviso*, Op. Sol. Dept. of Labor 161; a cook, *In re Reisinger*, Op. Sol. Dept. of Labor 161; a store-room clerk, *In re Inniss*, Op. Sol. Dept. of Labor 160; a workman engaged in collecting and hauling away garbage, *In re Gill*, Op. Sol. Dept. of Labor 170.

6. DECORATING.

It has been held that "decorating" within a workmen's compensation act does not include hanging a picture as incidental to the sale thereof. *Matter of Grasell*, 175 App. Div. 874, 162 N. Y. S. 421, wherein the court said: "In a sense where we beautify anything, we may be said to be 'decorating' it. But a 'decorator,' as stated in the Standard Dictionary, is 'specifically one whose business is decoration of dwellings or public edifices,' and clearly the employer and employee had nothing to do with such work. A merchant sells a picture; an employee carries it to the house of the purchaser, and, while standing on a rug, is hanging it, probably by a cord and hook attached to the molding of the room. It cannot be said that he is decorating within this group. The statutory intent may be gathered by considering the other employments mentioned in the group, such as stone cutting, marble works, manufacture of artificial stone, steel building and bridge construction or repair, installation or repair of elevators, and the like. And so far as relates to buildings, we have brick laying, tile laying, mason work, stone cutting, concrete work, plastering, manufacture of concrete blocks, structural carpentry, painting, decorating, or renovating, and sheet metal work. The hanging of the picture was a mere incident to the sale and by hanging it the retail art dealer, whose business is not hazardous, did not become a 'decorator,' whose business is hazardous."

7. ELEVATORS—OPERATION OF.

Where the context of an act indicates a legislative intent to cover classes of business rather than particular kinds of machinery, the term "elevators" will be held not to include the operation of a freight or passenger elevator. *Guerrieri v. Industrial Ins. Commission*, 84 Wash. 266, 146 Pac. 608.

For cases concerning the operation of an elevator as within an act relating to "vehicles," see *infra*, this note, subsection V. 26.

8. ENGINEERING.

An early English act provided that "engineering work means any work of construction or alteration or repair of a railroad, harbor, dock, canal, or sewer, and includes any other work for the construction, alteration,

or repair of which machinery driven by steam, water, or other mechanical power is used." See *Fletcher v. London United Tramways* [1902] 2 K. B. 269, 71 L. J. K. B. 653, 66 J. P. 596, 50 W. R. 597, wherein it was held that the term "railroad" included a tramway. In *Tullock v. Waygood* [1906] 2 K. B. 261, the court said: "Engineering work of itself, merely by the definition, means any work of construction, or alteration, or repair of a railroad, harbor, dock, canal, or sewer. It seems to me that all work done on such subject-matter is, in the view of the legislature, taken to presuppose some element of danger; and then they go on to subject-matters which may not in themselves *prima facie* presuppose an element of danger, but which include 'any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used.' Therefore it would seem that by introducing those elements you introduce the very element of danger by which the workman, if he is subject to it, is entitled to the benefit of the act. The element of danger to him is precisely the same whether he is actually engaged in repairing the machine which is put in motion for the purpose of the repair, or whether he draws the mechanical power from somewhere else; he is thrown into juxtaposition with machinery in motion." In *Middlemiss v. Berwickshire, Sc. Ct. Sess. 2 F. 392* the use of a steam roller for the purpose of repairing a road was held to be an "engineering work." See also *Lord v. Turner*, 5 W. C. C. 87. The construction of a signal-box on a new line of railway was held to be employment on, in, or about the construction of a railroad. *Fullick v. Evans*, 84 L. T. N. S. (Eng.) 413, 17 Times L. Rep. 346. Work done for the purpose of obtaining access to a sewer was included in "engineering work," as well as the actual alteration of the sewer. *Coles v. Anderson*, 21 Times L. Rep. 204, 69 J. P. 201. Adding a new story to a building where a steam winch was used was held to be "engineering work." *Cosgrove v. Partington*, 17 Times L. Rep. 39, 64 J. P. 788. In *Adams v. Shaddock* [1905] 2 K. B. 859, it was held that the employment of digging a trench under a tramway for the laying of telephone wires was within the statutory definition. And in *McGregor v. Wright*, 3 W. C. C. 121, it was held that "any other work for the construction of which machinery driven by steam," etc., included the construction of a condenser chamber for gas works. It would seem that the court in that case regarded the rule *ejusdem generis* as inapplicable to "any other work for the construction," etc. But in *Bennett v. Aird*, 1 W. C. C. 138, it was said that the rule must be applied to that clause, and it was held that the laying of pipes for water or

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gas was *ejusdem generis* with the work of construction, alteration, or repair of a sewer. Further, in that case it was held that the "other mechanical power" mentioned in the act must be *ejusdem generis* with steam and water, and that the power of a pulley worked by manual labor was not included. In *Belsey v. Sadler*, 1 W. C. C. 141, it was held that the construction of a hydraulic crane without the use of mechanical power was not within the definition. In *Watkinson v. Crouch*, 1 W. C. C. 137, the operation of a steam chaff-cutting machine was held not to be an "engineering work." In *Jefferson v. Jones*, 9 W. C. C. 65, it was held that the work of setting back a wall on private property for the widening of a street to allow a tramway to be laid was not included. In *Rochester v. Whiting*, 6 W. C. C. 91, it was held that an underground pipe, carrying dirty water from the reservoir of a waterworks, was not a "sewer." In *Rimmer v. Premier Gas Engine Co.* 97 L. T. N. S. 226, it was said: "Although it is more difficult to appreciate the idea of a physical area in the limits of an engineering work than it is as to those of a factory, yet you must find somehow or other a physical area when you are considering what an engineering work is." To the same effect see *Davis v. Aerated Bread Co.* 8 W. C. C. 56. In *Rimmer v. Premier Gas Engine Co. supra*, it was held that the construction of a dock as an "engineering work" did not extend to work on a gas engine used in connection therewith but situated one hundred and fifty yards from the dock. In *Chambers v. Whitehaven Harbour Com'rs* [1899] 2 Q. B. 132, work on a mud hopper, a mile and a half out at sea, was held not to be work on, in, or about an engineering work, as the employment must be within the locality named in the act. In *Pattison v. White*, 20 Times L. Rep. 775, carting sand from a pit to an "engineering work," an employment two and a half miles from the "engineering work," was held not to be within the definition. In *Back v. Dick* [1906] A. C. 325, 94 L. T. N. S. 802, *affirming* [1905] 2 K. B. 148, 93 L. T. N. S. 329, it was held that the work of stacking rails in a railway yard, preparatory to the alteration of a tramway, was not a part of the engineering work. See also *Cornea v. National Paving, etc. Co.* 9 Sask L. Rep. 40, 33 West L. Rep. 462, 26 Dominion L. Rep. 402.

In the repair of wires of a tramway, where the corporation was under obligation to keep the whole system in repair, it was held that each act of repairing was not to be considered as a separate engineering work, but the area of the work was coextensive with the tramway itself. *Rogers v. Cardiff* [1905] 2 K. B. 832. The construction of a reservoir and supply pipes was held to be one piece of

work, so that a workman engaged in laying pipes in a trench at a point five hundred yards from the reservoir was employed in engineering work. *Atkinson v. Lumb* [1903] 1 K. B. 861.

The *Washington* act includes "engineering work" but gives no such definition thereof as was found in the English act, referred to supra. In *Puget Sound Traction, etc. Co. v. Schleif*, 220 Fed. 48, 135 C. C. A. 616, it was held that the *Washington* act did not apply to the construction of a water gate or manhole in a city street.

In *British Columbia* it has been said that the work of clearing land from the natural growth thereon is not a work of construction, alteration, or repair, which is meant by the act to be termed an "engineering work." *Basanta v. Canadian Pac. R. Co.* 16 *British Columbia* 304.

9. FACTORY, MILL OR WORKSHOP—EMPLOYMENT IN.

a. Under State Acts.

Employment in a workshop, being in a "room or place wherein power-driven machinery is employed," includes employment in a repair shop having power-driven machinery. *Wendt v. Industrial Ins. Commission*, 80 Wash. 111, 141 Pac. 311. But that provision does not include cleaning an elevator shaft. *Remsnider v. Union Sav. etc. Co.* reported in full, post, this volume, at page 40.

"Employment in a factory" does not include employment in the making and repairing of barrels without the aid of mechanical power. *Menke v. Hauber*, 99 Kan. 171, 160 Pac. 1017, wherein the court said: "The plaintiff was injured while in the employ of the defendant, who was engaged in business as the Kansas City Second Hand Barrel Company. At that time the defendant had in his employ from ten to twenty men who were engaged in the work of making and repairing barrels. No mechanical power was used in the plant. Each workman used his own tools, consisting of an adz and driver, or hammer, and nails. Plaintiff's injury was caused by a barrel falling upon him.

It is quite obvious that at the place where the plaintiff was employed when he received his injury there was no extra-hazardous or dangerous situation which of itself would call for an application of the compensation law. The injuries to which he was subject by his employment were those likely to be encountered by a workman employed in any place where boxes are piled one above another, as in a shoe store, grocery or dry goods store, storage house or in a

transfer business. If there were room for doubt about the question, it is settled by section 9 of the act, in which the legislature defines a factory in these words: "(b) 'Factory' means any premises wherein power is used in manufacturing, making, altering, adapting, ornamenting, finishing, repairing or renovating any article or articles for the purpose of trade or gain or of the business carried on therein, including expressly any brick yard, meat-packing house, foundry, smelter, oil refinery, lime burning plant, steam heating plant, electric lighting plant, electric power plant, and water power plant, powder plant, blast furnace, paper mill, printing plant, flour mill, glass factory, cement plant, artificial gas plant, machine or repair shop, salt plant, and chemical manufacturing plant." We think it is clear that by the word 'power' the legislature did not intend to include hand power, but had reference to mechanical power. . . . We think it very clear that the enterprise carried on by the defendant was not a factory within the meaning of the compensation law."

"Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery," etc., includes cleaning racks in an open flume outside of a mill. *Boody v. K. & C. Mfg. Co.* 77 N. H. 208, Ann. Cas. 1914D 1280, 90 Atl. 859, L.R.A.1916A 10. But that provision does not include the handling of boxes of finished cloth on a hand truck about a storehouse apart from machinery, *Lizotte v. Nashua Mfg. Co.* (N. H.) 100 Atl. 757, and it does not include employment in building a pulpwood carrier a mile from the mill. *King v. Berlin Mills Co.* (N. H.) 99 Atl. 289. In *Boody v. K. & C. Mfg. Co.* supra, the court said: "The word 'mill' may be used as meaning a building in which manufacturing is carried on. It is, however, often used as meaning a manufacturing establishment, and when used in this sense it includes all that is usually intended by the plant of a manufacturing concern; that is, it includes not only the buildings in which the work is done, but everything appurtenant to them. The description of an accident that will entitle an employee to the benefits of the act as one caused by any defect in the employer's 'plant' (s. 2) tends to the conclusion that that is the sense in which the word 'mill' is used in section 1, and so does the context; for 'employment' (b) is described as 'work in any shop, mill, factory, or other place'—not other building, as it probably would be if the words mill, shop and factory were used in that sense. As there is nothing to rebut this presumption, it must be held that 'mill,' as used in section 1, includes not only the building in which the defendants'

business is carried on, but their dam, flume, yard, and the ways they provide for the use of their employees." And in *King v. Berlin Mills Co.* supra, it was said: "If the plaintiff had been engaged in working on or about a completed carrier propelled or operated by mechanical power when the accident occurred, there would be no question as to the applicability of the statute. He would then have been working in a place on, in connection with, or in proximity to machinery propelled or operated by steam or other mechanical power. But, as there was no apparatus or machinery installed or in operation at the time and place of the accident, it cannot be said that he was so employed. Therefore, if the employment of erecting the carrier falls within the ambit of the statute, it must be held to be work in a shop, mill, or factory; that is, the operation of the defendants' mills in which machinery is propelled by mechanical power must comprehend the work of erecting the carrier.

The place where the pulp carrier was being erected was in no way appurtenant to the defendants' mills, and in no sense a part of their manufacturing plant. To hold that building a pulp carrier for the defendants more than a mile from their mills is working in the mills within the meaning of the statute would lead to results never contemplated by the legislature. Under such an interpretation of the statute those engaged for the defendants in felling trees and hauling them from the forest many miles from their mills could be said to be working in their mills. Indeed it is difficult to imagine any manual or mechanical labor that employees of a manufacturing concern could do that might not be construed as work in a shop, mill, or factory."

Where an act prohibited children under the age of fourteen from working "in any factory, mill, workshop or store," it was held that the floating of bolts to a mill was a part of the manufacturing of shingles. *Hilfestad v. Industrial Ins. Commission*, 80 Wash. 426, Ann. Cas. 1916B 789, 141 Pac. 913.

b. Under Federal Act.

The present Federal Act (passed in 1916) is of general application, and the question herein considered does not arise thereunder.

The Act of 1908 applied to persons employed by the United States "in any of its manufacturing establishments," etc. Employments in the following places were held to be within that definition: the Government Printing Office where printing, binding and bookmaking were done, *In re Blaine*, Op. Sol. Dept. of Labor 117; the Bureau of Engraving

and Printing, where ink, paper, etc., were fashioned into bank notes and Treasury certificates and sometimes bound in book form, *In re Clark*, Op. Sol. Dept. of Labor 120; *In re Melling*, Op. Sol. Dept. of Labor 129; blacksmiths' shops, at which bolts, drills and other articles used in irrigation work were made and repaired, *In re Fenton*, Op. Sol. Dept. of Labor 127; the electric and ice plant of an executive department, *In re Pyrah*, Op. Sol. Dept. of Labor 129; a lighthouse depot, at which a material part of the work consisted in the manufacture and repair of materials, appliances and vessels, *In re Wygant*, Op. Sol. Dept. of Labor 118; *In re Bell*, Op. Sol. Dept. of Labor 120; carpenter and machine shops connected with an Indian industrial school, at which mission furniture was made, *In re Clarke*, Op. Sol. Dept. of Labor 133; the carpenter shop at West Point Military Academy, *In re McCreery*, Op. Sol. Dept. of Labor 134; an army Quartermaster's Depot, where clothing and tents were made, *In re Nicholas*, Op. Sol. Dept. of Labor 125; *In re Worthington*, Op. Sol. Dept. of Labor 126; the mail bag repair shop of the Post Office Department, at which a variety of mail equipment was made, *In re Kennedy*, Op. Sol. Dept. of Labor 131; the mechanical plant of the Smithsonian Institute, at which steam power and electric light were generated and cases, cages and museum furniture were made, *In re Strong*, Op. Sol. Dept. of Labor 132; a sawmill, *In re Herron*, Op. Sol. Dept. of Labor 124.

Employments in the following places were held not to be in any of the "manufacturing establishments" of the United States: a local office of the Weather Bureau, though a printing press was there operated, *In re McAllister*, Op. Sol. Dept. of Labor 121; a lighthouse tender, a vessel attached to a lighthouse depot and used in transporting workmen and supplies, and in placing aids to navigation, *In re Lambert*, Op. Sol. Dept. of Labor 122; *In re Veseth*, Op. Sol. Dept. of Labor 122, 185; a naval observatory, *In re Lamkin*, Op. Sol. Dept. of Labor 128; a laboratory used only for making tests of materials, *In re Meissner*, Op. Sol. Dept. of Labor 131; an aqueduct and a filtration plant, *In re Schlosser*, Op. Sol. Dept. of Labor 133. Likewise it was held that a storekeeper of the Internal Revenue Service was not within the act. *In re Roberts*, Op. Sol. Dept. of Labor 127. Nor were the following occupations included: driving piles by an employee of the Bureau of Fisheries at work about a lobster ground, *In re Feltis*, Op. Sol. Dept. of Labor 123; hauling and trucking oats from car to dock by laborer in Army Quartermaster Department, *In re Gray*, Op. Sol. Dept. of Labor 118.

c. Under English Act.

(1) Generally.

The following cases relate to the English Act of 1897, which was superseded by the Act of 1906. Under the present English act the question whether a given employment is in a "factory" does not arise, for the act covers all employments except a few that are specifically excluded.

Employment "about" a factory was held to mean employment in physical proximity to a factory, at the locality, not merely work in connection with a factory at a distance. *Spacey v. Dowlais Gas, etc. Co.* [1905] 2 K. B. 879; *Fenn v. Miller* [1900] 1 Q. B. 788; *Powell v. Brown* [1899] 1 Q. B. 157; *Lowth v. Ibbotson* [1899] 1 Q. B. 1003; *Ferguson v. Barclay*, 5 Sc. Ct. Sess. 5 F. 105; *Spencer v. Harrison*, 1 B. W. C. C. 76; *Lowth v. Ibbotson*, 1 W. C. C. 46.

Employment on a timber cart standing in the road near the entrance to a factory and receiving timber from the factory was held to be "about" a factory. *Powell v. Brown*, 1 W. C. C. 44.

"Employment by the undertakers as hereinafter defined on or in or about a . . . factory" was held to apply only to employment on, in, or about the undertakers' own factory. *Wrigley v. Whittaker* [1902] A. C. 299, *affirming* [1901] 1 K. B. 780; *Francis v. Turner* [1900] 1 Q. B. 478; *Belsey v. Sadler*, 1 W. C. C. 141; *Spencer v. Harrison*, 1 B. W. C. C. 76.

Working in a building of the dimensions specified in the Factory and Workshop Act, 1901, was held to be not necessarily employment in a "factory." *Dyer v. Swift Cycle Co.* [1904] 2 K. B. 36.

Premises enclosed by a wall and having sheds for the storage of materials for repairing highways were held to be a factory. *Powell v. Aston*, 7 W. C. C. 77.

In *Willmott v. Paton* [1902] 1 K. B. 237, it was held that the definition constituting premises a factory, where machinery driven by steam, water, or other mechanical power was used, did not include machinery kept in motion by hand power; that the "other" mechanical power must be *eiusdem generis* with steam or water power.

Employment in a shed to look after a steam engine connected with a mortar pan for mixing mortar for use on a nearby building was held to be employment in a "factory." *McNichols v. Dawson* [1899] 1 Q. B. 773.

It was held that a farm did not become a "non-textile factory," within the act, where a steam engine was used thereon for the purpose of grinding meal to feed the stock. *Nash v. Hollinshead* [1901] 1 K. B. 700, 70

L. J. K. B. 571. And the operation of a steam chaff-cutting machine was held not to bring the premises within the act. *Watkinson v. Crouch*, 1 W. C. C. 137. A hotel shed where chaff was cut was held not to be a factory, on the grounds (1) that no manufacture was carried on for direct gain, and (2) that the mechanical contrivance, worked by horse power, was not "mechanical power" within the statute. *Bolt v. Heywood*, 5 W. C. C. 151.

Where water and steam were used in preparing tripe for sale, it was held that the premises were a non-textile factory within the act. *Doswell v. Cowell*, 95 L. T. N. S. 38.

The Drury Lane Theatre was held not to be a "factory," the court saying that the hydraulic machinery for moving the stage did not bring it within the section relating to "premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the construction of a building or any structural work in connection with a building." *Burnett v. Drury Lane Theatre*, 4 W. C. C. 56.

"Bottlewashing works" were held to be included within the definition of factory. But a wine cellar used principally for storage and incidentally for corking and washing bottles was held not to be a bottlewashing work. *Kavanaugh v. Caledonian Ry.* 5 Sc. Ct. Sess. 5 F. 1128. The washing of bottles by mechanical means was held not to be a process "in aid of" the bottling of beer. *Law v. Graham* [1901] 2 K. B. 327.

The erection of a machine was regarded as constituting "construction," but where no mechanical power was used for that purpose, the use of such power in delivering the machine to its designated location was held not to bring the erection of the machine within the act. *Murphy v. O'Donnell*, 54 W. R. 149.

(2) Work in Warehouse.

The English decisions relating to warehousing as within the workmen's compensation act are treated here, since by the English statute "warehouse" was included in the definition of "factory." *Weavings v. Kirk* [1904] 1 K. B. 213; *Willmott v. Paton* [1902] 1 K. B. 237. For the American cases concerning employment in a warehouse, see *infra*, this note, subsection V. 28.

In *Tench v. Fish*, 3 W. C. C. 140, the rule was laid down that anything in order to be a "warehouse" must come within the general class denoted by "house."

The term "warehouse" was held to embrace: A building used for the business of storing, charging, and repairing electric trucks, *Evans v. British Columbia Electric*

R. Co. 29 West. L. Rep. (British Columbia) 435, 7 West. W. Rep. 121; a railway yard where goods were loaded and unloaded by means of cranes, *Adams v. Great Western R. Co.* 6 W. C. C. 87; and a room under a shop of a builder and contractor, stored with building materials, *Evans v. Wilson*, 1 B. W. C. C. 148. And it was held that a store which was merely ancillary to a retail business might be a warehouse. *Moreton v. Reeve* [1907] 2 K. B. 401, 97 L. T. N. S. 63, explaining *Green v. Britten* [1904] 1 K. B. 350.

But "warehouse" was held not to include the uncovered storage yard of a railroad, *Tench v. Fish*, 3 W. C. C. 140; a yard belonging to a local authority and used by them as a dumping ground, *Buckingham v. Fullam*, 21 Times L. Rep. 511, 69 J. P. 207, 53 W. R. 628; a large stable and yard, including a horseshoe shop, *Johnson v. London General Omnibus Co.* 7 W. C. C. 83, and an open timber yard without a shed, *Carter v. Shipway*, 8 W. C. C. 37. And in *Burr v. Whiteley*, 19 Times L. Rep. 117, it was held that rooms in the basement of a large block of shops used for storing goods by retail merchants were not a warehouse.

In *Smith v. Turner*, 3 W. C. C. 143, the court construed the term as used in the English statute to mean only those warehouses connected with a dock, wharf, or quay. See also *M'Ewan v. Perth*, Sc. Ct. Sess. 7 F. 714. But in *Willmott v. Paton* [1902] 1 K. B. 237, it was held that there was nothing in the statute compelling such a restriction.

(3) Work on Wharf or Ship.

Under the English Act of 1897, "factory" was held to include dock, wharf, quay, etc., with respect to loading or unloading. See *Woodham v. Atlantic Transport Co.* [1899] 1 Q. B. 15; *Kenny v. Harrison* [1902] 2 K. B. 168; *Merrill v. Wilson* [1901] 1 K. B. 35, 70 L. J. K. B. 97, 83 L. T. N. S. 490, 49 W. R. 161, 65 J. P. 53, 17 Times L. Rep. 49; *Hainsborough v. Ralli*, 18 Times L. Rep. 21; *Carrington v. Bannister* [1901] 1 Q. B. 20, 70 L. J. Q. B. 31, 83 L. T. N. S. 457. In *Hennessey v. McCabe* [1900] 1 Q. B. 491, it was said: "The question for our decision is whether a steam-winch on board a ship in a dock, which is used for taking in cargo from a lighter lying along the outside of the ship, is a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, for it was upon the ship that the injured was employed. . . . What is it that is made a factory for the purposes of the Workmen's Compensation Act? If we look at s. 7, sub-s. 1, of that act we find that the act is to apply to employment by the undertakers on, in, or about a factory; and

sub-s. 2 says that 'factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant to which any provision of the factory acts is applied by the Factory and Workshop Act, 1895. Turning to the last-named act, we find in s. 23 that certain specified provisions of the factory acts are divided into five classes and are there dealt with, none of which, upon examination, are applicable to a ship. But by that section something is brought within the purview of the factory acts which was not previously within them, and it is enacted that these provisions (of course, in cases where they apply) are to 'have effect as if (a) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (b) any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building were included in the word "factory." The point in the present case is whether the steam-winch on board the ship is machinery worked by steam within the meaning of s. 23 of the Factory and Workshop Act, 1895. What is the steam-winch worked for? Not for unloading to or from a dock, wharf, quay or warehouse, but for nothing else than loading cargo into a ship from a lighter lying on the outside of the ship. It would be straining the language of the statute beyond all bounds if we were to hold that loading from a lighter into a ship was loading from a dock, wharf, quay or warehouse. Loading from one ship to another is not, in my judgment, employment within the Act of 1897."

In *Spencer v. Livett* [1900] 1 Q. B. 498, the court said: "The decision of this court in the case of *Hennessey v. McCabe*, ante, p. 491, exactly covers this case as regards the first ground upon which the county court judge based his decision, and so far, therefore, it is clear that his award cannot be supported. But then the respondent's counsel very ingeniously endeavored to make out that the dock in question in this case was a 'factory' within the Workmen's Compensation Act, 1897, s. 7, by bringing in the definition of a 'non-textile factory' given by s. 93 of the Factory and Workshop Act, 1878. By that section the expression 'non-textile factory' means, among other things, '(2) also any premises or places named in Part II. of the said schedule (the 4th schedule to the act) wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.' Pausing

there, I do not see how any manufacturing process can be said to be carried on in this dock. Sched. IV, Part II, of the act includes '(24) "Shipbuilding yards," that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired.' It is contended that the inner dock at Southampton is a 'shipbuilding yard' within these words, and the question is whether that is so. *Prima facie* a shipbuilding yard is a place where ships are built: and, of course, it may also be a place where ships are repaired; but I cannot think that this dock can be said to be 'premises in which ships, boats, or vessels used for navigation are made, finished, or repaired' within the meaning of the schedule. An admirable illustration was suggested by my brother Romer as a test with regard to this question. If the argument for the respondent is correct, the result would appear to be that, if one ship in a dock which contains twenty or thirty other ships loading or unloading has some painting or trifling repairs done to her, the dock becomes a shipbuilding yard, and therefore a factory to which the Workmen's Compensation Act, 1897, applies with regard to all the ships in the dock. I do not think that this can be the meaning of the act."

Land lying more than 150 yards from the water's edge and cut off by a fence and gates was held not to be included by the word "wharf," and therefore the act did not cover the employment of a workman moving logs on such land. *Haddock v. Humphrey* [1900] 1 Q. B. 609.

It was held that every wharf or dock was a "factory." *Barrett v. Kemp* [1904] 1 K. B. 517 (treating *Raine v. Jobson* [1901] A. C. 404, as *overruling* *Hall v. Snowden* [1899] 2 Q. B. 136); *Hanlon v. North City Milling Co.* [1903] 2 Ir. Rep. 163. And working on a ship in a dock was held to come within the definition. *Cattermole v. Atlantic Transport Co.* [1902] 1 K. B. 204; *Bartell v. Gray* [1902] 1 K. B. 225, 85 L. T. N. S. 658, 71 L. J. K. B. 115, 50 W. R. 310, 66 J. P. 308, 18 Times L. Rep. 70; *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. 771, 85 L. T. 141, 17 Times L. Rep. 627, 49 W. R. 705, *disapproving* *Flowers v. Chambers* [1899] 2 Q. B. 142 (but see *Burdon v. Grepson* [1906] 2 K. B. 283). A structure in a river at some distance from the shore, and used for the purpose of discharging coal from ships into barges, was held to be a "wharf" and therefore a "factory." *Ellis v. Cory* [1902] 1 K. B. 38.

But it was held that the mere fact that a vessel was moored alongside a quay was not of itself enough to bring a person employed in the vessel within the terms of the act. *Handford v. Clark* [1907] 2 K. B. 409;

Harrison v. Oceanic Steam Nav. Co. [1907] 2 K. B. 420, *following* *Thompson v. Sinclair* [1906] 2 K. B. 278. See also *Smith v. Standard Steam Fishing Co.* [1906] 2 K. B. 275, 95 L. T. N. S. 42, 75 L. J. K. B. 640, 54 W. R. 582, 22 Times L. Rep. 578. See also *Owens v. Campbell* [1904] 2 K. B. 60. And work on a vessel moved to position one hundred yards from a quay was held to be not "about" a quay. *Owen v. Clark*, 3 W. C. C. 170.

Where a yacht lay on a mud-bank in a harbor, in a sort of a bed scooped out of the bank, it was held not to be in a "dock." *Streeter v. Courtney*, 5 W. C. C. 123.

Employment with machinery used in the process of unloading a ship in a navigable river was held to come within the definition of employment in a "factory" in the Act of 1897, by force of connected statutes. *Stevens v. General Steam Nav. Co.* [1903] 1 K. B. 890; *Reid v. Anchor Line, Sc. Ct. Sess.* 5 F. 435; *Lawson v. Atlantic Transport Co.* 82 L. T. N. S. 77; *Woodham v. Atlantic Transport Co.* [1899] 1 Q. B. 15, 79 L. T. N. S. 395, 68 L. J. Q. B. 17. But staging round a ship used for the workmen to stand on when screwing up the iron doors of the ship after the loading was completed was held not to be machinery or plant used in the process of loading. *Durrie v. Warren*, 15 Times L. Rep. 365. And movable iron doors in the side of a ship, through which cargo was loaded and discharged, were held not to be machinery or plant used in loading or unloading. *Medd v. MacIver*, 15 Times L. Rep. 364.

A lighter and machinery thereon, employed in raising goods from the hold to the deck of a vessel, was held not to be a "factory." *Laing v. Young, Sc. Ct. Sess.* 3 F. 31.

Work on a ship in a harbor, the ship being a mile and a half from a shipbuilding yard, was held to be "near" a shipbuilding yard. *Streeter v. Courtney*, 5 W. C. C. 123.

In holding that a seaman was not within the act of 1897, the court in *Houlder Line v. Griffin* [1905] A. C. 220, said: "The case before your Lordships really depends on the question whether the employment in which the injured man was engaged was an 'employment to which' the 'act applies.' The act applies 'only to employment by the undertakers as . . . defined on, in, or about' certain specified places, among which is included 'a factory.' 'Factory' includes 'any dock . . . to which any provision of the factory acts is applied by the Factory and Workshop Act, 1895.' As defined in the act, 'undertakers . . . means . . . in the case of a factory . . . the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895.' The Factory Act, 1895, declares that 'the person having

the actual use or occupation of a dock . . . or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory.' Now it seems to me to be pretty clear, upon the true construction of these somewhat singular provisions so curiously pieced together, that the shipowner in the present case was not the occupier of the dock where his ship was lying afloat, or of any premises within the same or forming part thereof. It is, I think, plain that by the expression 'dock' in the Factory Act, 1895, is meant the solid structure and body of the dock, not the water space within its limits. A corresponding meaning must be given to the word 'premises.' I do not think that a ship lying in a dock, whether afloat or not, can be included in the description of 'premises within the same or forming part thereof.'

d. Under Canadian Act.

In Nova Scotia it has been held that the statutory definition, by which "factory" means *inter alia* "plant," includes the teams used for the delivery of the output of a manufactory. *O'Toole v. Brandram-Henderson*, 48 Nova Scotia 293, 21 Dominion L. Rep. 83.

10. FOOD—PREPARATION OF.

Under the New York act, it has been held that "canning or preparation of fruit, vegetables, fish or foodstuffs" does not include the work of a hotel butcher in preparing meat for distribution to the cooks. *Matter of De la Gardelle*, 167 App. Div. 617, 153 N. Y. S. 162. Nor does it include the bottling of peroxide in a wholesale grocery business. But by the amendment of 1916 (chapter 622) "bottling" is classified as hazardous. *Matter of Beckmann*, 174 App. Div. 353, 160 N. Y. S. 791. Nor does the provision quoted include the making of butter. But butter is included by chapter 622, Laws 1916, which extends the act to the "manufacture of dairy products." *Pardy v. Boomhower Grocery Co.* 164 N. Y. S. 775.

11. FORESTRY.

The Federal Act, by an amendment in 1912, embraced "hazardous work under the Bureau of Mines or the forestry service." In the case of *In re Ives*, Op. Sol. Dept. of Labor 175, it was said: "All employees under what is known as the Forest Service of the Department of Agriculture engaged upon hazardous employment have been held to be within the provisions of the amendment. It will be noted that the designation 'forestry service of the United States' is very broad and general in its meaning, with no quali-

fication whatsoever. While the Forestry Service of the Department of Agriculture appears to be of a more comprehensive character in its area than that of the Interior Department, yet in a letter from the Assistant Commissioner of Indian Affairs dated March 5, 1915, he states that the duties performed in the forestry branch of the Indian Service are substantially the same as those of men employed as forest guards and rangers in the Forest Service of the Department of Agriculture. It appears, then, that the act provides compensation for all employees engaged upon hazardous employment under the Forestry Service of the United States, and that there is no limitation whatever in regard to which executive branch of the government performs the work of that character. Since there appear to be no logical grounds upon which to draw a distinction between a branch of the service designated in the act simply because it may be smaller in size than another, I am of the opinion that this branch of the service may properly be declared to come within the provisions of the act as amended."

In *England*, "forestry" being included within agriculture in the Act of 1900, it was held that the employment by a saw miller of a workman to cut down growing trees and cart them to the saw mill was not included. *Meally v. McGowan*, Sc. Ct. Sess. 4 F. 883.

In *Quebec* it has been held that the cutting of wood in the forest by lumbermen does not constitute an industrial operation within the act. *Michaud v. Tremblay*, 48 Quebec Super. Ct. 289. See also *Provost v. St. Gabriel Lumber Co.* 12 Quebec Pr. 285; *Novico v. E. B. Eddy Co.* 12 Quebec Pr. 319; *Duquette v. La Compagnie de Pulpe*, etc. 12 Quebec Pr. 359.

12. HORTICULTURE.

Horticultural labor has been held to include pruning a fig tree by a gardener, where the gardener also served as janitor, the employment as janitor not falling within the terms of the exception. *Kramer v. Industrial Acc. Commission*, 31 Cal. App. 673, 161 Pac. 278. In that case the court said: "Ohlsson was thus employed for the performance of services in two capacities: One that of janitor, falling within the terms of the act; the other as a house and garden laborer; employees engaged therein being excluded from its operation. Hence, if the injury sustained by Ohlsson was due to an accident while he was engaged in labor as and under his employment as a gardener, he would not be entitled to the benefits of the act, unless the service was incidental to the work of janitor. The pruning of this fig tree without specific instructions so to do might well be

regarded as within the scope of his employment as gardener, since the proper care thereof required such work to be done. It did not, however, interfere with the use of the driveway, and the pruning thereof had no connection with the work of janitor which by any stretch of the imagination could render it incidental thereto."

"Horticulture" was included in the definition of "agriculture," to which the English Act of 1900 applied. See *supra*, this note, subsection V, 1, c.

13. LONGSHORE WORK.

The New York statute applies to "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." In *Tomassi v. Christensen*, 171 App. Div. 284, 156 N. Y. S. 905, it was said: "The subdivision of the section quoted carries with it the legislative understanding as to what 'longshore work' means. Such employment not only refers to the loading and unloading of cargoes, but to the moving or handling of any part of a cargo upon any dock, platform, or place, or in any warehouse or other place of storage. The word 'cargo' ordinarily means the lading or freight of a ship or other vessel; the goods, merchandise, or whatever is conveyed in a vessel or boat. The claim, therefore, is not within this group unless claimant was loading or unloading, moving or handling, a part of a cargo. The fact that the city dump was at the foot of a street, and that the plaintiff was working upon it, does not make his work longshore work any more than if the dump had been at a distance from the shore."

The foregoing provision includes employment in weighing hides on a pier, the hides constituting parts of cargoes of vessels. *Hiers v. Hull*, 164 N. Y. S. 767. But it does not include the moving of stoves and ranges by an employee of a gas company. *Gutheil v. Consolidated Gas Co.* 94 Misc. 690, 158 N. Y. S. 622. And it does not include picking rags on a dump at the shore. *Tomassi v. Christensen*, 171 App. Div. 284, 156 N. Y. S. 905. Nor does it include the watching of cargoes by a night watchman. *Matter of Oberg*, 175 App. Div. 1, 161 N. Y. S. 934, wherein the court said: "A man engaged exclusively to watch a ship cargo, having no occasion to touch the cargo in any manner, merely to see that it is not stolen, cannot either technically or in common understanding be regarded as a longshoreman. His occupation is that of a watchman, and the mere fact that it is at a dock instead of a railroad station

can have no legitimate bearing upon the question here presented; he does not become a longshoreman because he is stationed upon a dock to perform his services rather than upon the shipping platform of a manufacturing plant or a railroad freight depot. It is the character of the employment, not the particular place, which determines the classification."

The New York Act includes longshore work in interstate commerce. *Jensen v. Southern Pac. Co.* 215 N. Y. 514, Ann. Cas. 1916B 276, 109 N. E. 600, L.R.A.1916A 403, *affirming* 167 App. Div. 945, 152 N. Y. S. 1120.

14. MACHINERY—INSTALLATION OF.

"Installation of . . . boilers, engines or heavy machinery" does not include the setting up of a water tank on the top of a building. *Maloney v. Levy, etc. Co.* 176 App. Div. 470, 163 N. Y. S. 505.

In *Replogle v. Seattle School Dist. No. 1*, 84 Wash. 581, 147 Pac. 196, it was conceded that the installation of an electric motor was embraced in the statutory enumeration, and it was held that such employment included the work of a truck driver who was required to assist in the installation of a motor.

15. MANUFACTURING.

"Manufacturing drugs and chemicals" includes the occupation of a "porter, elevator and handy man" in a wholesale and retail drug store. *Larsen v. Paine Drug Co.* 218 N. Y. 252, 112 N. E. 725, *affirming* 169 App. Div. 838, 155 N. Y. S. 759.

"Manufacture of glass, glass products, glassware, porcelain or pottery" includes cutting and beveling glass, or making looking glasses. *McQueeney v. Sutphen*, 167 App. Div. 528, 153 N. Y. S. 554.

"Manufacture of machinery" covers employment as an inspector-salesman of machinery. *Benton v. Fraser*, 219 N. Y. 210, 114 N. E. 43. In that case the court said: "The manufacture of machinery is declared to be a hazardous employment by the express language of the Workmen's Compensation Act itself; and an employee of a person engaged in such manufacture whose duty it is to inspect the machinery which he has sold and who customarily does so after it is put in place at the different plants where it has been installed is engaged in the hazardous employment of his master. That the work actually was hazardous in the present instance would seem to be sufficiently indicated by the occurrence of the accident. Our attention is called to *Wilson v. Dorfinger*, 218 N. Y. 84, in which it was held that the business of selling glassware, carried on by the firm against which the claim was made, was

not included in group 20 of the Workmen's Compensation Law, which covers the manufacture of glass, glass products, glassware, porcelain and pottery. That case, however, involved no such question as that presented here, which is whether a salesman employed by a manufacturer of machinery whose duties require him to inspect it generally and who does inspect it after it is set up and in operation, may not be regarded as employed in the manufacture of machinery, one of the employments pronounced hazardous by the statute. In the Wilson case, the selling of glassware was an independent business, wholly separated from the manufacture of the product."

"Manufacture or preparation of meats, or meat products" includes the making of sausage by a retail meat dealer. *Kohler v. Frohmann*, 167 App. Div. 533, 153 N. Y. S. 559. But that provision does not include the work of a hotel butcher in preparing meat for distribution to the cooks. *De la Gardelle v. Hampton Co.* 167 App. Div. 617, 153 N. Y. S. 162. Nor does it include the grinding of a few pounds of meat in connection with its retail sale. *Matter of Pietha*, 174 App. Div. 764, 161 N. Y. S. 661, wherein the court said: "We are fully persuaded that the incidental grinding up of a few pounds of meat, purchased by a customer who is present and waiting for this service to be performed, is not 'a business in the preparation of meat,' any more than the chipping of dried beef, purchased at a grocery store, is such a business, or the grinding of a pound of coffee while the customer waits is 'milling,' within the meaning of group 29. Group 30 does not provide for the preparation of meat. Its language is: 'Packing houses, abattoirs, manufacture or preparation of meats, or meat products or glue.' It is where the employer is engaged in the 'manufacture or preparation of meats, or meat products,' that he comes within the law; not where he incidentally prepares a particular purchase of meat for the convenience or satisfaction of his customer. In a sense, of course, one is engaged in preparing meat when he cuts off a steak or trims away some portion of the flesh or fatty matter; but the statute is to be intelligently construed. Words are to be construed in their ordinary and commonly accepted sense, and no one, in reading the provisions of group 30, would think of such an incidental work as that involved in the present case being a preparation of meats, unless he was looking for a pretext to pay for an accident which had happened in the particular act. If there is liability under the statute here, then there would be liability if a grocer chipped the dried or smoked beef which his customer purchased, if an accident happened

in the particular act: and there would be equal liability if a clerk cut his fingers in carving a cheese, for this, under group 33, would be a 'canning or preparation of fruit, vegetables, fish, or foodstuffs,' and, as we have already suggested, it would be 'milling,' under group 29, to grind a pound of coffee which the customer had purchased, and would be the preparation of foodstuffs, perhaps, under group 33. The statute fairly construed, means, of course, the commercial preparation of meats and meat products, the curing of meats in connection with the packing houses, abattoirs, etc., and has no possible relation to the mere cutting up of particular pieces of meat, whether the cutting be in large or small particles. It might be, of course, that a man conducting a meat market might be engaged in the occupation of a sausage maker, or in the preparation of meats or meat products for the market generally, and if this was done he might come within the statute in so far as his employees were engaged in this manufacturing branch of the business; but here the record shows that the grinding was of a small quantity of meat purchased by a customer, a purely incidental service performed for the particular customer in connection with the purchase."

"Manufacturing paper" does not include the installation of an engine in a paper mill. *McNally v. Diamond Mills Paper Co.* 164 N. Y. S. 793.

"Manufacture of women's clothing" does not include the occupation of exhibiting and selling feminine apparel. *Matter of Lyon*, 173 App. Div. 377, 159 N. Y. S. 162, wherein it was said: "The claimant's contention here is that a 'salesman' becomes engaged in the 'hazardous employment' of manufacturing dresses if, in the course of his work of selling dresses, he went into the place where dresses were being manufactured, even though the purpose of going there was not to participate in manufacture, or perform any act incidental to any process of manufacture, but only to obtain a completed garment for exhibition to a customer in the adjoining showroom. To state the contention is to expose its unsoundness, in law and in common sense. The ordinary activities of salesmanship are not embraced with the 'manufacture' of the article being sold. The claimant had nothing to do with manufacture, in the general round of his daily tasks. He was injured while doing what he ordinarily and often did. By no stretch of fact or fancy can he be said to have been, at the moment of injury or at any other moment, engaged in the 'manufacture' of the article he sought for purposes of display and sale. A salesman does not become an artisan, or a participant in any process of

manufacture, merely by crossing the threshold of a factory."

In *Matter of Saenger*, 220 N. Y. 556, 116 N. E. 367, it was held that the millinery business and the making of hats and feathers are within the enumeration of hazardous employments in the New York statute.

A company engaged in cutting timber and driving it to sawmills, where it is manufactured into commercial lumber, is performing a commercial and manufacturing operation, and the "drivers" of its timber come within the provisions of the statute respecting accidents to workmen. *Baie St. Paul Lumber Co. v. Tremblay*, 25 Quebec K. B. 1.

16. MINING.

Employment at the pit-head of a colliery as a surface laborer is not employment in "mining," in the sense in which that expression is used in relation to industrial diseases in the English Act of 1906. *Scullion v. Cadzow Coal Co.* 7 B. W. C. C. 833.

The English Act of 1897 applied to employment on or in or about a mine. This was held to include blasting boulders of stone close to the shaft for the purpose of making a road which was a necessary part of preparing and working the mine. *Ellison v. Longden*, 18 Times L. Rep. 48. The operation of a mine engine carrying sand to the mine siding from a sandpit three hundred yards away was held to be employment "about" a mine. *Anderson v. Lochgelly Iron, etc. Co.* Sc. Ct. Sess. 7 F. 187. In *Turnbull v. Lambton Collieries Co.* 82 L. T. N. S. 589, 64 J. P. 404, 16 Times L. Rep. 369, the court said: "Sec. 7 (1) of the act provides that 'this act shall apply only to employment by the undertakers, as herein-after defined, on or in or about a railway, factory, mine, quarry,' etc. . . . By sec. 7 (2), 'in this act "mine" means a mine to which the Coal Mines Regulation Act 1887, or the Metalliferous Mines Regulation Act 1872, applies.' . . . The Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58) provides in sec. 75 that: 'In this act, unless the context otherwise requires, 'mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine. . . . The words 'and belonging to the mine' mean belonging to and being part and parcel of the mine itself, and do not mean belonging to the owner of the mine." Accordingly, in that case it was held that employment on a railroad owned by a colliery company and used to carry their coal was not included.

17. MUNICIPAL EMPLOYMENT.

In *Griswold v. Wichita*, reported in full, post, this volume at p. 31, the question of the application of a workmen's compensation act to employment as a policeman was discussed, and it was held in that case that such employment was not included, although the act embraced "county and municipal work."

Under a statute not specifically mentioning municipal work, it has been held that occupations carried on by municipal authorities without any view to profit are not within the act. *Trudeau v. Montreal*, 17 Que. Pr. 216, 49 Quebec Super. Ct. 62.

Employment in a municipal plant operated for profit has been held to be within the scope of the act. *Bernier v. Montreal*, 13 Quebec Pr. 94. See also *Page v. Joliette*, 49 Quebec Super. Ct. 437, 29 Dominion L. Rep. 240.

Maintenance of water mains by a municipality in connection with its waterworks plant has been held to be included in an act applying to the "building, maintaining, or demolishing of any structure." *Brown v. Decatur*, 188 Ill. App. 147.

18. NAVY YARD—EMPLOYMENT IN.

The Federal Act of 1908 applied to persons employed by the United States in any of its "navy yards." It was held that the Naval Academy at Annapolis was a navy yard. In *re Brown*, Op. Sol. Dept. of Labor 137. And that holding was extended to include the Naval Experiment Station, located near Annapolis. In *re Bullard*, Op. Sol. Dept. of Labor 140. A naval station, also designated a coaling depot, was held to be a navy yard. In *re Burke*, Op. Sol. Dept. of Labor 139. A gardener at a naval training station was held to be within the act. In *re Pangburn*, Op. Sol. Dept. of Labor 138. And a navy yard employee, though injured while at work on a naval hospital outside the yard, was held to be within the act. In *re Blount*, Op. Sol. Dept. of Labor 137.

But it was held that a laundress at a naval home, which was an asylum for disabled seamen, was not employed in a navy yard. In *re Carey*, Op. Sol. Dept. of Labor 139.

19. PAINTING.

The New York act specifies painting as a hazardous employment. And this provision has been considered as including the painting or repainting of an advertising sign. *Rheinwald v. Builders' Brick, etc. Co.* 168 App. Div. 425, 153 N. Y. S. 598.

20. PILE DRIVING.

Under the New York act, it has been held that "pile driving" embraced the driving of

sheeting. *Mazzarisi v. Ward*, 170 App. Div. 368, 156 N. Y. S. 964. In that case it was said: "In work of this character, sheeting is a form of piling. *Volpe v. Cederstrand*, 126 Minn. 355, 148 N. W. 119. The Century Dictionary defines 'sheeting' as follows: 'In hydraulic engineering, a lining of timber to a caisson or cofferdam formed of sheet piles or piles with flanking between. Also any form of piling used to protect river banks.' The 'driving' of 'sheeting' was, indubitably, under the evidence and the authorities, the driving of 'sheet piling,' and brought *Mazzarisi's* employment within group 11 of the enumerated employments, to wit, 'pile driving.' The fact that the deceased may, at the moment he met with injury, have been engaged in performing a physical act more approximately incident to the making of this sheeting than to the driving of it down into the sand could not, had the same been found by the commission, or were the same required by the evidence, require reversal of the award."

21. RAILROAD EMPLOYMENT.

For cases concerning railroad employees as within the purview of a workmen's compensation act, see the notes to *Matter of Winfield*, Ann. Cas. 1916A 817, and *Minneapolis, etc. R. Co. v. Industrial Commission*, Ann. Cas. 1914D 655.

In *England* it has been held that employment on a railroad included only employment for purposes of public traffic and hence did not include work in a railroad refreshment room. *Milner v. Great Northern R. Co.* [1900] 1 Q. B. 795. It has been held that the term did not include repairing railroad stations, such work being "merely ancillary or incidental to" the business carried on and therefore excluded by the terms of the act affecting the liability of the undertaker to workmen employed for it by a contractor. *Pearce v. London, etc. R. Co.* [1900] 2 Q. B. 100, 69 L. J. Q. B. 683, 82 L. T. N. S. 487, 48 W. R. 599, 16 Times L. Rep. 336. And it has been held not to include the erection of a stone wall in a railroad cut for the purpose of preventing dirt from obstructing access to a signal station. *Dundee, etc. Joint Ry. v. Carlin*, Sc. Ct. Sess. 3 F. 843, *not following* *Burns v. North British Ry. Sc. Ct. Sess. 2 F. 629* (wherein it was held that fitting signal wires for a new siding was part of the business of the railroad company, and not merely ancillary). But in *Caledonian Ry. v. Breslin*, Sc. Ct. Sess. 2 F. 1158, it appeared that a smith in the employment of a railroad company was injured while shoeing horses belonging to the company. The smithy where the accident occurred, and the stables in which the

horses were kept, were both situated in a yard within the area occupied by the railroad company as a general station. The yard was separated from the station proper by a fence of sleepers and partly by the stable wall. The horses were used for collecting and delivering goods and for hauling trucks. It was held that the smithy was "used for the purposes of public traffic" within the definition of "railway" given in section 3 of the Regulation of Railways Act, 1873, and adopted in the Workmen's Compensation Act, 1897, and that the company was liable to the injured workmen.

Transferring goods from a wagon to a train for transmission by rail is part of the work of a railroad company. *Greenhill v. Caledonian Ry. Sc. Ct. Sess. 2 F. 736*.

In *Western Trust Co. v. Reg. 34 West. L. Rep. (Saskatchewan)* 1125, the court was evenly divided on the question whether employment about a railroad included employment about a municipal street railway.

22. RIVER AND HARBOR OR FORTIFICATION WORK.

The Federal Act of 1908 applied to persons employed by the United States "in the construction of river and harbor or fortification work." Referring to that provision, it has been said: "It is apparent that the purpose was to make the bill apply to those works provided for in the fortifications appropriation acts as well as those provided for in the river and harbor appropriation acts. The word 'construction' is broad enough to cover repairs." In *re Buzby*, Op. Sol. Dept. of Labor 141.

Under that statute the following employments were included: Repairing cables in the underground electric system of a fort, In *re Buzby*, Op. Sol. Dept. of Labor 141; working on gun carriages at a sea coast fortification, In *re Moore*, Op. Sol. Dept. of Labor 143; carpentry in the quartermaster department at a fort, In *re Kearney*, Op. Sol. Dept. of Labor 147, *overruling* In *re Ryan* Op. Sol. Dept. of Labor 145; In *re Burgess*, Op. Sol. Dept. of Labor 146; In *re Schenk*, Op. Sol. Dept. of Labor 147; employment on a dredge engaged in reclamation work; In *re Bristow*, Op. Sol. Dept. of Labor 150; rock-crushing for the preparation of concrete required in new construction work at a fort, In *re Montes*, Op. Sol. Dept. of Labor 153.

The following employments were not included under that provision: The erection of an ice house for a fort, In *re Olson*, Op. Sol. Dept. of Labor 141; In *re Cale*, Op. Sol. Dept. of Labor 142; work on a river bank in improving a water supply system, In *re Mackay*, Op. Sol. Dept. of Labor 136;

employment as an engineer on a steamer attached to barracks, *In re Jerman*, Op. Sol. Dept. of Labor 152; employment at an aqueduct, *In re Rollins*, Op. Sol. Dept. of Labor 153; the transport service, *In re Hogan*, Op. Sol. Dept. of Labor 180; employment as a pilot in the service of the quartermaster's department, *In re Pent*, Op. Sol. Dept. of Labor 181; construction or repair of light-house or beacon stations under the light-house establishment, *In re Michel*, Op. Sol. Dept. of Labor 178. For other cases holding employment in the lighthouse service not to be included, see *In re Britt*, Op. Sol. Dept. of Labor 179, and *In re Hansen*, Op. Sol. Dept. of Labor 179.

23. STORAGE.

The New York statute specifies "storage" as a hazardous employment. In *Sickles v. Ballston Refrigerating Storage Co.* 171 App. Div. 108, 156 N. Y. S. 864, it was held that the term does not include the duties of a purchasing agent, although the articles purchased may find their way into a storage house of the employer.

24. STRUCTURAL CARPENTRY.

"The words 'structural carpentry' must be construed together and cannot be separated. They do not include an isolated act in planing wood." *Schmidt v. Berger*, 221 N. Y. 26, 116 N. E. 382.

"Structural carpentry" does not include the employment of a carpenter by the hour to make improvements on the premises. *Bargey v. Massaro Macaroni Co.* 170 App. Div. 103, 155 N. Y. S. 1076, *affirmed* 218 N. Y. 410; 113 N. E. 407.

25. TRANSPORTATION.

The words "undertaking for transportation" mentioned in the Quebec statute respecting accidents to workmen (R. S. Q. 1909, art. 7321) do not include such services performed by a merchant for his own purposes in carrying on his business. They include only the transportation of goods for third persons. The same is true with respect to the words "undertakings for loading and unloading." It would be otherwise if the employer was a manufacturer or other person subject to the operation of the statute. A driver of a delivery wagon, who is employed by an importer for the delivery of merchandise, cannot invoke the provisions of that statute in an action to recover damages sustained from an automobile while he is engaged in unloading goods from his wagon. *Rosenbloom v. Lavut*, 50 Quebec Super. Ct. 48. Likewise in *Labbé v. La Compagnie Julien*, 48 Quebec Super. Ct. 322, it was held

that the operations of loading and unloading fall within the act only in so far as they are performed as an enterprise by persons who make it their business. But the loading by a merchant of goods which form the object of his business for delivery to his customers does not constitute an enterprise of loading.

In *Kennedy v. Thom*, 49 Quebec Super Ct. 211, it was held that the chartering of a steamship to the government, by an ordinary charter-party to serve for the transport of troops and the patrol of a port, does not affect the nature of the owner's enterprise who, engaged in the work of transport by water, remains subject to the provisions of the workmen's compensation act.

26. VEHICLES—OPERATION OF.

The New York statute applies to "the operation otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules." *Matter of Holtz* 175 App. Div. 878, 162 N. Y. S. 350.

The Maryland act has a similar provision, except that the words "horses or mules" are omitted. Nevertheless, the Maryland act has been held to include the driving of horse-drawn vehicles. *American Ice Co. v. Fitzhugh*, reported in full post, this volume, at page 33.

Such provision includes employment as for an express company, *Costello v. Taylor*, 217 N. Y. 179, 111 N. E. 755, *affirming* 169 App. Div. 905, 153 N. Y. S. 1111; caring for the horse at the close of the day, *Smith v. Price*, 168 App. Div. 421, 153 N. Y. S. 221; the work of a teamster in loading his wagon at a sand pit, *Dale v. Saunders*, 218 N. Y. 59, 112 N. E. 571, *affirming* 171 App. Div. 528, 157 N. Y. S. 1062; the employment of a "helper" on a truck, *Hendricks v. Seeman*, 170 App. Div. 133, 155 N. Y. S. 638; employment of a day laborer in working and moving a threshing machine, *White v. Loades*, 164 N. Y. S. 1023; and the operation of a motorcycle, *Mulford v. Pettit*, 200 N. Y. 540, 116 N. E. 344.

In *Costello v. Taylor*, 217 N. Y. 179, 111 N. E. 755, the court said: "It is the business of operating wagons drawn by horses that is intended to be covered by the act and not the mere steering of a wagon or handling the reins while driving a horse attached to a wagon. If the appellant's claim be sustained in its entirety, its employees will not be entitled to recover for injuries sustained when a wagon is not moving, or at any time in connection with the employment other than when an employee is actually engaged in steering or operating the wagon or per-

haps driving a horse attached to a wagon or vehicle. Such a construction would be narrow and restricted and not in accordance with the spirit of the act. The extent to which a person can be said to be employed in the business of operating an express wagon within the meaning of the act can be better appreciated by assuming that one person is employed to care for a particular horse at the stable and in fastening him to the wagon, driving him when actually engaged in the delivery of express packages and in the return of the horse and wagon to the stable, placing them therein and providing the feed and care for such horse until he is used again to draw the wagon for the delivery of express packages. Such employment of a man would in all its parts be fairly included in the operation on streets, highways or elsewhere of wagons or other vehicles drawn by horses or mules. It seems quite clear to us that the statute was intended to cover an employee so engaged and that the operation of the wagon includes such attendance upon and care of a horse as is necessary to constitute a practical business. An express wagon driver in all of the work of such driver, as such work is commonly understood, should be deemed included in and protected by the terms of the statute. We do not see that a distinction should be made among the men employed in the practical business of operating express wagons even if part of the duties in such operation is required of one man and part of another. The stableman should be deemed within the act of the driver of an express wagon, acting as his own stableman, would in all his work be included therein."

So in *Hendricks v. Seeman*, 170 App. Div. 133, 155 N. Y. S. 638, the court said: "It is conceded by the appellant that the operation of the vehicle in question comes within the language of group 41, but it is contended that the helper on such a truck is not one who operates the truck. If the word 'operation' is to be restricted to the actual process of driving the truck—that is, steering it and manipulating the brakes and levers—then, of course, the deceased was not engaged in the operation of this truck. But no such narrow construction should be placed upon the expression 'operation of trucks.' In order to operate this truck, used in the wholesale grocery business, the proprietors of the concern found it necessary to employ two men. There were other duties required of these men beyond the mere matter of driving the truck. Presumably goods were to be loaded and unloaded and delivered; and in driving through the streets of the city it was thought necessary by the employers, very likely, to have one person guard and look after the load, to prevent articles being lost or stolen, while the other person was driving the truck.

All these various labors made up the duties of the men and constituted the operation of the truck. Therefore it must be held that the deceased was engaged in the operation of the vehicle."

But such a provision does not include operating an elevator. *Wilson v. C. Dorfinger & Sons*, reported in full, post, this volume, at page 38; *Sheridan v. P. J. Groll Constr. Co.* 218 N. Y. 633, 112 N. E. 568, reversing 171 App. Div. 958, 155 N. Y. S. 859; *Chappelle v. Four Hundred, etc. Broadway Co.* 218 N. Y. 632, 112 N. E. 569, reversing 171 App. Div. 958, 155 N. Y. S. 858. And it does not include the operation of a hand truck in a department store. *Matter of Holtz*, 175 App. Div. 878, 162 N. Y. S. 359, wherein it was said: "The association of the word 'trucks' with the words 'cars' and 'wagon' indicates that it was intended to cover vehicles of similar use. The sentence as a whole indicates that the trucks, wagons, and other vehicles intended to be included were those only which were power propelled, and not operated on tracks, and also those drawn by horses or mules. In order that the truck in question may be considered as being embraced in group 41, it must be held that the words 'propelled by . . . other power' include a truck drawn by hand and operated inside a building. The application of the rule of *ejusdem generis* to the group precludes such a construction, and requires the holding that the expression 'other power' applies to trucks propelled by steam, gas, gasoline, electric, mechanical, or other power of like character. Under the construction contended for by claimant, an accidental injury sustained in a nonhazardous employment while pushing a wheelbarrow could be held to be included in the group. The addition, by amendment of 1916 (chapter 622), to the hazardous employments theretofore specified in group 41, of 'public garages, livery, boarding or sales stables; movers of all kinds,' tends to indicate that the proper construction of the language of the group is as before stated."

Employment as helper in the operation of a motor truck is not classified in the *Washington* Act as extrahazardous, nor has it been so classified by the Industrial Insurance Commission. *Collins v. Terminal Transfer Co.* 91 Wash. 463, 157 Pac. 1092.

27. VESSEL—OPERATION OF.

Cases concerning maritime employees as within the purview of a workmen's compensation act are collated in the note to *Walker v. Clyde Steamship Co.* Ann. Cas. 1916B 87.

For the *English* cases dealing with work on a ship as within the statutory definition of "factory," see *supra* this note, subsection V. 9, C. (3).

In New York the statutory provision covering the "operation" of vessels has been held to include the work of the captain of a lighter in helping to unload the vessel. *Edwardsen v. Jarvis Lighterage Co.* 168 App. Div. 368, 153 N. Y. S. 391.

28. WAREHOUSE—EMPLOYMENT IN.

A building used for smoking, storing, and shipping meat has been held to be a "warehouse." *Armour v. Illinois Industrial Board*, 275 Ill. 328, 114 N. E. 173. In that case the court, including a private warehouse within the statute relating to "any warehouse or general or terminal storehouses," said: "The work connected with the storage of provisions by plaintiff in error in this building, awaiting distribution in a wholesale trade, is no less hazardous in that the property stored is its own than if said company were storing such goods for third persons for hire. The risk and danger to the employee would be equal in both cases. It is manifest, however, that the legislature did not intend to include within the meaning of the word 'warehouse' every place where goods are stored by the owner, for that might make it apply to the storing by any citizen of a barrel of apples or potatoes in his cellar or basement; but if any person should store thousands of barrels of produce in a three-story building the work might readily be attended with considerable danger. The rule of the English courts seems to be that a warehouse or storeroom for the storage of goods in a wholesale business is necessarily a warehouse within the meaning of the workmen's compensation act, and that the circumstances may make a storeroom used in connection with a retail business a warehouse, as that term was used in the act. In *Green v. Britten*, supra, the court said (page 86) that the word 'warehouse' 'involves the idea of a place normally of considerable size, . . . in which, consequently, the dangers incident to the handling of goods in bulk might . . . naturally arise.' Why would the legislature use in this act, in connection with the word 'warehouse,' the words 'general or terminal storehouse,' if it intended to mean only public warehouses used for hire? It is well known that many large concerns in this country have general or terminal storehouses at certain points, where they hold their goods and distribute them to wholesale customers or to their retail business. Such storehouses are not public warehouses. We think it is clear, however, that the legislature intended to include the

operation of such general storehouses in said clause 4 as a hazardous occupation."

The *New York* statute was applied in *Mihm v. Hussey*, 169 App. Div. 742, 155 N. Y. S. 860, as follows: "The State Industrial Commission has certified to this court the question: 'Was the claimant at the time of the injury engaged in a hazardous employment, within the meaning of the workmen's compensation law, and entitled to compensation as a result of injuries arising out of and in the course of such employment?' The employer was engaged in the wholesale produce business, with an office at 346 Broadway, Albany, N. Y. In connection with said business, and upon said premises, he maintained a warehouse or place of storage, in which the produce owned by him was kept in storage until sold at wholesale. The claimant was in his employ as shipper, and on the 28th of September, 1914, while tiering barrels of vinegar, weighing about 500 pounds each, in the storehouse, his right hand was pressed against a brick wall, injuring the second and third fingers. The commission has found that the injuries were accidental, arose in the course of employment, and were without fault of the employee. The alleged hazardous employment, in which claimant was engaged, is embraced in group 29, which is as follows: 'Milling; manufacture of cereals or cattle food; warehousing; storage; operation of grain elevators.' The single question, therefore, for decision, is whether the claimant was engaged in the 'employment' of 'warehousing' at the time he sustained his injuries. Warehousing is defined in the *Century Dictionary* as: '1. The act of placing goods in a warehouse. 2. The business of receiving goods for storage.' 'Employment includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain.' Workmen's compensation law, § 3, subd. 5. Claimant's employer was not carrying on the business of warehousing for pecuniary gain; hence the submitted question should be answered in the negative." But see the dissenting opinion of Kellogg, J.

For the *English* decisions, treating "warehouses" as within the statutory definition of "factory" see *supra*, this note subsection V. 9, C. (2).

29. WELL-DIGGING.

In *Quebec* it has been held that digging a well comes within the act. *Larouche v. Jobidon*, 49 *Quebec Super. Ct.* 10.

GRISWOLD ET AL.

v.

CITY OF WICHITA.

Kansas Supreme Court—January 6, 1917.

99 Kan. 502; 162 Pac. 276.

Workmen's Compensation Acts — Employments Included — Policeman.

The Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216) does not apply to the case of a police officer of a city who is killed in the discharge of his duties.

[See note at end of this case.]

Policeman as "Workman."

A police officer of a city of the first class is not a "workman" as defined by the compensation act.

(Syllabus by court.)

Appeal from District Court, Sedgwick county: SARGENT, Judge.

Action by Rinda E. Griswold et al., plaintiffs, against City of Wichita, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

Earle Blake, W. A. Ayres and O. A. McCorkle for appellants.

James A. Conly and J. A. Brubacher for appellee.

[502] PORTER, J.—This action was brought under the workmen's compensation law to recover for the benefit of the family of a policeman, who was killed while in the discharge of his duty. The court sustained a demurrer to the petition and the plaintiffs appeal.

Frank Griswold, the deceased, was a captain of the police force of the city of Wichita; he was killed by a pistol shot fired by some person who had broken into a store building in the nighttime, and whom he was attempting to arrest. The amount sued for is \$3600, the maximum amount of recovery under the [503] workmen's compensation act, in view of the salary or earnings of the deceased during the year preceding his death.

The sole question to be determined is whether this action can be maintained under the compensation act. The exact question has never been decided by this court. In *Udey v. Winfield*, 97 Kan. 279, 155 Pac. 43, the action was by the widow for the benefit of herself and children to recover damages for the death of her husband, who was killed while working in an electric light and water plant controlled and operated by the city for

profit. The city had not elected to come within the provisions of the compensation act, but it was contended that it was within the terms of the act by reason of having fifteen persons in the employ of its light and waterworks department. In order to show that fifteen persons were thus employed, it was necessary to include mere clerical employees in the office of the city clerk. It was held that to include such employees was not within the letter or spirit of the statute, because they were not engaged in the hazardous enterprise of operating the light and waterworks system. In the opinion it was said:

"Assuming, without deciding, that a municipal corporation like the defendant, if employing the requisite number of persons in such plant, should be deemed to be an employer within the meaning of the act in question, it must be held that the testimony failed to show that fifteen persons were thus employed." (p. 281.)

The city in that case made no claim of exemption on the ground that in operating its electric light and water system it was exercising governmental instead of proprietary functions, and so the court found it unnecessary to determine that question.

The plaintiffs' contention is that the compensation law, as originally adopted (Laws 1911, ch. 218) has been broadened in its scope by the amendment of 1913, in which the legislature extended its application to "county and municipal work." Section 2 of chapter 216 of the Laws of 1913, so far as it applies to the question, reads:

"APPLICATION OF THE ACT. This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive [504] or inflammable materials is carried on, which is conducted for the purpose of business, trade, or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen."

This section amended section 6 of the original act by the addition of the words "county and municipal work." Counsel for plaintiffs insist that the decision in the present case depends on whether the amendment is to be given a narrow or a broad construction by the courts. We have uniformly held

it to be our duty to give to the compensation act a broad and liberal interpretation, for the purpose of carrying out its wise and beneficent purposes; but the court has also recognized its limitations in this respect. In *Menke v. Hauber*, 99 Kan. 171, 160 Pac. 1017, it was said in the opinion:

"This court has always recognized the obligation resting upon it to give to the compensation law a liberal construction in order to carry into effect the provisions of the legislature, but we have no right to extend its construction to cover enterprises and industries not within the scope and intent of the law." (p. 175.)

The precise contention of plaintiffs is that the original act was broad enough to include workmen employed in building and engineering work, whether the employer was a person, county or corporation, municipal or private; and therefore it is argued that when the legislature by the amendment of 1913 added the words "*county and municipal work*" the purpose must have been to extend the application of the law, and that by a liberal interpretation we should hold it was the intention to include all employees of the city whose work, for any reason, becomes especially dangerous. It may have been the intention of the legislature to remove any doubt that might exist as to the application of the act to county and municipal work "which is conducted for the purpose of business, trade or gain," provided the nature of the work is such as to render it especially dangerous and hazardous to life and limb of the workmen engaged therein. Whatever the purpose of the legislature in including the words "county and municipal work," we think it is clear that the construing sections 2 and 4 of the [505] act of 1913 together with the well known purpose and objects sought to be attained by the enactment of the compensation law, it was not the intention to extend the application of the law to the case of a policeman killed in the discharge of his duty. Section 4 of the act defines "workman" as follows:

"'Workman' means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, but does not include a person who is employed otherwise than for the purpose of the employer's trade or business."

The defendant is a city of the first class, governed by the commission act. The statute relating to appointive officers in cities of the first class under the commission form of government provides for the appointment of a captain of police and such assistants and other officers as the commissioners may deem necessary for the best interest of the city. The same section provides that "no such officer shall be appointed until his term and

salary shall have been fixed by ordinance" (Gen. Stat. 1909, § 1304), and that the terms of all appointed officers shall expire with the term of office of the board appointing them. It has been held that a policeman in performing his duties is exercising the rights of sovereignty, and represents the state and not the city, inasmuch as the state requires the city to appoint him, and because his duties are those of a public nature. In *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490, it was said:

"The police officers of a city not regarded as the servants or agents of the city; their duties are of a public nature; their appointment is made by the city as a convenient mode of exercising a function of government; their duties are to preserve the good order and provided for the safety of the people of the city." (p. 656.)

In *Haney v. Cofran*, 94 Kan. 332, Ann. Cas. 1917B 660, 146 Pac. 1027, it was said in the opinion:

"There is no end of authority that a policeman is a public officer (citing cases). . . . In many respects a policeman is a municipal officer, but in other and important respects the legislature and the courts have raised him out of the class of a mere subordinate or employee like a field man of a local department of health (*Jagger v. Green*, 90 Kan. 153, 133 Pac. 174), or a cell-house man at the penitentiary (*Jones v. Botkin*, 92 Kan. 242, 139 Pac. 1198)." (p. 334.)

The primary purpose in the enactment of the compensation act has been considered in former decisions. In *McRoberts v. National Zinc Co.* 93 Kan. 364, 144 Pac. 247, it was said:

"In the enactment of the compensation law the legislature recognized [506] that the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific and unjust, and therefore a substitute was provided by which a more equitable adjustment of such loss could be made under a system which was intended largely to eliminate controversies and litigation and place the burden of accidental injuries incident to such employments upon the industries themselves, or rather upon the consumers of the products of such industries." (p. 366. See also, *Menke v. Hauber*, 99 Kan. 171, 160 Pac. 1017.)

The theory is that the employer who obtains a profit from the labor of workmen may very easily add to the cost of the manufactured goods a limited amount to cover the cost of compensation to the workmen injured in certain hazardous employments, and thus, without loss to himself, the burden may be distributed upon the consumers which constitute the public. Many good reasons might be suggested for including within the

scope of the act workmen employed in hazardous enterprises by cities engaged in conducting a business for profit, as electric-light or waterworks plants, because a city, like any private individual engaged in trade or business, could pass on to the public at large the burden by adding to the cost of the service. But where a city is engaged merely in the exercise of its governmental functions we think it clear that the workman, no matter how hazardous his employment, would not come within the spirit and purpose of the compensation act any more than the clerks and stenographers in the case of *Udey v. Winfield*, supra. So that even though a policeman be regarded as a workman in the employ of the city, and notwithstanding the performance of his duties places him at times in a dangerous and hazardous situation, still, the employer, the city, is not engaged in trade or business, and therefore a policeman is not within either the spirit or letter of section 2 of the act, which limits its application to persons employed for the purpose of the employer's trade or business.

In operating electric-light and power plants and waterworks system, cities are engaged in the exercise of their proprietary functions, while in enforcing the laws of the state against crime they are exercising a purely governmental function. This proposition is so elementary as not to require the citation of authority.

One or two cases are cited from other courts construing compensation acts the language of which differs materially from [507] our statute. It is not contended that any of the cases are directly in point, and a discussion of them would be of no benefit.

There may be, as suggested in the brief of the defendant, good reasons why a policeman, sheriff or other police officer, in the discharge of his duties should be protected; but this presents a question for the legislature and not for the courts. The legislature might see fit to provide a pension for the family of a policeman killed in the discharge of his duties. It could not do so under the compensation law, without a very wide departure from the theory and purpose upon which that law was enacted, as expressly declared in the act itself.

The judgment sustaining the demurrer to the petition must be affirmed.

NOTE.

The reported case deals with the question whether a policeman can claim the benefit of a workmen's compensation act. A policeman's right to such benefit varies under the different acts. The English Act of 1906, Ann. Cas. 1917D—3

which is of very broad application, expressly excludes policemen (see Halsbury, *Laws of Eng.* vol. 20, p. 156). Sometimes the validity of the claim hinges entirely on whether a member of the police force is an "employee," or "workman," within the meaning of the statute (see *State v. District Ct.* 134 Minn. 26, 158 N. W. 790, and *Kiel v. Industrial Commission*, 163 Wis. 441, 158 N. W. 68).

Apparently the reported case is the only one disposing of the claim of a policeman by a consideration of the nature of the employment. The court considers whether a policeman is a "workman," but independently of that question, the court denies the application of the compensation act to an employment supported by a municipality in the exercise of its governmental functions.

For cases concerning employments embraced by a workmen's compensation act, see the note to *Uphoff v. Industrial Board*, reported ante, this volume, at page 1, and for cases considering who is a "workman" within the meaning of workmen's compensation acts, see the notes to *Walker v. Crystal Palace Football Club*, Ann. Cas. 1913C 25, and *Hillestad v. Industrial Ins. Commission*, Ann. Cas. 1916B 789; and for a discussion of the liability of a state as an employer within a workmen's compensation act, see the note to *Miller v. Pillsbury*, Ann. Cas. 1914B 886.

AMERICAN ICE COMPANY

v.

FITZHUGH ET AL.

Maryland Court of Appeals—April 26, 1916.

128 Md. 382; 97 Atl. 999.

Workmen's Compensation Acts — Hearing of Appeal — Right to Open and Close.

Under Workmen's Compensation Act (Acts 1914, c. 800), § 55, giving any person aggrieved by a ruling of the Industrial Accident Commission the right to appeal, such appealing party, having the burden of overcoming the decision which is *prima facie* correct, has the right to open and close the evidence and the arguments.

Employments Included — Truck Driver.

Acts 1914, c. 800, § 32, enumerating the extrahazardous employments, for death or injury in which the act provides compensation, includes that of driving a horse-drawn truck, though it does not expressly enumerate it, since subsection 43 makes the act applicable to all extrahazardous employ-

ments not specifically enumerated, and the words "or other power," as applied to propulsion of vehicles in subsection 41, include horse power.

[See note at end of this case.]

Statutes — Construction — "Other."

The rule of construction requiring the word "other" in a statute to be construed as "other such like," with reference to things previously enumerated, does not apply where legislative intention is manifestly to the contrary, and the word will then receive a general construction.

Workmen's Compensation Acts — Wilful Misconduct — Intoxication.

Under Workmen's Compensation Act, § 14, providing the circumstances under which if injuries occur compensation shall be made, if the deceased workman died in an accident while in the employ of another, in the course of his employment, and death was not due to self-inflicted injury or wilful misconduct or intoxication, compensation must be made, and it is presumed, in the absence of substantial evidence to the contrary, that death did not occur from wilful intention or solely from intoxication.

[See Ann. Cas. 1915B 997.]

Same.

Under such statute, the right to compensation is cut off by intoxication only if the intoxication was the sole cause of the injury.

Basis of Liability — Negligence and Contributory Negligence.

Under Acts 1914, c. 800, regulating workmen's compensation, compensation for injuries or death is not dependent on negligence of the employer nor denied by reason of contributory negligence.

Appeal from Baltimore City Court:
GORTER, Judge.

Claim for compensation under workmen's compensation act. Catherine Fitzhugh et al., claimants, and American Ice Company, defendant. Claim allowed by State Industrial Accident Commission. Decision affirmed by Baltimore City Court. Defendant appeals. The facts are stated in the opinion.
REVERSED.

Eli Frank, C. John Beeuwkes and H. H. Emory for appellant.

W. Booth Settle for appellees.

J. Walter Lord for State Industrial Accident Commission.

[333] THOMAS, J.—This appeal brings up for review the rulings of the Baltimore City Court on appeal from a decision of the State Industrial Accident Commission.

The record contains eleven exceptions. The first two raise the question of the constitutionality of the Act of 1914, Ch. 800, commonly known as the "Workman's Compensation Law," which is alleged to be re-

pugnant to the Constitution of the United States and to the Bill of Rights and Constitution of the State of Maryland. These exceptions were not pressed, however, in this Court, and as we understand [334] that a case has been instituted and is now pending in one of the courts of Baltimore City for the purpose of testing the Constitutionality of the Act, we will reserve our decision of the question until the same is pressed and fully argued.

The third and tenth exceptions are to the refusal of the lower Court in the trial of the case to allow the appellant to "open and close the evidence and arguments." Section 55 of the Act provides:

"Any employer, employee, beneficiary or person feeling aggrieved by any decision of the Commission affecting his interests under this Act may have the same reviewed by a proceeding in the nature of an appeal and initiated in the Circuit Court of the county or in the Common Law courts of Baltimore City having jurisdiction over the place where the accident occurred or over the person appealing from such decision, and the Court shall determine whether the Commission has justly considered all the facts concerning injury, whether it has exceeded the powers granted it by the Act, whether it has misconstrued the law and facts applicable in the case decided.

Upon the hearing of such an appeal the Court shall, upon motion of either party filed with the Clerk of the Court according to the practice in civil cases, submit to a jury any question of fact involved in such case. . . . The Attorney General shall be the legal adviser of the Commission and shall represent all of its proceedings whenever so requested by any of the Commissioners in all Court proceedings under or pursuant to this Act; the decision of the Commission shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same."

The American Ice Company, the appellant in the Court below, filed a motion for leave to produce evidence in addition to that taken before the Commission, alleging that the testimony taken before the Commission did not fully and fairly present the appellant's defense, and the motion was [335] granted. By the express terms of the statute the burden is placed upon the appellant to show error in the decision of the Commission which must be taken on appeal as *prima facie* correct. In the case of *Frazier v. Leas*, 127 Md. 572, 96 Atl. 764, which determined the right of the appellant to offer additional evidence, we said, through Judge Burke: "The Act provides that the decision of the Commission shall be treated on appeal as *prima facie* correct, that the burden of proof shall be upon the party attacking it. The Act secures to the party appealing the

right to a jury trial, and the right to have 'any question of fact involved in the case' submitted to the jury. The Court is empowered to confirm, reverse, or modify the decision of the Commission, and it is provided that in the proceedings on appeal 'full opportunity to be heard shall be had before judgment is pronounced.'" We think the contention of the appellant here made is fully sustained by the case of *Baltimore v. Hurlock*, 113 Md. 674, 78 Atl. 558, where we held that the right to open and close follows the burden of proof, unless otherwise provided. In that case Judge Pearce said: "In 16 Cyc. 931, it is said: 'The rule regulating the burden of proof in special judicial proceedings is the same that governs where an issue has been formulated by the pleadings. He who asks affirmative relief, one for example who appeals from an order . . . has the burden of convincing the Court that action should be taken in his favor.' The right to open and close accompanies the burden of proof, unless otherwise clearly provided by law. Hence it follows, as stated in 15 Enc. Pl. & Pr. 183-4: 'the test is that the right belongs to the party against whom judgment would be rendered if no evidence were introduced on either side.' . . . We must assume that the ruling we are now considering was based upon the requirement to hear the case *de novo*, and in analogy to the practice in appeals from justices of the peace, which are required to be heard *de novo*, and in which the plaintiff below has the burden of proof, and must open the cause, whether he be appellant or appellee; and the argument of the appellee in the case before us [385] proceeds upon the theory that the same rule and reason necessarily applies here. But that view ignores the proviso which requires the affirmance of the assessment in the absence of affirmative evidence to the contrary, and it thereby gives the words *de novo* an effect and scope clearly denied to them by that proviso. . . . Whatever conclusion might be drawn from the words *de novo*, if the burden of proof was not fixed by the proviso embodied in this section, effect must be given to that proviso, which thus becomes decisive of the question." The rule stated in *Hurlock's* case was later approved in *Shoop v. Fidelity, etc. Co.* 124 Md. 130, Ann. Cas. 1916D 954, 91 Atl. 753, and in the case of *Yingling v. Hesson*, 16 Md. 112, the Court, referring to the claim of an executor, said: "When contested he ought not to be deprived of the advantage of position which the burden of establishing the claim would give any other creditor of the estate."

The evidence shows that Seymour Fitzhugh was employed by the appellant, the American Ice Company, as driver of a two-ton ice

and coal wagon; that his duties also required him to load and unload the wagon, and that on the 12th of December, 1914, while driving the wagon of the company, loaded with oysters shells, along North avenue in Baltimore City he fell or was thrown from the wagon and killed. The ice company offered evidence tending to show that he was drunk at the time of the accident, and that the accident was due to his intoxication. The widow of Fitzhugh presented her claim to the State Industrial Accident Commission, and the appeal of the ice company to the Baltimore City Court was from the order or decision of the Commission allowing her compensation.

The main contention of the appellant in the Court below and in this Court is that the provisions of the Workman's Compensation Law do not include drivers of horse-drawn vehicles. Section 32 of the Act provides: "Compensation provided for in this Act shall be payable for injuries sustained or death incurred by employees engaged in the following extra-hazardous employments." Then follow forty-two [387] paragraphs or sub-sections specifying certain extra-hazardous employments. The forty-first section is as follows: "The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical, or other power," and sub-section forty-three provides: "In addition to the employments set out in the preceding paragraphs, this Act is intended to apply to all extra-hazardous employments not specifically enumerated herein." The appellant insists that the intention of the Legislature to exclude drivers of horse-drawn wagons or vehicles is evidenced by the use of the words "operation," "power" and "propelled," and by the fact, disclosed by the journals of the House and Senate, that the Act as originally introduced contained the words, "or drawn by horses or mules," following the words "mechanical or other power," and that the words "or drawn by horses or mules" were by amendment stricken out. Following the doctrine of *noscitur a sociis* and the rule *ejusdem generis* the appellant argues that the words of the statute "or other power" in sub-section forty-one should be read as "other such like," and as including other power of the kind and character of the several kinds enumerated. The doctrine relied upon, is, however, only applied as an aid in ascertaining the legislative intent and is not controlling where it appears that no such limitation was intended. It is said in 36 Cyc. 1121-22: "Nor does the doctrine apply where the specific words of a statute signify subjects greatly different from one another, nor where the

specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless." In the case of *National Bank of Commerce v. Ripley*, 161 Mo. 126, 61 S. W. 587, the Supreme Court said: "It is a rule of construction that a statute should be construed so as to give effect to all its words, if it can be done. Out of that rule grew the further rule on which the respondent relies, that is, that when particular words of description are used, followed by general [388] words, the latter are to be limited in their meaning so as to embrace only a class of things indicated by the particular words. . . . But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. It is a corollary to the first proposition above stated, that the statute must be construed to give effect to all its words. The rule itself must not be so construed as to defeat that purpose. Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose." Applying the well recognized exception to the doctrine relied on to the provisions of the Act in question the kinds of power specifically mentioned in sub-section forty-one of section 32 of said Act would seem to embrace all kinds of power other than animal power, and if we are to give the words "or other power" any meaning at all there is no reason why they should not include horse power or mule power. It is said in *Luce v. Hassam*, 76 Vt. 450, 58 Atl. 725: "The word 'wagon' is synonymous with the word 'carriage,' and may be used to designate any wheeled vehicle drawn by horses," and in the case of *Fifth Avenue Coach Co. v. New York*, 58 Misc. 401, 111 N. Y. S. 759, the Supreme Court speaks of "horse propelled cars" and stages "propelled by horse power." In the case of *Frazier v. Leas*, supra, Judge Burke said: "The language of the section must be examined in the light of accepted rules of construction. First, the intention of the [389] Legislature as expressed

in the words of the Act must be ascertained and given effect; secondly, 'the language of a statute is its most natural expositor, and where the language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations.'" In view of the authorities cited, and the clearly expressed intention of the Legislature to include within the provisions of the Act all extra-hazardous employments we would not be justified in giving sub-section forty-one the narrow and restricted construction contended for by the appellant, and must therefore hold that the employment in which Seymour Fitzhugh was engaged at the time he received the injury which resulted in his death is covered by that section.

The evidence excepted to in the fourth, fifth, sixth, seventh, eighth and ninth exceptions is the testimony of the superintendent of the State insurance fund under the Workman's Compensation Act, whose duties are the same as the superintendent of the insurance department of a casualty company which underwrites various occupations which was offered in connection with a list of employments "on which a lower rate of insurance is charged than is charged for drivers of horse-drawn vehicles," for the purpose of showing that the employment of a driver of a horse-drawn coal or ice wagon is an extra-hazardous employment within the meaning of sub-section forty-three of section thirty-two of the Act. This evidence would seem to be admissible upon the principle applicable to mortality tables (3 Wigmore on Ev. secs. 1698-1707; 1 Greenleaf on Ev. (10th ed.) secs. 162i-162m; *Kerrigan v. Pennsylvania R. Co.* 194 Pa. St. 98, 44 Atl. 1069), but in view of the construction we have placed upon sub-section forty-one of section thirty-two of the Act it is not necessary to pass upon these exceptions, and we are not to be understood as ruling upon the admissibility of the evidence referred to.

The only remaining exception is to the ruling of the Court below on the prayers. The appellant states in his brief that his A, B, C and D prayers were offered on the theory that [390] the driver of a horse-drawn vehicle is not covered by the provisions of the Act, and they are disposed of by what we have already said upon that subject.

Section fourteen of the Act provides: "Every employer subject to the provisions of this Act shall pay or provide, as required herein, compensation according to the schedules of this Act, for the disability or death of his employee resulting from an accidental personal injury sustained by the employee, arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is

occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or where the injury results from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this Act. Section forty-five is as follows: "Notwithstanding anything hereinbefore or hereinafter contained, no employee or dependent of any employee, shall be entitled to receive any compensation or benefits under this Act on account of any injury to, or death of an employee, caused by self-inflicted injury, the willful misconduct, or the intoxication of such employee," and section sixty-one provides, "In any proceeding for the enforcement of a claim for compensation under this Act, it shall be presumed in the absence of substantial evidence to the contrary, . . . (d) That the injury did not result solely from the intoxication of the injured employee while on duty."

By the eighth prayer of the appellee the jury were instructed as follows: "If they shall find from the evidence that the deceased, Seymour Fitzhugh, met his death in an accident while in the employ of the American Ice Company, and in the course of his said employment, and that his said death was not due to any self-inflicted injury, or willful [391] misconduct, or intoxication on the part of the said Seymour Fitzhugh, then the verdict of the jury must be for the claimants. And the jury are further instructed that it is presumed by the law, in the absence of substantial evidence to the contrary, that the death of said Seymour Fitzhugh was not occasioned by his willful intention, and that his said death did not result solely from intoxication while on duty." We see no objection to this prayer. It required the jury to find all the disputed facts necessary to entitle the appellee to recover, and the concluding portion of the prayer simply instructed the jury as to the burden of proof, in the language of the Act.

The appellant's first prayer asserted its right to a verdict if the jury found that Seymour Fitzhugh was intoxicated at the time of his death and that such intoxication contributed to his death. The defendant's second prayer asked for the instruction that if the jury found that Seymour Fitzhugh was intoxicated while on duty and that his death directly resulted from such intoxication then their verdict should be for the appellant. By its third prayer the jury were

instructed that if they found that Seymour Fitzhugh was intoxicated at the time of the accident referred to and that his death directly resulted from such intoxication, and if the jury further believed from the evidence that the accident would not have happened if the deceased had not been intoxicated then their verdict should be for the appellant. These prayers ignore the provision of the Act which disentitles the employee to recover only where intoxication is the *sole cause* of the injury which results in death. The prayers properly present the defense of contributory negligence applicable to ordinary cases of negligence, but the Act in question was designed to abolish the defense of contributory negligence in cases falling within its provisions, and it is only where intoxication is the *sole cause*, and not the contributing cause of the injury that it can be relied on as a defense to the claim of the employee or his dependents. In other words under the terms of the Act the injury for which [392] compensation is sought must be due exclusively or entirely to the intoxication of the employee in order to constitute a defense to the claim. Sub-section 7 of section 61 declares that "death," referred to as the basis of compensation under this Act, means "only death resulting from such injury," and where the *injury*, which results in the death of the employee, results solely from intoxication the defendants are not entitled to compensation.

The appellant's fourth prayer sought to instruct the jury that if the negligence on the part of Seymour Fitzhugh directly contributed to the happening of the accident which caused his death the verdict should be for the appellant, and its fifth prayer asked for the instruction that if the jury found that the death of Seymour Fitzhugh was not caused or contributed to by any act, neglect or default of the ice company then their verdict should be for the company. The right of the employee to compensation under the provision of the Act is not dependent upon negligence on the part of the employer, and is not denied by reason of contributory negligence on his part, and these prayers were therefore properly refused.

It follows from what we have said that because of the errors in the rulings referred to in the third and tenth exceptions the judgment must be reversed and case remanded for a new trial.

Order reversed, with costs to the appellant and new trial awarded.

ON MOTION TO MODIFY OPINION.

THOMAS, J.—The obvious purpose of the Workman's Compensation Law was to do away with the defense of contributory neg-

ligence in all cases coming within its provisions, and to require compensation without regard to the question of negligence on [393] the part of the employer or employee, "except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty."

Where, therefore, the intoxication of the injured employee is relied on as a defense, it must be made to appear that the injury, that is to say the *accident* which resulted in the *injury* for which compensation is sought, was caused *solely* and *exclusively* by the intoxication of such employee. In other words, the injury for which compensation is required is the "*accidental personal injury*" of the employee resulting in his "disability or death," except where such *injury*, or the *accident* resulting in such injury, is attributable *solely* and *exclusively* to "the intoxication of the injured employee while on duty."

This construction of the Act we have already stated, we think, with sufficient clearness in discussing the appellant's prayers, and we will therefore overrule its motion for a modification of the opinion.

Motion overruled.

NOTE.

In the reported case the court discusses the rule *ejusdem generis* with reference to the construction of a workmen's compensation act, and holds that where the particular words exhaust the genus, a general word, following the particular words, may be given a meaning outside of the class indicated by the particular words. Accordingly, the court holds that a workmen's compensation act which covers operation of "vehicles . . . propelled by steam, gas, gasoline, electric, mechanical, or other power," includes the employment of one driving a horse-drawn vehicle.

The cases discussing what employments are within the purview of a workmen's compensation act are reviewed in the note to Uphoff v. Industrial Board, reported ante, this volume, at page 1.

WILSON

v.

DORFLINGER ET AL.

New York Court of Appeals—April 25, 1916.

218 N. Y. 84; 112 N. E. 567.

Workmen's Compensation Acts — Definition of Terms — Elevator as "Vehicle."

An elevator is not a "vehicle" within the classification of group 41 of Workman's Compensation Law (Consol. Laws, c. 87), which embraces the operation "otherwise than on tracks, of cars, trucks, wagons, and other vehicles," etc.

Employments Included — Hazardous Employments — Elevator Operator in Store.

The business of selling glassware is not "hazardous," and an employee injured operating an elevator in such business cannot recover under the Workmen's Compensation Law.

[See note at end of this case.]

Wilson v. Dorflinger, 170 N. Y. App. Div. 119, reversed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Claim for compensation under Workmen's Compensation Act. Leona Wilson, claimant, and C. Dorflinger et al., defendants. Claim allowed by State Workmen's Compensation Commission. Decision affirmed by Appellate Division of Supreme Court. Defendants appeal. The facts are stated in the opinion. REVERSED.

Arthur Butler Graham and William Henry Woolley for appellants.

Egburt E. Woodbury and E. C. Aiken for respondent.

[85] WILLARD BARTLETT, Ch. J.—This claim grows out of the accidental death of William H. Wilson, the husband of the claimant, who was employed as a porter and shipping clerk by C. Dorflinger & Sons, who were engaged in the business of selling glassware in the city of New York. One of the incidental duties of Wilson was to operate an elevator on the premises of his employers when he had occasion to use the same. On September 30, 1914, being engaged in thus operating the elevator, he accidentally fell down the elevator shaft, and was so severely injured that he died on the same day as the result of the fall. The workmen's compensation commission has decided that his injuries arose out of and in the course of his

employment, and the only question presented by this appeal is whether the case falls within the purview of the Workmen's Compensation Law (Chap. 816 of the Laws of 1913, as re-enacted and amended by chap. 41 of the Laws of 1914).

The Workmen's Compensation Law enumerates forty-two groups of hazardous employments, and provides that compensation thereunder shall be payable for injuries sustained or death incurred by employees engaged in any of these employments. If the employment in which the claimant's husband was engaged when he was accidentally killed by falling down the elevator shaft was one of [86] those thus enumerated in the statute there would be no question as to the right of his widow to recover compensation for his death. The finding of the commission, however, is that he was employed by a firm "engaged in the business of selling glassware," and this employment is not mentioned in any of the groups enumerated in the Workmen's Compensation Law. The manufacture of glass, glass products, glassware, porcelain or pottery is covered by group 20; but that group does not extend far enough to include the business of selling glassware. The Appellate Division concedes this and holds that the employee was not engaged in a hazardous business within the Workmen's Compensation Law unless the business falls within group 41 of the act, which embraces the operation "otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules."

It is only by construing the word "vehicle" in this group as broad enough to include an elevator that the present case may be brought within the scope and operation of the Workmen's Compensation Law. The Appellate Division pronounced the question a serious one, but reached the conclusion that an elevator fell fairly within the definition of a vehicle. "There seems to be no good reason," says the opinion, "why cars, trucks and wagons propelled in the manner mentioned in that group should be included and an elevator excluded." It may be observed, however, that the courts are not concerned with the wisdom of the legislation under consideration when they are engaged in construing a statute. Their only purpose is to ascertain the true meaning and intent of the law makers. If the legislature has not included the operation of elevators generally within the Workmen's Compensation Law, but has confined compensation for accidental injuries in ele-

vators to such accidents as [87] occur in certain specified employments, the argument that it would have been wise to establish a broader liability is not available here.

The character of the Workmen's Compensation Law indicates that it was prepared with the utmost care and it is only fair to its authors to assume that nothing was inadvertently omitted therefrom. The mention of the "operation of grain elevators" in group 29 indicates that the operation of elevators generally must have been considered; yet we find no mention of elevators anywhere else in the statute unless, as held by the Appellate Division, it is included in the term "vehicles" as used in group 41. We agree with that learned court that the Workmen's Compensation Act must be liberally construed, but we think that the rule of *ejusdem generis* applies to group 41 and that the vehicles therein referred to are structures similar to those previously mentioned, that is to say, similar to cars, trucks or wagons operated on streets and highways. An elevator which runs up and down bears no similarity either in construction or method of operation to such vehicles. We think that a construction which brings such an elevator within the scope of group 41 is too far-fetched to be justified by any canon of statutory interpretation.

This conclusion does not by any means import that compensation for injuries due to elevator accidents is not recoverable under the Workmen's Compensation Law; all that we decide is that in order to be recoverable it must appear that the elevator was used in one of the employments classified by the act as hazardous. The business of selling glassware is not a hazardous employment under the act.

The order of the Appellate Division should be reversed, with costs, and the claim dismissed.

Hiscock, Collin, Cuddeback, Hogan, Seabury and Pound, JJ., concur.

Order reversed, etc.

NOTE.

Applying the rule *ejusdem generis* in the construction of the New York workmen's compensation act, the court holds in the reported case that operating an elevator is not within the purview of that act. Cases dealing with the question what employments are included within the scope of a workmen's compensation act are collated in the note to *Uphoff v. Industrial Board*, reported ante, this volume, at page 1.

REMSNIDER

v.

UNION SAVINGS AND TRUST COMPANY.

Washington Supreme Court—January 5,
1916.

89 Wash. 87; 154 Pac. 135.

Workmen's Compensation Acts — Employments Included — Janitor in Office Building.

A janitor in an office building was injured while scrubbing down the walls and floors of the elevator shaft beneath the cage. The elevator was operated by electricity. The workmen's compensation act (3 Rem. & Bal. Code, § 6604—1 et seq.) provides, in section 2, that the act shall apply to all inherently hazardous employments, including factories, mills, and workshops where machinery is used. Section 3 defines a workshop as a room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise. It is held that though the elevator was operated by electricity, the shaft could not be considered a workshop, and the janitor's rights were not governed by the statute.

[See note at end of this case.]

Same.

Where neither the work of a janitor in an office building nor employment about an elevator shaft had been classified as extra hazardous by the Industrial Insurance Department as authorized by workmen's compensation act, § 2, an injury to a person engaged in such employment is not governed by the statute.

[See note at end of this case.]

Damages — Excessiveness — Internal Injury and Loss of Leg.

In view of the conflict in medical testimony as to the permanency of the injuries of a servant 54 years of age, whose injuries consisted of paralysis of one leg and internal injuries, it is held that an award of \$5,000 could not be determined excessive.

[See 16 Ann. Cas. 8, Ann. Cas. 1913A 1361.]

Appeal from Superior Court, King county:
RONALD, Judge.

Action by A. Remsnider, plaintiff, against Union Savings and Trust Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion.
AFFIRMED.

Farrell, Kane & Stratton for appellant.

Clem J. Whittemore and Peters & Poicell for respondent.

[88] ELLIS, J.—Action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as its janitor. The defendant is the owner of an office building known as the Hoge Building, in the city of Seattle. In the building are maintained and operated three elevators or lifts. The plaintiff, as janitor, was directed by the superintendent or head janitor to go into the elevator shaft beneath the elevator cage and scrub down the walls and doors. While he was so employed, the elevator was run down into the shaft, crushing him between the board across the shaft on which he was reclining and the bottom of the cage.

At the trial, defendant's negligence was conceded. The only contested issue of fact was as to the extent and character of the injuries sustained by the plaintiff. The jury returned a verdict in favor of the plaintiff for \$5,000. From the judgment thereon, the defendant appeals. The record sufficiently presents two questions, which we shall consider in their logical order.

The appellant's first claim is that the respondent, while engaged in cleaning the elevator shaft, was a "workman" engaged in "extra hazardous work," within the meaning of the workmen's compensation act, chapter 74, Laws of 1911, p. 345 (3 Rem. & Bal. Code, § 6604—1 et seq.), and that the court, therefore, had no jurisdiction of the action. It is argued that the elevator shaft, wherein was operated an elevator driven by electricity and wherein the respondent was working when injured, was such a place as to make the respondent's work extra hazardous within the meaning of §§ 2 and 3 of the act, in that it was a "room or place wherein power-driven [89] machinery is employed." The appellant relies upon our decision in *Wendt v. Industrial Ins. Commission*, 80 Wash. 111, 141 Pac. 311, as decisive of this point. In that case, the deceased was a carpenter, regularly employed as such by a corporation operating a large department store. His duties comprised making shelving, display standards, repairs, additions, alterations and the like about the store. The company maintained a repair shop primarily for the repairing of its delivery wagons and automobiles. In this shop, besides a carpenter bench and carpenter's tools, there were a power lathe, an emery wheel, a grindstone, drills, etc., operated by electricity. The deceased met his death through receiving an electric current while turning on a switch to put in motion the grindstone for the purpose of sharpening a chisel. After a careful analysis of the statute, we held, in substance, that the company conducted, as a department of its business, this shop, which was extra hazardous within the enumeration of § 2 of the act, being a "workshop" as defined in § 3, a ". . . room or

place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control." Our decision was based upon the plain fact that the shop there in question met the definition of a workshop, and that the deceased met his death in attempting to operate the power-driven machinery in connection with his regular employment, that of "carpenter work," which is in § 4 of the act specifically classified as among the extra hazardous works contemplated by the act.

The distinction between the *Wendt* case and the case before us seems clear. If an elevator shaft in an office building is, as appellant argues, a "room or place wherein power-driven machinery is employed," so as to fall within the [90] meaning of the workmen's compensation act, then it is such because the elevator shaft is a workshop, since the language quoted is employed in § 3 of the act as defining the word "workshop" as used in the enumeration of extra hazardous works found in § 2. The act does not say, nor does it imply, that every place in which power-driven machinery is employed impresses an extra hazardous character on work performed in such a place. It merely employs the circumstance of the presence of power-driven machinery in connection with a number of other things in defining a workshop. If the presence of power-driven machinery is the sole determining factor, then every shaft in which is operated a power-driven elevator or lift is a workshop. Then, also, the operator of the elevator, and every employee of the appellant who in the course of his duties had occasion to enter the elevator to pass from one floor to another, would be employed, for the time being, in a room or place wherein power-driven machinery is employed—hence, in a workshop, and in an extra hazardous work.

Though the respondent was injured in a place where power-driven machinery was employed, it cannot, by the widest stretch of the meaning of the statute, be termed a workshop. Though his regular employment was at times fraught with hazard, as are all employments, it was not one which, to use the language of § 2 of the act, has "come to be, and to be recognized as being, inherently and constantly dangerous." Neither was it connected with any of the occupations enumerated as extra hazardous in § 2, nor is it mentioned on any of the schedules in § 3, or in any of the classifications in § 4. Section 2 of the act closes with the provision that:

"If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4." 3 Rem. & Bal. Code, § 6604-2.

[91] But neither the work of a janitor in an office building nor working in or about an elevator shaft has yet been classified by the department as extra hazardous, nor has any rate of contribution been fixed as provided in the clause quoted.

In the recent case of *Guerrieri v. Industrial Ins. Commission*, 84 Wash. 266, 146 Pac. 608, after another careful analysis of the statute, we held that one who was employed in operating a passenger or freight elevator or lift in a mercantile establishment was not engaged in an extra hazardous employment within the meaning of the statute. That decision, by plain inference, is contrary to the appellant's contention here. Respondent was not engaged in an extra hazardous work within the meaning of the act. Though § 2 points out that "there is a hazard in all employments," it provides statutory compensation only for injuries received in employments recognized as "inherently and constantly dangerous," and which it enumerates as extra hazardous. As we said in the *Guerrieri* case:

"The manifest intent of the law is not to cover and compensate for accidents generally, but to cover accidents occurring in those employments or occupations which are specifically classed as, or which may be found by the commission to be, extra hazardous."

On a careful reconsideration of the whole question, we are satisfied that the *Guerrieri* case was correctly decided and is controlling on the facts here.

The other contention is that the verdict is excessive. The injury was mainly to the sciatic nerve, resulting in a partial paralysis of the right leg and foot. There was also a small hernia and an injury to the kidneys, causing a passage of blood. All of these conditions persisted at the time of the trial, nine months after the injury, the last, however, only to a slight extent. The leg was still swollen and of a bluish color. The respondent was still on crutches. He is nervous and suffers from insomnia. He is fifty-four years old, but had always been strong and well prior to the injury. As to [92] the man's condition at the time of the trial, the testimony presents a sharp conflict. Of five physicians who had examined him a short time prior to the trial, two intimated a belief that he was malingering, and were of the opinion that the injury to the leg was not permanent.

Three were strong in the opinion that his suffering was real, and two were of the positive opinion that the injury to the leg was permanent. The third expressed doubt as to whether the full use of the leg would ever be restored. Upon this conflict of evidence, the question of the permanency of the injury was one for the jury, as was also the amount of the damages. The award is large, but the evidence gives us no warrant to interfere with the verdict. To do so would be a wanton invasion of the province of the jury.

The judgment is affirmed.

Morris, C. J., Chadwick, Mount, and Fullerton, JJ., concur.

NOTE.

The court in the reported case discusses the question what is employment in a "workshop" under the Washington workmen's compensation act, and holds that the work of a janitor in cleaning an elevator shaft is not an occupation to which the act is applicable. The subject of occupations or employments within the purview of workmen's compensation acts is treated at length in the note to *Uphoff v. Industrial Board*, reported ante, this volume, at page 1.

SIMMONS

v.

NATIONAL LIVE STOCK INSURANCE COMPANY.

Michigan Supreme Court—July 23, 1915.

187 Mich. 551; 153 N. W. 696.

Witnesses — Competency — Transactions with Deceased Agent of Party.

In an action on a policy insuring a stallion, where the brother of the insurer's agent, who was associated with him as a clerk, had been present while the agent prepared the application, such agent having been taken ill in the course of the transaction, leaving the office, and his brother having completed the filling out of the application, which, as to the circumstances of the acquisition of the stallion, was not in accordance with the facts, the agent having died, his brother's testimony that the insured had told the truth as to such circumstances was not inadmissible on the ground that the facts were equally within the knowledge of the deceased agent.

Evidence — Conclusion of Witness.

In an action on a policy on a stallion, where the plaintiff was allowed to testify

that the \$2,000 cash which he had paid at the time of the purchase of the insured horse and others was paid for that horse, because the seller claimed that a note was outstanding on such horse, and she had to have the cash to pay it, such testimony is not improper as calling for the conclusion of the witness as to how the money was applied, since it was a mere relation of alleged facts.

Animal Insurance — Notice of Sickness or Accident — Timeliness.

Where the insurance policy on a stallion provided that the perils indemnified against did not include death from any cause, where the insured did not render forthwith by telegraph or telephone to the company at its home office notice of any sickness or accident, where the stallion was taken ill at 8:30 P. M., November 28th, plaintiff and veterinaries working over the animal all night, plaintiff sending a telegram to the insurer at 8:30 A. M. the next morning, notifying it of the illness, which telegram was not actually sent until 11:30 A. M., and not received at the home office of the insurer until after 1 P. M., the sending was a reasonable compliance with the policy, since the term "forthwith" does not in all cases mean instant, but often has a relative meaning of all reasonable celerity, or all reasonable dispatch, or with reasonable and proper diligence, depending on the circumstance of each case.

[See note at end of this case.]

Harmless Error — Admission of Evidence — Issue Not Submitted to Jury.

In an action on a policy on a stallion, where the plaintiff was allowed to testify that, in signing an application which the company's agent had filled out falsely, he had no intention of committing fraud, and where the court, in submitting the question of fraud, instructed that if the insured truthfully states the facts to the agent who fills out the answers in the application, and the party securing the insurance does not read over the application, and does not have it read over to him, and has no reason to suspect disparity between the application and his answers, he may recover, and is not guilty of fraud, although the agent has placed in the application different answers than those given him by insured, any error in the admission of the testimony is harmless, since the question of intent was not submitted to the jury.

Insurance — Fraud — Unintentional False Statements — Application Not Read by Insured.

Where one applying for insurance truthfully states all the facts required by the application to the insurer's agent, who fills out the application falsely and not in accordance with the applicant's statements, and the latter does not read over the application, or have it read over to him, and has no reason to suspect disparity, he is not guilty of fraud, and may recover.

Trial — Striking Out Testimony — Testimony Admitted without Objection.

Where the court refuses to strike the plaintiff's incompetent testimony, which

came in without objection or exception, the action is proper.

Error to Circuit Court, Gratiot county: SEARLE, Judge.

Action by Orla J. Simmons, plaintiff, against National Live Stock Insurance Company, defendant. Judgment for plaintiff. Defendant brings error. **AFFIRMED.**

[552] On January 27, 1913, the plaintiff was the owner of three valuable stallions. Desiring to secure insurance upon them, he made application to the defendant company. A separate application was made as to each horse, and the several applications contained representations [553] as to the purchase price paid for each horse as follows:

"Gascon.

"Q. Was purchase price cash, trade, or both? If part trade, state what it consisted of. Ans. Purchase part trade and part cash, \$2,250. Q. Cash paid for animal? Ans. \$750. Q. Is purchase money all paid? Ans. Yes. Q. If not, for what sum, to whom, and when due? (Not answered.)

"Egypt.

"Q. Was purchase price cash, trade, or both? If part trade, state what it consisted of. Ans. Cash. Q. What amount did you pay in cash for the animal? Ans. \$2,000. Q. Is purchase money all paid? Ans. Yes. Q. If not, for what sum, to whom, and when due? (Not answered.)

"Hursus.

"Q. Was purchase price cash, trade, or both? If part trade, state what it consisted of. Ans. Cash. Q. Cash paid for animal? Ans. \$2,000. Q. Is purchase money all paid? Ans. Yes. Q. If not, for what sum, to whom, and when due? (Not answered.)"

The defendant company issued three separate policies, one upon each stallion, on the 29th day of January, 1913, for the premiums upon which plaintiff paid the sum of \$290.

On November 28, 1913, at about 8:30 o'clock in the evening, the plaintiff noticed that the horse Gascon was acting in a peculiar manner. He watched him for a short time. When the horse started to eat, and plaintiff left him. Returning in about an hour, the horse was standing with his head down, acting "kind of funny." Plaintiff immediately called a reputable and experienced veterinary surgeon, who gave the horse some medicine and stayed with it about an hour, when it appeared to him to be all right. He instructed the plaintiff to stay with the horse and call him if it became [554] worse. Its

condition at or about midnight on the 28th caused the plaintiff to again call the veterinary, who responded at once, and the horse was removed to the stable of the veterinary surgeon, who worked with it all that night, treating it for indigestion and impaction. About 4 o'clock in the morning a second veterinary was called by telephone from a neighboring town, and both surgeons continued to work over the animal. At about 8:30 A. M. plaintiff filed for transmission a telegram to defendant company notifying it of the illness of the animal. The telegram was not actually sent, however until 11:52 A. M., and was not received at Indianapolis, the home city of the defendant company, until after 1 P. M. that day. As soon as defendant company received notice of the condition of the horse, it secured the services of a third veterinary surgeon, who arrived at about 6 o'clock in the evening of the 29th. He remained with the horse until it died at 6 o'clock the following morning, the 30th.

Shortly after the death of the horse, plaintiff filed proofs of loss, in which, under oath, he stated that he had paid \$2,000 in cash for the horse. Defendant at once denied all liability under its policy, whereupon this suit was brought. The defendant filed a notice under the plea of the general issue, setting up, as matter of special defense, the alleged fact that the plaintiff had falsely and fraudulently represented the cost of the animal insured and the manner of payment therefor. Said notice further sets out that the insurance contract, among other things, provided that:

"The perils indemnified against by this policy do not include death from any cause, where the assured does not render forthwith by telegraph or telephone to the company at its home office, 504 Central Union Telephone Building, Indianapolis, Indiana, notice of any sickness or accident with which any of the animals hereby insured may become afflicted."

[555] The claim is made under said plea and notice that the telegram sent by plaintiff notifying defendant of the illness of the horse Gascon was not a compliance with this provision of the policy. Upon the trial, plaintiff testified, without objection on the part of the defense, to the following facts:

"At the time I made application for insurance on Gascon, I made application for insurance on Hursus and Egypt, and received policies for all three stallions at the same time. I paid \$290 to A. E. Barstow, agent of the company, for it as premium on said policies before I received the policies. Henry Barstow and A. E. Barstow were in the office together at the time. When I paid for these policies, I can't just remember whether I made the check to A. E. Barstow or Henry

Barstow, but I think A. E. Barstow. Exhibit 10 is the check by which I paid A. E. Barstow \$290 premium. I delivered it to him at the time I got the policies I received February 13th. Mr. A. E. Barstow drew one and part of another of the applications and was taken sick and Henry drew the rest of them.

"Q. Did you read them?

"A. I didn't.

"Q. Or were they read to you?

"A. No, they were not.

"Q. You didn't read them you say?

"A. I didn't."

These facts were equally within the knowledge of A. E. Barstow, the agent of the defendant company, who wrote the insurance, and who was dead at the time of the trial. A motion having been made to strike out plaintiff's testimony so far as the facts related were equally within the knowledge of the defendant's agent, the court in the first instance granted the motion, but later reinstated the testimony. Plaintiff was permitted to testify, over objection, that, in signing said application, he had no intention of committing a fraud upon the defendant. The case was submitted to the jury upon two grounds:

[556] (1) As to whether the plaintiff was guilty of fraud because of the alleged misstatements contained in the application.

(2) Whether the telegram sent by plaintiff to defendant on the morning of the 29th of November was a compliance with the policy requirement that a notice be sent "forthwith."

Plaintiff had verdict and judgment.

McCall Bros. and M. S. Meyberg for appellant.

O. G. Tuttle and Edwin H. Lyon for appellee.

BROOKE, C. J. (*after stating the facts*).—There is no doubt that the statement appearing in the application for insurance upon the horse Gascon, touching the question of the cost of said animal, is not in accordance with the facts. It appears that plaintiff bought three horses, a small piece of real estate, and some other personal property for \$5,000. At the time he consummated the deal, he paid \$500 down to bind the bargain. One thousand five hundred dollars further was paid at the time the property was delivered to him, and the balance of \$3,000 was secured by two promissory notes of \$1,500 each, indorsed by his father, falling due some time later. It was, however, claimed by the plaintiff, and his claim is borne out by the testimony of Henry Barstow, who was a brother of A. E. Barstow, the agent of the defendant company, and who for many years

had been associated with his brother as clerk in the latter's office, that he truthfully disclosed the facts attending the purchase. This witness testified explicitly to the fact that the plaintiff had told his brother, the agent of the defendant company, that he paid \$2,000 for the horse Gascon, \$1,500 for the horse Egypt, and \$1,200 for the horse Hursus; that he had paid \$2,000 in cash, and had given notes indorsed by his father for \$3,000, the balance of the purchase price. An objection was made to the testimony of this witness upon the ground that the facts related in his testimony were equally within the knowledge of A. E. Barstow, defendant's agent, and for the reason that no foundation was laid for the testimony, [557] and it was therefore incompetent. The objection was overruled, the testimony taken, and error is assigned thereon. We are of opinion that the ruling was correct. Henry Barstow was a clerk in his brother's office. He was present probably all of the time, but certainly a large part of the time while the applications were being prepared by his brother. His brother was taken ill and left the office in the course of the transaction, and Henry Barstow completed the filling out of the applications. It certainly cannot be said that in so doing he acted as agent for the plaintiff. We are of opinion that his relation to the business in hand was practically that of his employer, who certainly would have been a competent witness to testify to the facts elicited from his clerk.

Error is assigned upon the ruling of the court permitting the plaintiff to disclose the details of his bargain with Mrs. Clark at the time he purchased the horses. It was his claim that the \$2,000 cash paid at the time of the purchase was paid for the horse Gascon, for the reason that Mrs. Clark claimed that a note was still outstanding on said horse, and that it was necessary for her to have the cash to pay for that horse and some other obligations. It is urged on behalf of the defendant that this testimony should have been excluded, because it was the conclusion of the witness as to how the money paid was applied, and as to the details of the transaction. We do not think the testimony open to this objection. It was a narration of alleged facts and not in any sense an assertion of the conclusions of the witness.

It is next urged that the court erred in submitting the question of the sufficiency of the notice to the jury. Many authorities are cited upon this point by defendant's counsel, among them the following: *Illinois Live Stock Ins. Co. v. Kirkpatrick*, 61 Ill. App. 74; *Green v. Northwestern Live-stock Ins. Co.* 87 Ia. 358, 54 N. W. [558] 349; *Alston v. Northwestern Live Stock Ins. Co.* 7 Kan. App. 179, 53 Pac. 784; *Johnston v. North-*

western Live Stock Ins. Co. 107 Wis. 337 83 N. W. 641; Swain v. Security Live Stock Ins. Co. 165 Mass. 321, 43 N. E. 105. Without determining whether the question should have been submitted to the jury (*Griffey v. New York Cent. Ins. Co.* 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; *Carpenter v. German American Ins. Co.* 135 N. Y. 298, 31 N. E. 1015; *McNally v. Phoenix Ins. Co.* 137 N. Y. 389, 33 N. E. 475; *Hernden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467) or passed upon by the court, we are of opinion that the defendant was not injured by such submission. Under the circumstances surrounding this case, as disclosed by the record, we think that the sending of the telegram at 8:30 in the morning was a reasonable compliance with the "forthwith" requirement of the policy. We had occasion to consider the legal meaning of the term "forthwith" in the case of *Walker v. Detroit*, 138 Mich. 538, 101 N. W. 809. We there said:

"The term 'forthwith' does not in all cases mean 'instantly,' but may and often does have a relative meaning, and may mean 'all reasonable celerity' or 'all reasonable dispatch,' 'with reasonable and proper diligence.' 13 Am. & Eng. Enc. Law (2d ed.) p. 1157 et seq. And what is a reasonable time depends on the circumstances of each case. *Anderson v. Goff*, 72 Cal. 73, 13 Pac. 73, 1 Am. St. Rep. 34."

The horse fell seriously ill about 10:30 P. M. From that time on during the night the plaintiff, part of the time with one veterinary surgeon and part with two, worked over him in a fruitless endeavor to save his life. He testified that he filed his telegram about 8:30 A.M. It was not actually transmitted until nearly 12 o'clock. This delay in transmission was apparently in no sense due to the negligence of the plaintiff. It should perhaps be noted that, while the policy requires [559] "forthwith" notice by telephone or telegraph, the application signed by the plaintiff contains the agreement of warranty that he will send such notice "forthwith by registered mail or telegraph." The policy makes the application a part of the contract, and the plaintiff would clearly have acted within his legal rights had he sent the notice by registered mail instead of telegram, in which event it would not have reached the plaintiff until a much later hour than the telegram, in fact, did. We think that the court might, with entire propriety, have withdrawn the question from the consideration of the jury and himself determined, as a matter of law, that the notice as sent was a reasonable compliance with the policy requirement.

Error is assigned upon the ruling of the court in permitting the plaintiff to testify that, in signing the application, he had no intention of committing fraud. The assign-

ment is without merit, for the reason that the court, in submitting the question of fraud to the jury, instructed them:

"But I also charge you that in that respect it is the law in this State that if a party truthfully states the facts to the agent who fills out the answers to the questions upon the application, and the party securing the insurance does not read over the application and does not have it read over to him, so that he has no reason to believe or know that the application is not exactly like the answers that he has made, then he may recover and is not guilty of fraud, even though the agent places different figures or different statements or answers to the questions than the party gave."

It is therefore apparent that the question of intent was not submitted to the jury. We think this portion of the charge, which is the subject of an exception, is warranted under the following authorities: *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41; *Tempink v. Metropolitan L. Ins. Co.* 72 Mich. 388, 40 N. W. 469; *Van Houten v. Metropolitan L. Ins. Co.* 110 Mich. 682, 68 N. W. 982; [560] *Perry v. John Hancock Mut. L. Ins. Co.* 147 Mich. 645, 111 N. W. 195; *Clark v. North American Union*, 179 Mich. 131, 146 N. W. 336.

The refusal of the court to strike out that portion of the testimony of the plaintiff relating to facts equally within the knowledge of defendant's agent was correct. The testimony came without objection or exception. Counsel cannot sit by and permit incompetent testimony to be introduced without objection and afterwards, when it is found to be unsatisfactory, have it stricken from the record. *Berryman v. Graham*, 21 N. J. Eq. 370; *Quin v. Lloyd*, 41 N. Y. 349; *Barbier v. Young*, 115 Mich. 100, 72 N. W. 1096. Other assignments of error, in our opinion, do not require consideration.

The judgment is affirmed.

Kuhn, Stone, Ostrander, Bird, Moore, and Steere, JJ., concurred.

The late Justice McAlvay took no part in this decision.

Rehearing denied December 22, 1915.

NOTE.

Animal Insurance.

- Introductory, 46.
- Formation or Renewal of Contract, 46.
- Ownership by or Interest of Insured, 46.
- Cause of Loss, 46.
- Place of Loss, 47.
- Notice of Sickness, Accident or Loss, 47.
- Proofs of Loss, 49.
- Conditions, Warranties or Representations, 49.

Introductory.

The earlier cases on the subject of animal insurance are reviewed in the note to *Kinney v. Farmer's Mut. F. etc. Soc.* Ann. Cas. 1915A 609. This note collates the more recent decisions.

Formation or Renewal of Contract.

In *Live Stock Ins. Assoc. v. Stickler* (Ind.) 115 N. E. 691, it was held that a mutual live stock insurance company was not estopped by the retention of the premium to deny that an application had been accepted.

In *National Live Stock Ins. Co. v. Cramer* (Ind.) 114 N. E. 427, an oral contract to renew a policy of animal insurance was held to be valid, and a recovery was sustained in the following facts "On April 16, 1912, defendant issued to plaintiff a policy of insurance, by the terms of which defendant, in consideration of the sum of \$50 as premium, agreed to insure plaintiff against the loss of two horses by death for a period of one year to the amount of \$100 on one horse and \$400 on another, named 'Turban.' Before the expiration of the policy defendant mailed a letter to plaintiff, wherein he was informed of the time his policy would expire, and a request was made that he renew his policy, and he was directed to reach the local agent and 'have him take care of his interests.' On the same day defendant also wrote its local agent Cummins, directing him to use his best endeavors to secure a renewal of the policy if he still considered the risk desirable. Upon receipt of his letter plaintiff called upon the agent Cummins, and informed him of his desire to again insure with his company for the same amount, 'but that he desired the entire sum placed on the one horse Turban.' The agent instructed plaintiff to bring him the card, giving the description and number of the horse, and that they would arrange to reinsure him. Afterwards, and before the expiration of the old policy, plaintiff provided defendant with the requested information, and thereafter, and in the absence of plaintiff, the agent Cummins prepared an application for him, which was mailed to defendant at its office in the city of Indianapolis. Plaintiff then offered to pay the premium to the agent, but he was told not to pay it until he received the policy, and that he could consider himself insured. Immediately after the expiration of the policy plaintiff again called on the local agent for his new policy, but was informed that it had not been received from the home office, but agreed and promised that he should consider himself insured in the sum named in his application on the horse Turban. While all these matters were happening defendant was holding out to the public and to appellee that

Cummins was its agent; that plaintiff had no knowledge of any limitation on his authority. Plaintiff relied on the agreement, believing that Cummins was defendant's agent, and was induced to rely on said insurance, and not to take insurance in any other company. About 8 o'clock A.M. of May 18, 1913, the horse Turban became sick. He was then on plaintiff's farm, about one mile from Millville, Henry county, and about seven miles from Hagerstown. Plaintiff immediately called a veterinary surgeon at Hagerstown by telephone, and he came at once to attend the horse. Plaintiff was required to telephone through the exchange at Millville, and, the 18th day of May being Sunday, the exchange was closed after 9 o'clock of that day. The veterinary remained with the horse the greater part of that day and until two o'clock of the next morning, when the horse died. Plaintiff immediately notified defendant of the death of the horse, and asked what disposition should be made of him, and was told by Cummins to bury him. He had the horse moved, however, to Hagerstown, where an autopsy disclosed that he had died from acute indigestion. The horse had never been sick before, was a pedigreed stallion, and was worth \$1,000. After the death of the horse and within a reasonable time, on the 22d day of May, plaintiff wrote a letter to defendant, in which he narrated all the business transactions had with their agent; that he relied upon the statement made by the agent that the horse was insured; that he had died shortly after the new insurance had been placed; that he had notified the agent of his death, and demanded the new policy and the amount of insurance which had been placed on the horse. All of which was refused by the defendant on the ground of nonliability."

Ownership by or Interest of Insured.

A local agent of a live stock insurance company may consent to an incumbrance on the insured animal. *National Live Stock Ins. Co. v. Jackson*, 160 Ky. 228, 169 S. W. 695.

It must appear affirmatively that the insured was the owner of the animal at the time of the loss. *Live Stock Ins. Assoc. v. Sticker* (Ind.) 115 N. E. 691.

Cause of Loss.

Where an insured animal is in a dying condition the fact that the owner authorizes it to be killed to end its suffering does not preclude recovery on the policy. *National Live Stock Ins. Co. v. Elliott*, 60 Ind. App. 112, 108 N. E. 784, wherein it was said: "The animal was in a suffering, dying condition, and there was no possibility of recovery. Under such circumstances every in-

instinct of humanity dictated that the veterinary surgeon and the owner of the animal should do exactly what they did—end the suffering. It is idle to say under such circumstances that the death was not caused from foaling insured against in the policy. The foaling brought about the dying, suffering condition. The act of the veterinary surgeon and owner was but humane, and to be commended rather than condemned, as the facts are here shown. This question has recently been decided by this court adversely to appellant's contention. *Live Stock Ins. Assoc. v. Edgar*, 56 Ind. App. 489, 105 N. E. 641. It is further argued that the animal was killed by an officer of the law, and therefore there could be no recovery, as the policy contains the following language: 'This company will not be liable . . . for the death of any animal which is caused by the authority or direction of any state or government officer, or other officer or of any person claiming to act under and by virtue of any law.' Prior to the trial appellant propounded to appellee various interrogatories, among which was the following: 'Was this party [veterinary surgeon] an officer of the law, or any person claiming to act under the law? Answer: Yes.' Upon the basis of this clause of the policy, and interrogatory, appellant contends there can be no recovery. There is no merit in this contention. It is not disclosed what official position the veterinary surgeon held, and it is clear that he was not acting in an official capacity when he performed the act complained of, but was rather performing his duty as a veterinary surgeon, prompted by the instincts of humanity, in order that the pain and suffering might be relieved."

If, in an action on a policy of animal insurance, it appears that the insured animal was found dead with no mark of violence on its body, it will be presumed that it died from some disease common to its species. *Colley v. National Live Stock Ins. Co.* 185 Mo. App. 616, 171 S. W. 663; *Shipman v. National Live Stock Ins. Co.* 187 Mo. App. 400, 173 S. W. 735. See to the same effect *National Live Stock Ins. Co. v. Warren* (Tex.) 181 S. W. 790. In that case there was testimony as follows: "He (the horse) had not shown any signs of sickness before the night of his death. I heard him making a noise at the barn, and went out and opened the door. As soon as I opened the door, he fell out of the barn and was dead before I could put a bridle upon him. I did not have time to get a veterinary surgeon or any one to treat him. I do not know what caused his death. He had never been sick but once before, and that was for but a few moments." The court said: "If the burden was on appellee to show not only the death of the horse, but also the cause of his death, we think the trial court,

in the absence, as was the case, of testimony tending to show, or even suggesting, that his death was due to one of the excepted causes, had a right to infer from the testimony of appellee set out in the statement above that the horse died from disease or accidental injuries provided against in the policy. The circumstances as to his death shown by that testimony to our minds negatived an inference therefrom that he died from any of the excepted causes, but indicated, instead, that his death was due to sudden illness or accidental injuries covered by the policy."

Place of Loss.

As to whether a policy of insurance on live stock in a designated place covers the animals while they are temporarily in another place, see the notes to *Lathers v. Mutual F. Ins. Co.* 15 Ann. Cas. 659, and *Rosenthal v. Insurance Co. of North America* Ann. Cas. 1916E 395.

Notice of Sickness, Accident or Loss.

A slight scratch received by an insured animal from which no injury is reasonably to be apprehended is not an "accident" of which notice must be given to the insurer. *Scarlett v. National Live Stock Ins. Co.* 193 Ill. App. 488. So in *National Live Stock Ins. Co. v. Bartlow*, 60 Ind. App. 233, 110 N. E. 224, it was said: "The language of the policy, literally interpreted, would require notice in case of sickness, however trivial, and that such notice be given by instantaneous action. The language, however, should receive a reasonable interpretation. It should not be construed to require such notice in the case of mere temporary indisposition, plainly and apparently inconsequential in nature, and bearing no relation to the prospective health or continued existence of the animal. Nor should it be so interpreted as to require notice simultaneous with the manifestation of the physical disorder and regardless of attending circumstances."

In *Robson v. Pennsylvania Mut. Live Stock Ins. Co.* 57 Pa. Super. Ct. 491, the court said: "During the life of the policy nodules developed on the stallion's legs which were examined by a veterinarian, who reported that the horse was suffering from epizootic lymphangitis, a disease of dangerously infectious and virulent character. The policy provides, 'This company will not be liable if the insured in case of sickness or accident to the animal or animals hereby insured shall fail to render at once notice, to the secretary of the company, of such sickness or accident, or fail to immediately employ a duly registered and licensed veterinary for the same and promptly furnish his name and address to the company.' Was the condition

of the stallion such as to require the insured to report the facts to the company? The testimony in the case shows that, notwithstanding these lumps upon the stallion, he continued as active as ever and was used for breeding purposes up to within three days prior to his death. Several witnesses, one a veterinarian, testified that the horse was in good health. The veterinarian, who testified to the sickness of the animal, admitted that in the condition in which he found the horse, he might render services little less than normal for months and in some cases for years. The learned judge left it to the jury to determine whether or not the horse was sick. Was the diseased condition of the legs such as to render the horse sick? Under conflicting testimony the court could not very well do anything but leave this question to the jury. There is undoubtedly a distinction between a disease which might affect some portion of the body and a general condition which causes sickness. Sickness is usually employed as a synonym to ill health. Many of the minor physical ailments are due to a diseased condition of some portion of the body and the general health nevertheless may remain good. Illness is a disorder of health; a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition which does not tend to undermine or weaken the constitution of a person: 21 Cyc. 1728. Sickness does not include any slight ill in no way seriously affecting the applicant's health or interfering with his usual avocations: 36 Cyc. 436. A statement in the revival application that the insured has not during the period covered thereby 'been sick or afflicted with disease' was not necessarily to be inferred to be false from the fact that the insured had 'a cold': 9 Am. and Eng. Ency. of Law (2d ed.) 475n, and other cases there cited. Whether the disorder that the horse had was such as came within the terms of the policy and was in contemplation of the parties was for the jury."

In *National Live Stock Ins. Co. v. Elliott*, 60 Ind. App. 112, 108 N. E. 784, the court doubted whether foaling was such a sickness as to require the giving of notice, but held on the evidence that notice was given with reasonable promptness.

In *Colley v. National Live Stock Ins. Co.* 185 Mo. App. 616, 171 S. W. 663, it was said: "Defendant's second and third defenses we think are overcome by the testimony of the plaintiff with reference to any knowledge of the jack being sick prior to his death. It is admitted that plaintiff did not have a veterinary surgeon, nor did he wire to the defendant advising it of the sickness of the animal. The evidence shows that a

veterinary came to plaintiff's on January 21st to treat a mule, and that as he passed by the barn door he saw the jack Gregory and plaintiff testified he said something about Gregory being a big jack, to which the veterinary replied, 'That jack always did look like there was something wrong with him,'—'and I said it is not, this is a good jack and healthy too, and I went up to see him and slapped him and he galloped off.' The plaintiff says that he went with the man to feed the jack and saw that he was eating heartily. He further testified that the veterinary never did say that the jack was sick or that it ought to be treated. The veterinary made the remark above referred to as he was going to his buggy. Plaintiff also testified that he never knew the jack was sick or that anything was the matter with him until he was found dead in his stall on January 23d. If this was true, and the jury believed it, he could not have telegraphed or telephoned the insurance company advising them of the jack's sickness prior to his death; neither was there any obligation on plaintiff to call a veterinary until there was some substantial reason for believing the animal was sick."

Where a policy of animal insurance requires notice of sickness notice must be given of a sickness occurring between the date of the policy and the time when it takes effect, and failure to give the notice invalidates the policy though the animal does die from another cause. *Talbot v. Atlantic Horse Ins. Co.* 193 Ill. App. 587. In that case it was also held that acts of the insurer done in ignorance of the first sickness did not waive the failure to give notice thereof.

In *National Live Stock Ins. Co. v. Simmons* (Ind.) 111 N. E. 18, a notice was held to have been given with reasonable promptness, the court saying: "Upon the question of notice the evidence is that the mare became sick about 2 o'clock in the afternoon; that appellee lived four miles from the town of Princeton, and could not send a telegram on the day the horse died; that he tried to telephone to Princeton, but could not get through; that he finally reached a veterinary by telephone, who arrived at 4 o'clock, and he and appellee worked with the mare until she died about midnight, and it was not safe for either to leave her before that time. Appellee notified appellant the next day, and furnished proofs of loss, and appellant disclaimed liability. . . . The circumstances shown by the evidence are such that it was practically impossible for appellee to have given the required notice before the death of the animal, and it appears that his entire time during the brief sickness before its death was taken up in giving it necessary attention. In view of such circumstances,

we held that the notice was given within the reasonable time."

In *National Live Stock Ins. Co. v. Bartlow*, 60 Ind. App. 233, 110 N. E. 224, a delay in giving notice was held to be unreasonable, the court saying: "On the evening of September 11, 1912, appellee discovered that the horse was again sick. This sickness continued, resulting in the death of the animal on the forenoon of the 13th. A veterinary was called the morning of the 12th. The malady was kidney trouble. One-fourth mile from appellee's residence was a telephone, and also a post office box from which letters could be mailed. At Petersburg, four miles distant, was a telegraph office. In no manner prior to the death of the animal did appellee notify, or attempt to notify, appellant or its secretary of the sickness. No excuse is given for such failure. Appellant's agent who solicited the insurance, and who delivered the policy after appellant had issued it, lived and maintained an office at Petersburg. On the evening of the 13th, appellee went to Petersburg, for the purpose of informing appellant's agent that the horse had died. The agent being out of town, appellee returned to his home without seeing him. On the 15th, which was Sunday, he returned to Petersburg, saw the agent, informed him that one of the insured animals was dead, and requested him to notify the company. The agent informed appellee that it was his duty to give notice of loss, and presented him a sheet of paper and an envelope to be used for that purpose. September 16th, appellee, at Vincennes, mailed such notice to appellant. On receipt of the notice, appellant forwarded to its agent at Petersburg blanks to be used in making proof of loss, and under date of October 8th, proof was made out, signed by appellee, and forwarded to appellant. The proof of loss disclosed the facts substantially as herein set out respecting the sickness and death of the horse, and also that it had some sickness from kidney trouble in May, whereupon by letter appellant denied liability. As we have indicated, the policy contained express provision to the effect that the company would not be liable for loss occurring by the death of an insured animal if such animal became sick and the assured failed to render at once notice to the secretary of the company of such sickness. Dismissing from consideration a case of sickness from which there is a recovery, as the May sickness here, and directing our attention to sickness terminating fatally, as the September sickness here, the provisions of the policy are plain and unambiguous that notice of sickness is a condition precedent to the attaching of liability for a loss resulting from the death of the insured animal caused by such sickness.

Ann. Cas. 1917D—4.

It cannot be contended that appellant waived the required notice, or that it is estopped from availing itself of the want of notice, for the reason that, under the evidence, appellant, after receiving knowledge of the circumstances preceding and attending the death of the animal, promptly denied liability, and neither required nor received anything further from appellee." See also the reported case as to timeliness of the notice.

Proofs of Loss.

Proofs of loss required by a policy of animal insurance are waived by a disclaimer of liability and also by a failure to furnish blanks, it being stipulated in the policy that the proofs shall be made "upon and in compliance with forms issued by" the insurer. *Atlantic Horse Ins. Co. v. Nero*, 108 Miss. 321, 66 So. 780.

Where the insurer sends a veterinary surgeon to examine the animal after its death and then delays for more than sixty days before disclaiming liability, a failure to file proofs of loss within sixty days is waived. *Mills v. Pennsylvania Mut. Live Stock Ins. Co.* 57 Pa. Super. Ct. 483.

Conditions, Warranties or Representations.

In *National Live Stock Ins. Co. v. Owens* (Ind.) 113 N. E. 1024, statements in an application for animal insurance that the insured had lost no animals within the last two years and that the insured animal (a stallion) would be handled by the insured, were held to be warranties.

Where the insured gives true answers to all questions, and the agent of the insurer writes them down incorrectly, the insurer is estopped to assert a breach of warranty. *Scarlett v. National Live Stock Ins. Co.* 193 Ill. App. 488. See to the same effect *National Live Stock Ins. Co. v. Simmons* (Ind.) 111 N. E. 18; *Robson v. Pennsylvania Mut. Live Stock Ins. Co.* 57 Pa. Super. Ct. 491; *Bush v. Indiana, etc. Live Stock Ins. Co.* 74 W. Va. 244, 81 S. E. 984.

In *Kentucky Live Stock Ins. Co. v. McWilliams*, 173 Ky. 92, 190 S. W. 697, a statement as to the price paid for the animal was held not to be materially false, the court saying: "The uncontradicted proof here shows that appellee did not pay \$1.105 in cash for the horse to those from whom he bought it, as stated in both the application and proof of loss, but that, instead, he paid \$580 in cash, \$40 in accounts that he held against two of the owners of the horse, a \$50 note he gave in part satisfaction of the price for which he bought the interest of one of the joint owners, and 19 shares of the capital stock of the Central Life Insurance

Company, which was accepted at \$20 per share in the trade, making the purchase price \$1,050. Appellee testified that to this sum he added the \$55 that he paid as a premium on the policy, because he regarded the premium as a part of what the horse was costing him. As it is clear that the \$55 he was paying as a premium for the insurance policy was no part of the purchase price, and as the purchase price was not all paid in cash, but a part of same consisted of a note for \$50 and shares of stock, which, it is claimed, were worth much less than \$20 per share, the price at which it was accepted in the trade, it is claimed by appellant that the statements made by appellee, in both the application and proof of loss, that he paid \$1,105 for the horse, and that he paid same in cash, were false, fraudulent, and material and that, upon this proof, it was entitled to a peremptory instruction. While it is apparent that the statements are inaccurate and, in a sense, false, we are of the opinion that they were neither fraudulent nor material. Counsel for the appellant insist that a different rule is necessary and should apply to representations of the purchase price of live stock in an application for insurance than with reference to other kinds of property, as such companies must depend and do rely almost entirely, in fixing the value of such property, upon the price paid for it by the owner, and that, for that reason, misrepresentations or false statements with reference to the purchase price are always material, but we are unable to see any reason why the rule should be different with reference to such property than with reference to any other property. In *Providence Sav. L. Assur. Co. v. Whyne*, 131 Ky. 84, 93 S. W. 1049, 29 Ky. L. Rep. 160, this court said: "Whether it was material to the contract, as we have seen, depends on whether prudent men of ordinary judgment engaged in the same business would, if it had been disclosed to them, have either raised the price or rejected the risk." The material question in fixing the insurable value is, therefore, not what the owner paid for the property, but what it is worth. Appellee stated in his application that the horse was worth \$1,200, and this value is fully established and in no wise contradicted by the proof, in which state of case it is apparent that what appellee actually paid for the horse was not material." See also *Bush v. Indiana*, etc. *Live Stock Ins. Co.* 74 W. Va. 244, 81 S. E. 984, wherein it was held to be a question for the jury whether a statement of the amount "paid" for the animal was fraudulent, it appearing that the animal was obtained by the insured in exchange for another.

The fact that as the result of a post-mortem examination a veterinary surgeon testi-

fied that in his opinion the animal had heart trouble at the time the policy was issued does not as a matter of law show a breach of a warranty of soundness. *Shipman v. National Live Stock Ins. Co.* 187 Mo. App. 400, 173 S. W. 735, wherein the court said: "The only evidence offered by the defendant as to the cause of the jack's death and that the diseased condition existed when the policy was issued to the extent of rendering the animal unsound was the evidence of the veterinary. This was in the nature of expert evidence and the question is whether it is conclusive and precluded a contrary finding. The jurymen were living in a rural community and familiar with domestic animals, their habits, diseases, etc. This animal is conceded to have been perfectly healthy so far as could be seen or discovered by one handling him. It was a serious question whether his sudden death, without known cause, was not caused by lightning, but nothing to justify that theory was discovered. This was the purpose of holding the post-mortem. What was the cause of his death, as well as whether such cause or any diseased condition existed two weeks earlier, was a question for the jury."

In *Mills v. Pennsylvania Mut. Live Stock Ins. Co.* 57 Pa. Super. Ct. 483, the evidence was held to make a question for the jury as to the soundness of the animal at the time the policy took effect.

CROWELL

v.

MARYLAND MOTOR CAR INSURANCE COMPANY.

North Carolina Supreme Court—April 28, 1915.

169 N. Car. 35; 85 S. E. 37.

Insurance — Construction of Policy — Rules of Construction.

An insurance policy should be interpreted by the rules which are applicable to other written contracts to ascertain and give effect to the intention of the parties.

[See 14 R. C. L. tit. *Insurance*, p. 925 et seq.]

Same.

An insurance policy should be so construed as to effectuate the purpose of indemnification against loss, rather than to defeat it.

Same.

An insurance policy should be fairly and reasonably construed, unless it is so clear

and unambiguous as not to require a construction, when its words are taken in their plain and ordinary sense.

Conditions in Policy — Use of Insured Property.

An insurance company may insert in its policy reasonable conditions as to the use of the property insured.

Automobile Insurance — Condition against Carrying Passengers for Hire.

A clause in a policy of insurance on a motor car, providing that the car should not be "rented or used for passenger service of any kind for hire," does not authorize a forfeiture, where the car was used by the owner's chauffeur without his knowledge upon a single occasion to carry persons for hire; the car being destroyed while in the exclusive possession of the owner and after the forbidden use had ceased.

[See note at end of this case.]

Same.

A clause in a policy of insurance of a motor car, providing that the car should not be "rented or used for passenger service of any kind for hire," implies more than a single act of renting or using, and refers to the business of carrying passengers for hire.

[See note at end of this case.]

Appeal from Superior Court, Mecklenburg county: SHAW, Judge.

Action by W. J. Crowell, plaintiff, against Maryland Motor Car Insurance Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[35] The defendant insured the plaintiff's motor car and accessories for \$1,000, under a policy which, by its eighth clause, provided as follows: "The motor car hereby insured will not be rented or used for passenger service of any kind for hire, except by special consent of this company [36] indorsed hereon in writing." The tenth and eleventh clauses declare that the policy shall be void if there be false representation or concealment in certain particulars set forth, or any fraud or false swearing about any matter relating to the insurance, and shall also be void if the interest of assured in the car be other than the sole and unconditional ownership, or if it be or become encumbered by chattel mortgage, or if there is any change in the owner's interest or title, other than that caused by his death, whether by legal process or judgment or by his voluntary act, or otherwise. The nineteenth clause provides that "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the loss or damage." In November, 1913, plaintiff was the owner or

proprietor of a garage in the city of Charlotte, N. C., and sometimes hired automobiles, and held a license for the purpose. He also kept the car in question in the garage for his own use, and not for renting or to be used in passenger service of any kind for hire, though it had been used just once, before it was burned, to take a man to the railroad station. The car was taken from the garage by Ben Stitt, one of plaintiff's employees, and he carried a party of bird hunters in it to Lincoln County on Thanksgiving day, 1913. It was punctured several times on the return, and finally left at a place on the Dowd road, 6 miles from Charlotte, and Ben Stitt telephoned to another garage for another car to take the party of men to the city. The car came and the men were carried to the city, and Stitt paid the money he had received from them for this service.

The defendant offered in evidence the proof of loss, signed by plaintiff, in which he stated that the car had been used for his private purposes "and some for hire."

The court charged the jury that if they found that the car was used only twice, in carrying a man to the station at a former time and, on the occasion when it was burned, to carry the hunters to Lincoln County, under the circumstances as testified by the plaintiff, and only twice during a period of a year and a half, it would not be such a renting or using of the car "for passenger service for hire" as is forbidden by section 8 of the policy, and they would answer the issue in respect thereto "No;" but if, on the contrary, they found it was kept for hire and used for hire, for passenger service, they would answer the issue "Yes," as that was a violation of section 8 of the policy of insurance. The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Cameron Morrison and J. H. McLain for appellant.

Thad. A. Adams and Cansler & Cansler for appellee.

[37] WALKER, J. (*after stating the facts*).—We find no material error in the trial of this case, and have concluded, after patient consideration of the facts, that substantial justice has been done, and in accordance with well settled principles of the law. A policy of insurance, it may be said generally, should be interpreted by the rules which are applicable to other written contracts for the purpose of ascertaining and giving effect to the real intention of the parties. We have said that it should be construed strictly against the insurer and favorably to the insured, when there is doubt or ambiguity in its terms, as it is supposed to be prepared by the former. But,

however this may be, the object of the contract being to afford indemnity against loss, it should be so considered as to effectuate this purpose, rather than in a way which will defeat it. It should have, from every point of view, a fair and reasonable construction, unless it be so clearly and unambiguously expressed as not to require construction, when its words will be taken in the plain and ordinary sense. *Bray v. Virginia F. etc. Ins. Co.* 139 N. C. 390, 51 S. E. 922; *East Carolina R. Co. v. Maryland Casualty Co.* 145 N. C. 116, 58 S. E. 906; 19 Cyc. 655; *Watertown F. Ins. Co. v. Simons*, 96 Pa. St. 620; *Rogers v. Aetna Ins. Co.* 35 C. C. A. 396, 95 Fed. 103; *Liverpool, etc. Ins. Co. v. Kearney*, 180 U. S. 132, 21 S. Ct. 326, 45 U. S. (L. ed.) 460; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; *Springfield F. etc. Ins. Co. v. Wade*, 95 Tex. 598, 68 S. W. 977, 93 Am. St. Rep. 870, 58 L.R.A. 714; *Vance on Insurance*, p. 429.

The clause in this policy, upon the alleged violation of which the defendant relies to defeat a recovery, provides that the motor car thereby insured "will not be rented or used for passenger service of any kind for hire, except by special consent of the company indorsed on the policy." It is apparent, we think, that the parties, by this clause, contemplated, not a single act of renting or using the car for hire, a mere casual or isolated instance, and that, too, without the knowledge or consent of the owner, but something of a more permanent nature. 19 Cyc. 736. This car was not "rented" in the sense of that word as employed in the policy, but it was used by the plaintiff's servant to carry the hunters to the country, but this can hardly be considered as being engaged in the "passenger service." In *Mears v. Humboldt Ins. Co.* 92 Pa. St. 15, 37 Am. Rep. 647, it was held: "We are not disposed to give the word 'use' in this policy the narrow construction claimed for it. It must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. Nearly every policy of insurance issued at the present time contains this condition, or a similar one. What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency." The case of *Springfield F. etc. Ins. Co. v. Wade*, supra, furnishes another illustration of this rule. This machine was not kept for the purpose of being rented or used in the passenger service. It was the merest accident that it was used on this occasion, "the other car which had been used for hire not [38] being in the garage that morning." This is what the witness Ben Stitt said about it, and, besides, when the car was burned the journey had been completed and all the parties had returned to

the city by another car, the night before the burning, which was one of those unaccountable accidents, not attributable to any use of the car for carrying the parties to their hunting ground, so far as appears. The hire had been given up and the owner had resumed the possession of his private car, and placed it in the care of his servant to be brought back to the garage. We do not see, from the language of the policy, how such a case could have been intended by the parties as a ground of forfeiture. There was no increase of the risk, which would be incurred by its ordinary and perfectly legitimate use as a private automobile, it being all the time in the possession of the plaintiff's chauffeur, and, at the time of the fire, in his exclusive possession and control. It seems to us that it would be too narrow and rigid a construction of the clause if we should hold that this single act of the chauffeur falls within its prohibition, and consequently involves a forfeiture of the insurance. The carrying of the man, some time before, to the station was, if forbidden, too remote from the time when the car was burned, and is covered by the principle announced in *Cottingham v. Maryland Motor Car Ins. Co.* 168 N. C. 259, Ann. Cas. 1917B 1237, 84 S. E. 274, L.R.A.1915D 344.

At the time the car was burned the alleged forbidden use of it had entirely ceased, and its owner, without whose knowledge or consent it was taken out of the garage, had resumed possession and control of it, the tire had been repaired, and he was then engaged in returning it to the garage. The increase of risk by the wrongful use, if there was such, had entirely ceased and determined. It would seem, therefore, that upon this undisputed state of facts the case is brought fairly within the influence of the principle of *Cottingham's* case. Insurance companies have the right to insert in their policies reasonable conditions as to the use of the insured property, and the court will not, by subtle and ingenious argument, construe away the provisions for their security or deprive them of their full benefit, as safeguards against fraud or negligence, or other unlawful act, nor, on the other hand, will they construe the policy so strictly in favor of the insurer as to make them more than they were designed to be—a protection against such hazards, and consequently a precarious indemnity to the insured. *Gardner v. North State Mut. L. Ins. Co.* 163 N. C. 367, Ann. Cas. 1915B 652, 79 S. E. 806, 48 L.R.A.(N.S.) 714. They are entitled, both insurer and insured, to a fair, just, and common-sense interpretation of the policy, so that the one may be restrained from doing things calculated unnecessarily to increase the risk, and which are forbidden by the policy, and the other may be held to the full obligation assumed by the

contract to furnish a certain and reliable indemnity against loss, the parties being reciprocally held to the same measure of duty and fidelity in respect to the obligations imposed by the insurance contract.

[39] The eighth clause is somewhat obscurely worded, and we must give it that construction which favors the plaintiff, as it involves a question of forfeiture. The words "passenger service," when considered in connection with the preceding words, "rented" or "used," imply more than a single act of renting or using, and refer to the business of carrying passengers for hire. It is susceptible of this meaning, which, under the familiar rule applicable to such cases where the language is not clear and definite, we are authorized to give them.

Being of the opinion that the case is not covered by the eighth clause of the policy, it is not necessary to discuss the other questions argued before us.

No error.

NOTE.

Automobile Insurance.

Scope of Note, 53.

In General, 53.

Fire, 54.

Theft, 55.

Casualty, 57.

Scope of Note.

The earlier cases relating to the subject of automobile insurance are reviewed in the note to *Wettengel v. U. S. Lloyds*, Ann. Cas. 1915A 626. This note presents the recent cases on that subject.

In General.

A misstatement in an application for automobile insurance as to the year of issue of the insured car has been held not to be material, it appearing that no distinction was made either as to insurability or as to the rate. *Locke v. Royal Ins. Co.* 220 Mass. 202, 107 N. E. 911, wherein the court said: "Without reciting this evidence in detail, the testimony of the plaintiff's witnesses, and the rate sheets issued by the insurance companies, indicated that there would have been no increase of premium if the cars in question had been made in the earlier years, as claimed by the defendants. The list price of each of the cars in question was more than \$3,500. The premiums for insurance on the higher priced cars seem to depend on the original list price, and the amount of insurance; and the year model would not make any

difference so far as the 'Insurance Rates' table shows. The 'Instructions and Limits' restricting the amount of insurance to be written apparently do not limit the amount for which such higher priced cars may be insured, except that the amount must not be more than the actual value, and probably not more than the cost of the automobile to the assured. In other words there was evidence for the jury that no greater premium would be charged for a Fiat 1907 than for a Fiat 1908 car, and that hence the misstatement, if made, did not increase the risk of loss and was immaterial. The Hotchkiss cars were insured as 'Dealers' Automobiles,' and admittedly the rate was properly determined by adding one per cent to the basis rate for new cars, and did not depend upon their age. Further, although the agents testified that they would not have issued the policies at all if they thought that the cars were 1906 or 1907 model, the jury could find, in view of the rate sheets and other testimony, that only in the case of the cheaper cars of model before 1909 did the company reserve the right to accept the risk 'only after the receipt of application with full particulars.' They may have been content in the case of the higher priced cars with the protection afforded by the provision that the 'amounts to be insured must not be more than actual value.' But a different conclusion was reached in *Smith v. American Automobile Ins. Co.* 188 Mo. App. 297, 175 S. W. 113, it appearing that no insurance of cars of the age of that of the insured was permitted by the rules of the insurer. So in *Reed v. St. Paul F. etc. Ins. Co.* 165 App. Div. 680, 151 N. Y. S. 274, it was said: "The statement made to the agents of the defendant, and embodied in the policy, was that the automobile was a No. 877 Premier, 40 horse power, four-cylinder touring car, built in 1910. In fact it was a twenty-four horse power car, capable of developing twenty-nine horse power, and built in 1906. The misrepresentation that the car was a 1910 model, while it was in fact a 1906 model, was clearly a misrepresentation of a material fact. It is impossible for insurance agents to ascertain the condition of the car from its outside appearance. The condition largely depends upon the wearing of the gears, which are concealed within metalbound cases. It also largely depends upon the year of the manufacture, as it is a matter of common knowledge that in the manufacture of automobiles changes are made from year to year to remedy defects that are found to exist, and to add to the conveniences and safety in the use of the car, as are shown to be important through experience. It is matter of common knowledge that in 1912 a 1910 Premier was of a value greatly in excess of that of a 1906 Premier

of the same model. So that there was a clear misrepresentation of a material fact which as matter of law vitiates the defendant's contract."

In *Farber v. American Automobile Ins. Co.* 191 Mo. App. 307, 177 S. W. 675, it was held to be a question for the jury whether the cost of the car was misrepresented by the insured.

A state statute providing for cancellation on the request of the insured may be waived by the parties to a policy of automobile insurance written in that jurisdiction but covering property located elsewhere. *Hartford Automobile Ins. Co. v. Guaranty Securities Corp.* 240 Fed. 222.

Though a notice of cancellation by mail is provided for by the policy, if the envelope enclosing the notice bears an indorsement requiring its return to the sender if not called for in five days and it is actually so returned, the notice is nugatory. *American Automobile Ins. Co. v. Watts*, 12 Ala. App. 518, 67 So. 758. In that case, after setting out the postal regulations as to the return of unclaimed mail, the court said: "It is plain that, under these regulations, the defendant's indorsement on the envelope of the request that the letter be returned if not delivered in five days had the effect of depriving the plaintiff of the opportunity of receiving it, or of even ascertaining who was the sender of it, if for any reason it should happen that his mail was not called for within five days after the letter reached the postoffice at Selma, and had the further effect of depriving the postmaster of the right, which, but for such indorsement, he would have had, of retaining the letter for delivery for not longer than three months if he believed that it could be properly delivered to the addressee, who lived in Selma and had a post office box there. But for that request for a return of the letter 85 days sooner than it could have been returned, pursuant to a request, on a failure to deliver, the letter could have been held at Selma until after the plaintiff actually returned and got his mail, about six weeks before the automobile was burned. The existence of different methods of mailing a letter, each equally permissible, and of differences in the opportunities afforded to the addressee of actually receiving it, according as one or another method is adopted injects an element of ambiguity into a stipulation which in general terms calls for a deposit of the letter in the mail, postage prepaid, to a stated address, without specifying the particular mode of mailing to be adopted. If it is held that such a stipulation is complied with by adopting a method of mailing, the result of which, in the not improbable event of the addressee's being absent for a few days from the place to which the letter is addressed, will be that he will

not get it at all, the construction is one under which the sender may make the addressee's opportunity of getting the letter materially less than it would be if it was so mailed as to permit it to be forwarded to the addressee or to be held for a considerable time for delivery to him at the place to which it was addressed. To hold that under such a stipulation the sender has the option of selecting the method of mailing to be adopted would be construing it liberally in his favor, and not strictly in favor of the other party to the contract."

In *Browne v. Commercial Union Assur. Co.* 30 Cal. App. 547, 158 Pac. 765, the insured was held to have acquiesced in the attachment to his policy of a rider which did not include a risk which he desired to have covered.

Fire.

In *Orient Ins. Co. v. Van Zandt-Bruce Drug Co. (Okla.)* 151 Pac. 323, a provision that a car insured against fire should not be used to carry passengers for hire was held to be a promissory warranty the breach of which invalidated the policy without regard to whether the risk was thereby increased. Compare the reported case.

A stipulation that the car, when not in use, shall be kept in the garage of the owner is material. *Lummus v. Firemen's Fund Ins. Co.* 167 N. C. 654, 83 S. E. 688, L.R.A.1915D 239. In *Commercial Union Assur. Co. v. Hill (Tex.)* 167 S. W. 1095, a similar clause was held to have been waived.

A clause invalidating automobile fire insurance in case an incumbrance is placed on the car is valid. *Springfield F. etc. Ins. Co. v. Chandlee*, 41 App. Cas. (D. C.) 209. But a satisfaction of the mortgage revives the policy. *Cottingham v. Maryland Motor Car Ins. Co.* 168 N. C. 259, Ann. Cas. 1917B 1237, 84 S. E. 274, L.R.A.1915D 344.

Knowledge of a change in the ownership of a car by the agent of a company which has insured it against fire estops the company to avoid liability on that ground. *Commercial Union Assur. Co. v. Lyon*, 17 Ga. App. 441, 87 S. E. 761; *Hamilton v. Fireman's Fund Ins. Co. (Tex.)* 177 S. W. 173.

In *Thornton-Smith v. Motor Union Ins. Co.* 30 Times L. Rep. (Eng.) 139, the following facts appeared: "The plaintiff insured a motor car with an insurance company, but the company refused to renew the insurance, and he mentioned this fact to an agent of the defendants, another insurance company. The defendants' agents offered to propose him to the defendants, and the plaintiff, on receiving a proposal form, with the question whether any company had refused to renew his insurance, spoke about it to the defendants' agent, who replied that he would make

it all right. The plaintiff did not fill in any answer to the question. The company accepted the proposal, and afterwards agreed that it should cover a new Vauxhall car. Subsequently the plaintiff insured a Siddeley car with the defendants, and they had notice that the plaintiff had had a previous insurance, but the spaces for answers to the questions on the proposal form were left blank. Accidents occurred to both cars, and the defendants refused to pay on the ground that the plaintiff had originally represented that no insurance company had refused to renew. The plaintiff brought an action against the defendants for a declaration that the policies on the Vauxhall and Siddeley cars were valid. There was no evidence of any collusion between the plaintiff and the defendants' agent." It was held that, as the plaintiff had made full disclosure to the defendants' agent, and as there was no evidence of collusion, the plaintiff was entitled to the declaration.

In *Hart v. Springfield F. etc. Ins. Co.* 136 La. 114, 66 So. 558, an admission of liability by the insurer was held not to waive a provision for an appraisal. In *Jones v. Orient Ins. Co.* 184 Mo. App. 402, 171 S. W. 28, the evidence was held to show such bad faith on the part of an appraiser as to warrant the insured in withdrawing from the appraisal.

In *Strawbridge v. Standard F. Ins. Co.* 193 Mo. App. 687, 187 S. W. 79, the valuation of an automobile for the purpose of fixing the amount of a fire loss was discussed, the court saying: "Of course, at the time of the fire, the automobile could not have been sold for as much on the market as a new car of the same make and model, for, compared with the latter, the automobile in question would then be what is commonly called a 'second-hand' car. But, as between parties hereto, the value of the car, in respect of insurance, means its actual value as an instrumentality for continued use. If, through no depreciation inherent in the car itself by reason of the lapse of time, use, injury or damage, the car, as an instrumentality for continued use by the plaintiff, is worth as much or more than the amount claimed, the defendant cannot complain. He cannot add to that actual inherent depreciation the decrease in the price it would bring simply because it is not a new, but is now a used or second-hand car. One might buy a set of furniture, and, after using it in the house for one day without a particle of injury or damage thereto in any way, would be unable to sell it for anything like the price it would command if it had never left the store, and yet the furniture, as subject to insurance between the owner and the insurance company, would be as valuable as ever. Because the insurance company insures

it as used property intended for further use by the insured."

Theft.

To warrant a recovery on a policy insuring an automobile against theft there must be more than a wrongful taking; the taking must be with the intent to steal. *Michigan Commercial Ins. Co. v. Wills*, 57 Ind. 256, 106 N. E. 725; *Valley Mercantile Co. v. St. Paul F. etc. Ins. Co.* 49 Mont. 430, Ann. Cas. 1916A 1126, 143 Pac. 559, L.R.A.1915B 327. In *Stuht v. Maryland Motor Car Ins. Co.* 90 Wash. 576, 156 Pac. 557, the act of a person authorized to take a car to a particular place in going out of his way was held not to be a theft. So in *Rush v. Boston Ins. Co.* 88 Misc. 48, 150 N. Y. S. 457, wherein it appeared that a person who believed that he had a right to use the car obtained possession of it by a trick, the court said: "The plaintiff has recovered a judgment in an action brought upon a policy of insurance in the sum of \$1,000 against the loss of an automobile by theft, robbery, or pilferage. The evidence sufficiently shows that he owned the automobile; that he sailed for Europe on October 19, 1912; that at that time the automobile was in the garage of his country place in Connecticut; that on October twenty-seventh one Pope went to plaintiff's country place and told plaintiff's caretaker that he was a partner of plaintiff and was taking the car down to have it painted and would return it in ten days. The caretaker thereupon turned the car over to Pope, who gave a receipt for it in the name of the Knickerbocker Motor Sales Company, per C. M. Pope, president. Pope was at that time president of the Knickerbocker Motor Sales Company, and he took the car to the office of the sales company and kept it there for several weeks. It further appears that this car, with two others, had originally been bought and paid for by the plaintiff and delivered by him to the sales company, who sold two of the cars and used the third car, now the subject-matter of the action, as a demonstrating car. This car was, however, for some months previous to October, always left in plaintiff's garage and used by him as a 'family' car except upon the occasions when it was used by the sales company for demonstrating purposes. These facts have either been necessarily resolved in plaintiff's favor or are undisputed. There is, of course, no question that the plaintiff must, in order to recover on the policy, show that the car was stolen. The alleged theft took place in Connecticut, and the elements of what constitutes a larceny must be determined by the principles of the common law and, of course, include a felonious intent. The plaintiff has obviously no cause of action

against the insurance company, even though he has been wrongfully deprived of his property, unless he has been so deprived of his property feloniously. The criminal intent, however, must usually be gathered from the surrounding circumstances, and proof of the taking by trick and device would, as charged by the trial judge, be sufficient to allow an inference of felonious intent. Nevertheless, this inference would be completely rebutted if the defendant shows that Pope acted under an honest belief that he was entitled to the possession of the automobile and merely used a trick to obtain what he thought was his property."

In *Delaffield v. London, etc. F. Ins. Co.* 164 N. Y. S. 221, wherein it appeared that a person with the intent to steal an automobile obtained it from the owner for the avowed purpose of selling it on commission, it was said: "This complaint does not state facts sufficient to constitute a cause of action. It alleges in effect that the possession of plaintiff's automobile was obtained from him feloniously; i. e., in this case, pursuant to a conspiracy and through the device of a written agreement to sell it for the plaintiff. It further alleges that the conspirators, after thus obtaining possession of the car, converted it to their own use. This is an allegation of common-law larceny by trick and device, in which plaintiff parted with possession as a result of the deception, but not with his title. While this policy insures against 'theft,' it seems clear that it was not the intention of the parties to the contract of insurance to insure against larceny by trick and device; that is, theft, the commission of which involves, as an essential element, the deception of the insured, resulting in a surrender of the possession of his property. The term 'theft,' as used in this policy, does not include all forms of larceny recognized by law. It does not include a larceny perpetrated, as this was, under the form and guise of a business transaction conducted by the insured himself."

In *Siegel v. Union Assur. Soc.* 90 Misc. 550, 153 N. Y. S. 662, a certain transaction was held to be a purchase of an automobile on credit and not a theft thereof. It appeared that the owner of the insured car delivered it at a garage for sale, under an agreement whereby the garage proprietor was "to sell said car and pay [the insured] \$700 in full payment for the same." It was also provided in the contract that the insured might terminate the contract at any time before the car was sold. The owner thereafter telephoned instructions not to sell the car until further notice. Thereafter the garage proprietor sold the car and appropriated the proceeds to his own use.

In *Federal Ins. Co. v. Hiter*, 164 Ky. 743, 176 S. W. 210, L.R.A.1916E 575, a taking and

subsequent abandonment of an automobile were held to be a theft, the court saying: "But it is argued by appellant that there was no actual conversion by Yost of appellee's property so that he was deprived of the ownership thereof; that because he did not actually sell the machine there was no conversion. But manifestly this argument is unsound; the machine was loaned to Yost for a specific purpose, and to go to a certain place; he went not only beyond that place, but he never did in fact return the machine, but abandoned it in a remote section of a distant state in a badly damaged condition, and did not even notify appellee where it might be found, and it was not in fact recovered for some six or seven weeks after it should have been returned. This was just as effectual a conversion as if he had actually sold the machine and appropriated the proceeds."

In *Chepakoff v. National Ben Franklin F. Ins. Co.* 97 Misc. 330, 161 N. Y. S. 283, the evidence was held to show the theft of an insured automobile, the court saying: "Plaintiff proved that he, accompanied by two friends, drove the automobile aboard a ferryboat crossing the Hudson river from Englewood, N. J., to Dyckman street, N. Y. He placed the machine close up to the front of the boat, and put on the emergency brake, and stopped the engine. He and his friends then went into the cabin before the boat started. There was no other vehicle on the boat on that trip. Some minutes later, and when the boat was out on the river, they all came out and found the machine gone, the chain at the rear of the boat lying loose on the deck, and the gate at the rear halfway open. Much of this testimony was disputed by the defendant, but there is no question here of the weight of the evidence, since a verdict was directed. It seems to me that the facts testified to by plaintiff and his two witnesses were, under all the circumstances, prima facie proof of theft." In *Kansas City Regal Auto Co. v. Old Colony Ins. Co.* 187 Mo. App. 514, the uncontradicted evidence of the insured's agent that he left the car standing on the street for a few minutes and found it gone at the end of that time was held not to warrant the direction of a verdict for the insured, it appearing that the agent was drinking heavily at the time.

In *Callahan v. London, etc. F. Ins. Co.* 98 Misc. 589, 163 N. Y. S. 322, it was held that the facts did not bring the case within an exception relating to theft by an employee of the insured. The court said: "The complaint alleges and the proof establishes that plaintiff's auto was stored in a garage belonging to the M. J. Callahan Company, a corporation of which plaintiff was president and treasurer; that on the night of October 16,

1916, without plaintiff's permission, authority, or knowledge, said auto was removed from said garage; that it was subsequently found in a condition of utter destruction as the result of a collision with a pillar of the new subway construction, in which collision three persons were killed and two were injured, one of the injured being an employee of the M. J. Callahan Company, named Kinney, who resided in the garage where plaintiff's auto was kept, a building owned by the M. J. Callahan Company, said Kinney being caretaker of the building. . . . As to the defense that Kinney was in the service of plaintiff, there is no proof whatever to sustain such an allegation. The building in which the auto was stored was under the control of the M. J. Callahan Company, and plaintiff's auto was in its care, and not in the care of Kinney."

The amount of the recovery which may be had where a car is damaged while in the hands of a thief was discussed in *Callahan v. London, etc. F. Ins. Co.* 98 Misc. 589, 163 N. Y. S. 322, the court saying: "It is also contended, and this is the main issue presented on this appeal, that the policy only insured the plaintiff against damages directly resulting from theft, robbery, or pilferage, and that the occurrence of the accident by collision was not the direct result of a theft, and cannot be deemed to have been in contemplation of the parties entering into the contract. I am of the opinion that the proper construction of the policy is that it covers all damage resulting, or which, in the contemplation of the parties, might result, from theft, which would include damages caused by reckless driving or handling of the car and storage of the same, or any use which destroyed its value in whole or in part. If, following the theft, the car should be recovered intact, in the same condition it was before the theft, plaintiff's only damage would be expenses incurred in recovering the car, and, perhaps, in addition, the value of its use during the period between the theft and the recovery of the car. If the car were damaged or destroyed while in the custody of the thief, plaintiff's damage would include also the diminution or loss of value of the car thus stolen. In the present instance the car, while in the possession of the thief, whether Kinney or the chauffeur, who was engaged with him in operating the car at the time of the collision, was totally destroyed. I think the trial judge properly held that defendant was liable for the value of the car under the policy."

So in *Federal Ins. Co. v. Hiter*, 164 Ky. 743, 176 S. W. 210, L.R.A.1915E 575, it was said: "It is argued by appellant that inasmuch as under the express language of the policy, 'this company shall be liable only

for the actual cost of repairing or, if necessary, replacing the parts damaged or destroyed,' there was no liability for the diminution in value of the machine. But to so hold would give no effect, whatsoever, to the express language insuring 'against loss or damage if amounting to \$25.00 or more on any single occasion.' It is apparent that the language limiting the liability to the actual cost of repairing or replacing the damaged parts, in the light of the other language used, should not be interpreted as claimed by appellant. The car when it was loaned to Yost was a new car, and it had never been run more than one or two hundred miles, and was of the value of \$1,800; when appellee recovered it, even after the expense of recovering it and the expense of repairing it, it was a second-hand car and only worth \$750. The language used in the policy insuring against loss or damage, if amounting to \$25.00 or more on any single occasion by the theft, robbery, or pilferage, is very broad and comprehensive and it cannot be maintained with any degree of reason that the diminution in value was not a part of the loss or damage insured against under the plain terms of the policy."

In *Chisholm v. Royal Ins. Co.* 225 Mass. 428, 114 N. E. 715, a promise by an adjuster to make the car as good as new was held to be beyond his authority.

Casualty.

An exception in a policy of automobile insurance of loss caused by striking "any portion of the road bed or any impediment consequent upon the condition thereof" excludes liability for an injury to the car caused by striking a curb stone. *Gibson v. Georgia L. Ins. Co.* 17 Ga. App. 43, 86 S. E. 335.

In *Stuht v. U. S. Fidelity, etc. Co.* 89 Wash. 93, 154 Pac. 137, the injuries were held to fall within an exception of injuries caused by an upset which was not the result of a collision. The court said: "It seems too plain for discussion that this car was being driven down the hill at a rapid rate of speed, when the driver attempted to make the short turn to the right onto Fourteenth street, and on the brink of the hill the car upset and went over the hill. It was plainly a case where the car upset before it struck anything outside of the road. If the evidence of this witness is not clear upon this point, the evidence of the defendant's witnesses shows very clearly and beyond dispute that the sluice box in question was lying on the side of the hill, and not in the roadway. The marks upon the sluice box to which the plaintiff's witness referred were some distance down the hill, and showed where the car first struck the sluice box after the upset. The plaintiff's witness himself says this sluice box saved his

life. We have no doubt, from the plaintiff's own evidence, that this was a clear case of the car upsetting upon the brink of a precipice without any other cause. It was the duty of the trial court, therefore, to have directed a verdict upon the first motion made by the defendant, because the policy provides that if the damage is caused by an upset of the injured automobile, unless such upset is the direct result of a collision such as is covered thereby, such damage is not insured against. There was no collision with any object shown. The only claim of the respondent is that there was a sudden jar. It is argued from this that the jar was caused by a collision. But aside from the mere fact of a jar, there is nothing to show that there was anything in the roadway, either movable or stationary, that the automobile could have collided with. It simply went over the bank. The jar that the witness spoke of was no doubt caused by the automobile letting loose from the roadway and starting to turn over as it went down the precipice. It is plain, we think, that the court should have directed a verdict in favor of the defendant."

In *Wetherill v. Williamsburgh City F. Ins. Co.*, 60 Pa. Super. Ct. 37, it appeared that the policy contained the following provision: "In consideration of \$20.00, Additional Premium, this policy is hereby extended to cover damages to the automobile and equipment herein insured caused by collision with any other vehicle or with any animal or object, or any obstacle placed as a barrier; or in entering or leaving any building adjacent to any roadway. But nothing in this clause shall be held as making this company liable for damages caused by striking any portion of the gutter, roadbed or ditch, or by striking street or steam railroad rails or ties, or by upset unless the upset be caused by such a collision as is insured against hereunder; or for loss or damage by detention or loss of use." Holding that the insurer was liable for injuries caused by the car being backed into an open elevator shaft in a garage, the court said: "The defense is made that the damage was not covered by the terms of the policy or its reasonable intentment, as the accident was not the result of a collision, and that it occurred inside of a building. In considering this rider, effect must be given to the words in their ordinary and accepted meaning, when used independently, also their intended meaning when used in connection with a writing, even if such intended meaning may do violence to the literal definition of the word as used independently. In the policy we have the word 'object,' which has been defined as 'anything, whether concrete or imaginary, that may be perceived and apprehended by the mind, that of which the understanding has knowledge.' Vehicle, animal, obstacle, and the earth are physical objects. Collision has been defined

as a violent contact, a striking together. In the second paragraph of this rider it speaks of the company not being liable for damage caused by striking any portion of the gutter, etc. The policy nowhere refers to the company being liable for 'striking' anything, unless 'collision' and 'striking' were used synonymously. This is the sense in which they were intended to be used. 'Striking' is the defendant's own definition of the word 'collision.' There is no ambiguity in the contract, nor is there a 'forced, strained, unusual or unnatural' construction of the word 'collision,' as aided by the policy, in holding that it covered all damages caused by striking an object. It surely cannot be urged that when a body is hurled through the air and it hits the earth that 'striking' is not the accepted word to designate this contact. . . . As to the second phase of this case, what meaning can be attributed to the phrase 'on entering or leaving any building?' Is it an attempt to limit the general meaning as here used of the words 'collision with an object,' and confine it to collision with an object upon entering or leaving a building? The 'rider' reads: 'Collision with any . . . object . . . or in entering or leaving any building. . . .' The first phrase, standing alone, would mean an object anywhere, unlimited as to place; and this was understood by the insurer when it says: 'nothing in this clause shall be held as making this company liable for damages caused by striking (collision with) any portion of the gutter, roadbed or ditch, etc.' Is it not a fair inference, based upon their own interpretation and coming after the words 'entering or leaving any building,' that it was intended to include all accidents the result of collision, except those especially excepted; and is it not another fair inference, when gutters, roadbeds, and ditches were excepted, that it contemplated a liability for damages caused by striking any other part of the earth? To hold that the phrase under discussion would mean collision upon entering or leaving a building and not while inside a building, as asked by the appellant, would nullify the intentment of this policy. The disjunctive 'or' prohibits such thought. Under this policy the insurer is liable for striking an object without regard to the place where it might occur and it is liable for any damage to the automobile on entering or leaving the building from accidents not caused by collision. This, we feel, is a fair interpretation of this rider and the policy."

An insurance company which has paid the amount of the damage inflicted on an automobile is subrogated to the rights of the insured against the person causing the damage. *Allen, etc., Auto Co. v. United Traction Co.* 91 Misc. 531, 154 N. Y. 934.

COLLINS' EXECUTORS

v.

STANDARD ACCIDENT INSURANCE
COMPANY.

Kentucky Court of Appeals—May 5, 1916.

170 Ky. 27; 185 S. W. 112.

Insurance — Against Liability of Automobile Owner — Duty of Insured to Assert Defenses.

That the owner of an automobile allowed a guest to give some directions to the chauffeur as to the place they should be carried did not make the chauffeur the agent of the guest instead of the owner, and the chauffeur's negligence was not imputable to the guest, so, in an action by the owner on an accident policy, the guest having been injured and recovered against her, it is no defense that the owner, though obliged to defend action, refused the requests of the insurer to make the defense of imputed negligence.

[See note at end of this case.]

Same.

Where an accident policy, conditioned to save a motorist harmless from actions from injuries caused by her car, required the motorist to, in good faith, co-operate with the insurer in defending actions, a finding by the jury that the motorist failed to comply with such conditions, by failing to set up contributory negligence of a guest of the motorist, suing for injuries received in an action against the motorist, is held to be warranted by the evidence.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, First Division.

Action by Ruth S. Collins, plaintiff, against Standard Accident Insurance Company, defendant. Judgment for defendant. Plaintiff's executors appeal. The facts are stated in the opinion. **AFFIRMED.**

Bennett H. Young for appellants.
O'Neal & O'Neal for appellee.

[28] **SETTLE, J.**—This is an appeal from a judgment of the Jefferson circuit court, common pleas branch, first division, entered upon a verdict returned for appellee in an action brought against it by Mrs. Ruth S. Collins upon an accident insurance or indemnity policy she obtained of the latter May 2, 1911, whereby, in consideration of the required premium she then paid, it agreed, subject to certain conditions set forth in the policy, to indemnify her against any loss, not exceeding \$5,000.00, that might be imposed upon her by law and paid by her, by way of damages, on

account of bodily injuries suffered by any person by reason of her use and operation of a certain automobile owned by her and described in the policy.

On February 12, 1912, and during the life of the policy mentioned, Mrs. Collins while riding in the automobile accompanied by her sister, Miss Sallie Sevier, for the accommodation of the latter caused the chauffeur operating it to stop the machine in front of the public library on York street between Third and Fourth streets in the city of Louisville. After Miss Sevier had accomplished the object for which the automobile was stopped, it was at her command or that of Mrs. Collins again put in motion by the chauffeur. It skidded or by other accidental means so suddenly changed its course as to strike a post at the edge of the pavement. The shock of the collision caused Miss Sevier, who was sitting on the [29] front seat of the machine, to fall therefrom to the ground, thereby causing her to receive, as claimed, certain bodily injuries, to recover for which she thereafter sued Mrs. Collins and obtained against her a verdict and judgment for \$730.00 damages, with interest from May 26, 1913, and costs of the action, amounting to \$29.40.

Claiming to have paid this judgment to Sallie Sevier, Mrs. Collins by this action on the policy of indemnity received by her of appellee, sought to recover it of the latter, its resistance of the recovery resulting, as already stated, in the verdict and judgment in its favor. After the motion of Mrs. Collins for a new trial was overruled and before the filing of the bill of exceptions, she died in Jefferson county, testate, and by an agreed order entered of record the cause was revived in the names of the Fidelity & Columbia Trust Company, executor, and Sallie Sevier, executrix of her will, who, in their fiduciary capacity, are now prosecuting this appeal.

Clause "F" of the policy provides:

"The assured upon the occurrence of an accident shall give immediate written notice thereof with the fullest information obtainable to the company at its home office, Detroit, Michigan, or to its duly authorized agent. He shall give like notice with full particulars of any claim made on account of such accident, and if thereafter any suit, even if groundless, be brought against the assured to recover damages on account of such injuries as are covered by this policy, he shall immediately forward to the company every summons or other process served on him, and the company will, at its own expense, defend against such suit in his name and on his behalf, or settle the same."

Clause "G" provides:

"The assured shall not voluntarily assume any liability nor settle any claim, except at his own cost, nor incur any expense, nor

interfere in any negotiation for settlement or legal proceeding without the consent of the company previously given in writing; but he may provide, at the company's expense, such immediate surgical relief as is imperative at the time of the accident. The assured, when requested by the company, shall aid in effecting settlements, securing evidence, the attendance of witnesses, and in prosecuting appeals."

Clause "J" provides:

[30] "No action shall lie against the company to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by him in satisfaction of a judgment after trial of this issue; nor unless such action is brought within ninety days after final judgment against him has been satisfied."

The legal effect to be given the foregoing provisions of the policy is fully set forth in *New York Fidelity, etc. Co. v. Martin*, 163 Ky. 12, 173 S. W. 307. Appellee's answer admits the issue of the policy to Mrs. Ruth S. Collins, but denies its liability thereon for the judgment recovered against her by Sallie Sevier, because it, as alleged, was procured by fraud and collusion between Mrs. Collins and Miss Sevier; that although the former notified appellee in writing of the accident, as required by a provision of clause "F" of the policy, such notice did not comply with the further provision thereof, requiring that she furnish full particulars of the accident to and claim of Miss Sevier; that Mrs. Collins also failed to comply with the provision of clause "G" of the policy, which required her when requested by appellee to aid it in securing evidence for use in defense of the action brought against her by Miss Sevier to recover damages on account of her injuries; and, likewise failed, as further required by the provision of clause "G" in question, when requested by appellee to do so, to rely in her answer to the petition in that action upon a plea alleging contributory negligence upon the part of Miss Sevier in the matter of receiving her injuries, or to aid appellee in making defense for her to that action by relying upon the contributory negligence of the plaintiff Sevier. Also that she refused, at appellee's request, to plead certain other facts in her answer, as required by the same provision, which, in the opinion of its counsel, if established by the evidence, would have constituted the chauffeur in charge of the automobile at the time of the accident the agent of Miss Sevier. The averments of the answer were controverted by reply.

There was no evidence tending to show that the chauffeur in charge of the machine was the agent of Miss Sevier at the time of the accident. The mere fact that he ran it to the public library and there stopped it, at her

request, or that he left the library at her request, did not establish such agency. The machine was owned [31] by Mrs. Collins, who was in it with Miss Sevier during the ride of that day. The chauffeur was in Mrs. Collins' employ and subject to her control, which control was not lost by her, nor the relation that the chauffeur sustained as her agent altered, by the request or direction of Miss Sevier that he carry her in the machine to or from the public library, and the acquiescence of Mrs. Collins therein. In view of these facts there is no ground for appellee's contention that the negligence of the chauffeur alleged to have resulted in the injuries of Miss Sevier, if he was guilty of negligence, should be imputed to her. For these reasons the refusal of Mrs. Collins to rely upon this ground of defense in the answer filed by appellee's attorneys for her to the petition in the action brought by Miss Sevier against her, did not constitute a violation of the provision of clause "G" of the policy requiring her to aid it in resisting the recovery of damages sought against her in that action. Hence, the matter was properly omitted from the instructions given by the trial court to the jury.

There was, however, some evidence tending to show that the refusal of Mrs. Collins to rely upon the plea of contributory negligence contained in the answer originally prepared by her by appellee's counsel to be filed in the action brought against her by Miss Sevier was a violation of the provision of clause "G" referred to, because there was some evidence of such contributory negligence on the part of Miss Sevier, furnished by the testimony of the chauffeur in charge of the machine and the chauffeur in charge of the automobile of J. B. Camp, an eye-witness of the accident; that of the former being to the effect that at the time of the collision of the machine with the post, which he claimed was caused by the skidding of a wheel thereof on the ice of the street, Miss Sevier was sitting sideways on the edge of the front seat with her back toward the door, talking to Mrs. Collins, the occupant of the back seat, from which position she was liable to be thrown from the seat and out of the machine by a sudden turn or jar thereof, and that but for the position in which she thus placed herself the collision of the machine with the post would not have thrown her to the ground. This testimony of the chauffeur was in large measure corroborated by that of the chauffeur of the Camp automobile. Though the testimony of the two chauffeurs mentioned was contradicted [32] by the testimony of Miss Sevier and in some sort by the deposition of Mrs. Collins, it furnished some support to appellee's contention that the refusal of Mrs. Collins to permit her answer in the original action to contain a plea of contributory negligence de-

prived her and appellee of a defense which the latter had a right to make for her in that action.

There was also some evidence conducing to sustain the further and principal ground of defense presented by appellee's answer in the instant case, namely, that the judgment recovered against Mrs. Collins by Miss Sevier was procured by and through fraud and collusion between them, such evidence being in part circumstantial and in part furnished by the conduct of Mrs. Collins and Miss Sevier, the testimony of the former and other witnesses, and as a whole manifesting, as contended by appellee, the facts: (1) That Mrs. Collins, in notifying it, and, later, its counsel of the accident, claim and action of Miss Sevier, falsely represented that there were no witnesses to the accident known to her other than Miss Sevier and herself, when she knew that the accident was witnessed by her chauffeur and the chauffeur of J. B. Camp, the latter having lifted Miss Sevier from the street and placed her in the automobile immediately following its collision with the post; (2) that in giving such notice, first to appellee and then to its counsel, she suppressed information of the fact that Miss Sevier was her sister and, at the time of the accident and for several years prior thereto, resided with her as a member of her family, and falsely represented that Miss Sevier's residence was either in St. Louis, Missouri, or Memphis, Tennessee; (3) that Mrs. Collins never informed appellee or its counsel of the relationship of Miss Sevier to her or that she was an inmate of her home until her deposition was given in the action of Miss Sevier against her; (4) that Mrs. Collins failed and refused to render appellee or its counsel any assistance in finding or securing evidence for use upon the trial of the action of Miss Sevier against her, and refused to make such defense in that action as appellee's counsel advised her would be authorized by the law and facts connected with and surrounding the accident; (5) that Mrs. Collins gave assistance to Miss Sevier in the action brought by the latter against her, by carrying her in her automobile to the office of her attorney [33] during the latter's preparation of the case for trial, carrying her and some of her witnesses to and from the courthouse during the trial, and, on one occasion, during the trial, taking Miss Sevier and her witnesses to a restaurant for luncheon and returning them to the courthouse; (6) that although Mrs. Collins, after the institution of the action against her by Miss Sevier, went at the request of appellee's counsel to their office to be advised with as to the defense necessary therein, she declined to make any statement to them or to be governed by their advice in respect thereto, and after the interview went

from their office in her automobile to that of Miss Sevier's counsel and carried the latter therefrom to her home.

It was not the province of the trial court to determine, nor are we called upon to say whether the evidence tending to prove the foregoing facts and circumstances satisfactorily establish the fraud and collusion charged against Mrs. Collins and Miss Sevier. It was only the duty of that court to determine and of this court to declare whether the evidence authorized the submission of the issue as to the fraud and collusion to the decision of the jury, and as, in our opinion, it was sufficient for that purpose and we are unable to say the verdict is unsupported by evidence or is flagrantly against the evidence, we are without authority to disturb it, in the absence of error appearing in some ruling of the trial court, and no such error is disclosed by the record.

The two instructions given by the trial court with becoming brevity correctly submitted the issues of fact necessary to be determined by the jury, and the record as a whole disclosing no ground for a reversal, the judgment is affirmed.

NOTE.

Insurance against Liability of Automobile Owner.

Insurance against the liability of an automobile owner is discussed in the note to *Patterson v. Standard Acc. Ins. Co. Ann. Cas. 1915A 632*. This note collates the recent cases on that subject.

Where a policy insuring an automobile owner against liability for personal injuries caused by the operation of the car covers only liabilities which have been satisfied by the actual payment of money, a person holding a judgment against the insured for injuries cannot recover from the insurer although the insured is insolvent. *Goodman v. Georgia L. Ins. Co.* 189 Ala. 130, 66 So. 649, wherein it was said: "Under the express provisions of the policy of insurance, the assured, the auto company, had no right of action against the insurance company, except for liabilities actually discharged by the payment of money. Not having met this essential condition of the indemnity contract, the auto company could not itself maintain any action on the policy. Certainly a stranger to the contract cannot do so either directly or indirectly. Complainant's theory is that a court of equity may treat the contract as made for the benefit of any person injured by the auto company, and this without regard to its terms and limitations. This theory can find no support in any principle of law or equity, and is

too untenable for serious discussion. Courts cannot tamper with and change the terms of contracts, nor can they substitute as beneficiaries thereunder unnamed and unintended strangers who have nothing whatever to do with either the contracts or the contractors. To exercise such powers would be to usurp despotic authority."

In *Rock Springs Distilling Co. v. Employers' Indemnity Co.*, 160 Ky. 317, 169 S. W. 730, wherein it appeared that the insured corporation paid a judgment recovered against its manager for injuries caused by him while operating an automobile, it was held that there could be no recovery on the policy. The court said: "It will be observed that by the policy no action lies against the company under it unless it is brought by the assured to reimburse him for a loss paid in money by him after trial of the issue in satisfaction of a final judgment against him. It will also be observed that the Distilling Company was not sued by Hazel, and that no judgment was ever rendered against it. The judgment was against Silas Rosenfeld. The facts upon which that judgment was based are not before us, and in the absence of the facts it must be presumed that there was negligence on the part of Rosenfeld warranting the judgment. The indemnity Company did not insure Rosenfeld against any loss that he might sustain by reason of the automobile injuring another person's property. It is true the Distilling Company employed counsel and defended the action, but there has in fact been no judgment against it. The rule announced in *Schmidt v. Louisville, etc. R. Co.* 99 Ky. 143, that one who conducts the defense to an action is concluded by the judgment, has no application here. It cannot be maintained that a stranger who voluntarily employs counsel and defends a suit for a tort committed by the defendant is by reason of this, if unsuccessful, bound for the payment of the judgment against the defendant. When the Indemnity Company insured the Distilling Company and not Rosenfeld, the Distilling Company could not, by its voluntary act in defending the suit against Rosenfeld, add to the liability of the Indemnity Company, and thus make it indemnify Rosenfeld against the consequences of his negligence. If the Distilling Company had not defended the suit brought by Hazel against Rosenfeld, clearly there would have been no liability of the Indemnity Company for the payment of the judgment against Rosenfeld."

In *Hartigan v. Casualty Co. of America*, 97 Misc. 464, 161 N. Y. S. 145, it was held that the insured could recover a sum paid by him by way of compromise.

In the reported case the failure of the insured to plead the contributory negligence of the injured person is held not to preclude a recovery on the policy.

Policies of insurance against the liability of an automobile owner usually require "immediate" notice to the insurer of an accident. In *Oakland Motor Car Co. v. American Fidelity Co.* 90 Mich. 74, 155 N. W. 729, it was held that the term "immediate" was not to be literally construed but required notice to be given with reasonable promptness. It was further held in that case that the fact that the agent of the insured investigated and reported that there had been no accident did not excuse a failure to give notice.

In *Royal Indemnity Co. v. Schwartz* (Tex.) 172 S. W. 581, it was held that the fact that at the time of the accident the car was being driven by a person under the age at which by a local ordinance persons were allowed to drive motor cars precluded a recovery on the policy.

In *Hartigan v. Casualty Co.* 161 N. Y. S. 145, a recovery was permitted under the peculiar facts of that case for an injury caused while the car was being driven by an agent of a firm to whom the insured had loaned it. The court said: "The plaintiffs were and still are partners doing business in Troy under the name of Hartigan & Dwyer. During the life of the policy, without compensation, the plaintiffs loaned the insured Ford delivery car to a firm doing business in Albany, known as Hartigan, Dwyer & O'Brien, in which firm the plaintiffs had a two-thirds interest. The partner O'Brien managed the Albany business under the name of the 'Boston Store.' The insured automobile, while in use for the delivery of goods from the store of Hartigan, Dwyer & O'Brien in Albany, met with an accident on the streets of Albany, resulting eventually in the death of a boy. The car was at the time operated by an employee of Hartigan, Dwyer & O'Brien, who was paid by that firm and employed solely as a delivery agent of the Albany firm. The Albany firm of Hartigan, Dwyer & O'Brien was sued by the legal representatives of the boy who was killed. The attorney representing the defendant therein, Casualty Company of America, appeared for the defendants who were sued because of the death of the boy; that is, he appeared for the members of the firm of Hartigan, Dwyer & O'Brien, which appearance was under an arrangement evidently as covered by a letter written by Mr. Guy to each one of the members of the Albany firm, in which letter the writer, referring to instructions which he had received from the Casualty Company of America, said: 'They have instructed me to advise you that the company will assume the defense of this case under a reservation of policy rights and without assuming any liability for any judgment that may be recovered.' . . . In the loaning of the car it does not appear that the terms of the insurance contract were violated. The car was

being operated by the agent of the Albany firm, and he was as such also the agent of these plaintiffs individually as members of that firm. If that firm, through the act of negligence on the part of its agent, was liable for a tort, so each member of the Albany firm was liable to respond in damages for the tort of that same agent, and two of the members of that firm were the plaintiffs who were insured under this policy as against casualty loss resulting from the operation of that car. The legal representatives of the boy who lost his life were justified in suing the members of the Albany firm, and it must be remembered that two of those thus sued were the plaintiffs here, and when the Casualty Company undertook the defense of that action it must have been only with a reservation which meant that the Casualty Company did not assume such defense regardless of whether it was liable under the policy or not. It did assume the defense; its attorney, who is the attorney here for the defendant, recommended and advised the settlement. It must be assumed that the settlement was fair and just, and for the best interests of the defendants in the action as well as for the best interests of the Casualty Company, which was to say the least somewhat involved. When the defendant's attorney recommended that settlement, he recommended in effect that the plaintiffs here pay as members of that firm their proportionate share as copartners of the amount upon which the settlement was effected."

In *Hopkins v. American Fidelity Co.* 91 Wash. 680, 158 Pac. 535, a condition that the insured would not interfere in negotiations for settlement was held not to have been broken, the court saying: "It appears that the day after the accident Hopkins telephoned the claimant expressing his sympathy, stating that his attorneys would endeavor to get a settlement with the insurance company, and that he would call soon to see the claimant, whom he urged not to employ lawyers. The company's counsel protested against Hopkins having mentioned his being insured, and they sought an interview with the claimant themselves as his representative. Hopkins thereupon telephoned the latter that the lawyer coming, though he might call himself Hopkins', was not his but the insurance company's. Of this talk the company learned nothing at that time, and arriving at no settlement, they let the matter drop. Suit being subsequently begun by the claimant, the company took over the defense and, after filing pleadings, agreed on a compromise, but learning of Hopkins' second talk, they dropped the negotiations and withdrew from the case. Hopkins then took over the defense himself under a stipulation making the proposed settlement available to him without

prejudice to the company's disclaimed liability. What constitutes 'interference' it would be difficult to say, but we are satisfied that here there was none. It is obviously impossible for the assured to avoid conversation with the injured, their families, or their representatives. Indeed, the insurer himself must desire them to say what they can to reduce irritation. If they are then compelled to admit that they are insured, the law will not forbid their admitting the truth, and as to their voluntarily telling it, that is saying little more than claimants know. The vast majority of those who own automobiles are thus insured, and nearly every claimant knows or believes that they are. Neither can we assume that even if claimants do not know or suppose this, they will be harder to deal with when they find it out. That will depend on whether the owner appears of ample means himself. About this nothing is disclosed here. As for Hopkins' in a degree discrediting the company's lawyer in the second message, language more explicit and positive than 'interfere in negotiations for compromise' must be used to forbid what has occurred here. This is not the insured's meddling with settlements accepted or becoming a busybody about offers, of encouraging claimant to a stiff demand, or of secretly furnishing him useful facts."

In *McAleenan v. Massachusetts Bonding, etc. Co.* 219 N. Y. 563, 114 N. E. 114, it was held that an insurer who agreed to take an appeal from a judgment against the insured and allowed the time for appeal to expire was liable.

In *Levin v. New England Casualty Co.* 97 Misc. 7, 160 N. Y. S. 1041, it was held that an insured who had contributed to the amount paid by the insurer to settle a claim could not recover from the insurer the amount contributed. The court said: "The complaint, however, sufficiently alleges the execution and delivery, on or about June 10, 1912, of a policy by defendant insuring plaintiff against loss or expense on account of bodily injuries accidentally suffered by reason of the use of his automobile, due performance of all the conditions of the policy on the part of the plaintiff, injuries accidentally sustained December 22, 1912, by one Feuer through the use of the automobile, and the bringing of an action against the plaintiff to recover \$10,000 damages for such injuries; that in full settlement of his claim Feuer subsequently consented to receive \$3,150, which sum was within the liability of \$5,000 assumed by the defendant under the policy, and represented a fair and reasonable settlement of the claim; that the defendant, for the purpose of relieving itself of the payment of part of said sum of \$3,150, namely, of \$750, and forcing and compelling the plaintiff to contribute the said

sum to the defendant for the purpose of effecting a compromise and settlement of the action, unreasonably and unjustly refused to settle or compromise the claim unless the plaintiff would contribute \$750 to said sum of \$3,150, and threatened that, unless plaintiff would contribute said amount, defendant would allow the case to go to trial and subject the plaintiff to the hazard of having a verdict recovered against him in excess of the \$5,000 limit of the policy, and forced and compelled plaintiff to pay said sum of \$750. There is, however, no allegation that by the terms of the policy defendant agreed to consent to a settlement of any claim for less than the \$5,000 limit, provided the sum the claimant was willing to accept was reasonable and fair and less than the amount which would probably be recovered in an action. By paragraph XI. of the complaint this is pleaded as a conclusion of law; but there is no agreement pleaded upon which such a conclusion of law could be predicated. The complaint fails to make out a cause of action."

PHILADELPHIA CASUALTY COMPANY

v.

FECHHEIMER ET AL.

United States Circuit Court of Appeals,
Sixth Circuit—February 2, 1915.

220 Fed. 401.

Appeal and Error — Exceptions — Sufficiency — To Overruling of Objections to Report of Referee.

Where an action at law in a federal court is tried to the court by stipulation, pursuant to Rev. St. § 649 (4 Fed. St. Ann. 393), and by consent the cause is referred to a referee to take the evidence and report his findings of fact and conclusions of law, a general exception to the action of the court in overruling in a mass the exceptions taken to the report of the referee is too indefinite to present any question for review by the appellate court, and also, if any one of the rulings of the referee excepted to was correct, the exception is not good.

Trial — Motion for Judgment — Waiver by Introduction of Evidence.

An exception to the overruling of a motion for judgment at the close of plaintiffs' evidence on the trial of an action to the

court is waived by the introduction of evidence in defense.

[See 14 Ann. Cas. 222; Ann. Cas. 1914A 146.]

Exceptions — Necessity — Sufficiency of Findings.

No exception is necessary in a federal court to raise the question whether, when a jury has been duly waived, the special findings of fact by the court are sufficient to support the judgment rendered thereon.

Reference — In Action at Law — Erroneous Designation of Referee.

It is competent for a federal court to refer an action at law by consent of the parties, and the fact that the referee is designated a "special master" does not impair the validity of the reference.

Confirmation of Referee's Report — Adoption of Findings by Court.

When special findings of fact made by a referee are adopted by the court in such manner as to show an intention to make those findings its own, that intention will be given effect by the appellate court, and the findings will be treated as having been made by the trial court.

Same.

By overruling all exceptions of both parties to the report of a referee, and rendering judgment for the exact sum found by him to be due, the court evidences its intention to adopt the findings of the referee as its own.

Verdict and Findings — Form of Findings.

Special findings of fact by a court or referee should consist of a concise and specific statement of the ultimate facts found, without recitals of the evidence or conclusions of law.

Agreed Findings — Admission of Counsel.

Where counsel for appellant or plaintiff in error in the appellate court admit that the findings of fact made by the trial court are sustained by the evidence, such findings will be treated as in effect an agreed statement of facts.

Appeal and Error — Assignment of Error — General Assignment.

An assignment of error that "the court erred in entering judgment for the plaintiffs, to which the defendant then and there excepted," is insufficient to raise any question for review by the appellate court.

Insurance — Credit Insurance — Renewal Bond — Losses Covered.

A credit insurance policy, or "bond," insuring against loss of accounts due the insured from customers for goods shipped during the calendar year 1903, contained a clause providing that, "if this bond is renewed on or before the date of termination thereof by the issuance of a new bond, the losses occurring during the term of the renewal on goods shipped during the term of this bond shall be included in the calculation of losses under said renewal the same as if the goods had been shipped during the term

of such renewal bond." December 4, 1903, a second bond was issued, differing in some of its provisions, covering the term from October 1, 1903, to September 30, 1904. The only reference therein to the previous bond was a provision that losses occurring on goods shipped on and after October 1, 1903, should not be included under the first bond, but under the second. It is held that the second bond was a renewal of the first, within the meaning of the quoted clause of the first, and covered losses arising on shipments made during the term of the first bond previous to October 1, 1903.

[See note at end of this case.]

Same.

The losses to which such clause relates are to be determined by the terms of the first bond, and not of the renewal, and the insurer is liable for a loss which comes within the terms of the first, although it is of a class not insured against by the renewal.

[See note at end of this case.]

Same.

Each bond provided that on sales not exceeding \$450,000 during its term losses to the aggregate amount of \$5,000 should constitute an initial loss to be borne by the insured, the insurer being liable only for an excess of loss above that sum, and that, if the sales exceeded \$450,000, the initial loss should be proportionately increased. It is held that the fact that losses on sales made during the term of the first bond, but occurring during the term of the second, were payable under the latter, did not entitle the insurer to carry over the sales of the first term, and add them to those of the second, for the purpose of increasing the amount of the initial loss thereunder.

[See note at end of this case.]

Computation of Total Sales by Insured.

Where goods shipped by insured were returned, no sale was consummated which can be computed in making up the total sales under the bonds.

[See note at end of this case.]

Same.

Although the renewal bond was not executed until December 4, 1903, a clause therein providing that "losses occurring on goods shipped on and after October 1, 1903," should be included thereunder, and not under the first bond, made the second bond effective for all purposes from that date.

[See note at end of this case.]

Notice of Loss — Effect of Misstatement.

That a preliminary notice of loss required and given the insurer incorrectly stated that the debtor had been adjudged bankrupt, whereas in fact he had been closed on execution, is immaterial, where no objection was made on that ground, and the insurer was liable in either case.

Construction of Credit Insurance Bond.

Credit insurance bonds, like other insurance policies, if ambiguous in their language, are to be construed strictly against the insurer, by whom they were framed.

[See note at end of this case.]

Ann. Cas. 1917D—5.

Appeal and Error — Cross-Errors.

A defendant in error, who did not himself institute proceedings in error, cannot in the appellate court go beyond supporting the judgment and opposing the assignments of error by the adverse party.

Error to United States District Court, Western Division of Southern District of Ohio: **HOLLISTER**, Judge.

Action by Henry H. Fechheimer et al., plaintiffs, against Philadelphia Casualty Company, defendant. Judgment for plaintiffs. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

J. L. Kohl for plaintiff in error.

Alfred Mack for defendants in error.

Sitting: **WARRINGTON** and **DENISON**, Circuit Judges, and **TUTTLE**, District Judge.

[403] **TUTTLE, J.**—This is an action in assumpsit, brought by defendants in error, hereinafter called plaintiffs, against plaintiff in error, hereinafter called defendant, to recover on two so-called [404] credit indemnity bonds, which are in their nature and effect policies of insurance against loss on commercial accounts; said bonds having been issued by defendant to plaintiffs in return for premiums paid. The cause was one for trial by jury, but by stipulation in writing, duly signed by both parties hereto, in accordance with the provisions of section 649, United States Revised Statutes (4 Fed. St. Ann. 393), a jury was waived and said cause submitted for trial by the District Judge; it being provided in such stipulation that the court was "to make special findings of fact and conclusions of law." This stipulation also contained the following clause:

"By consent and stipulation of the parties this cause is hereby referred to B. R. Cowen as special master herein, said special master being appointed by the consent and at the request of the parties and on account of his familiarity with accounts; said special master to take the evidence to be submitted by the parties hereto and report the same, together with his special findings of fact and conclusions of law upon the matters in controversy herein."

The master named having died, another was, by order of the court, appointed in his place and directed to take testimony and report in accordance with the directions referred to. In pursuance thereof, the so-called special master, hereinafter called referee, took the testimony and thereafter filed a lengthy report, containing what he termed special findings of fact and conclusions of law, in which he found in favor of the plaintiffs on some items and in favor of the de-

fendant on others, and as a result of his several findings found that plaintiffs were entitled to a judgment against defendant in the sum of \$7,048.90, with certain interest.

The evidence, objections, rulings, and exceptions before the referee, together with his findings of fact and conclusions of law, were transcribed and returned as a part of his report. The report of the referee also states that the parties stipulated that the exceptions taken to the rulings of the referee on the admission and exclusion of evidence, as shown by the report, "be deemed as and stand as exceptions to said report, the same as if said exceptions were specifically filed with the clerk of the court." On the same day that the referee's report was filed with the clerk of the court, each of the parties filed exceptions to the report. We are concerned only with the exceptions filed by the defendant, which were 19 in number. The first of these alleged errors on the part of the referee "in the admission of evidence offered by the plaintiffs to which the defendant excepted" before the referee. This exception did not point out the particular evidence which was objectionable, or assign any reason for the objection, relying upon the stipulation reported by the referee to justify the failure to point out the particular rulings which it was desired to call to the attention of the court, and relying upon the objections made before the referee as a basis for the exceptions to be considered by the court. The second objection to the report of the referee alleged error on the part of the referee in the same indefinite manner "in exclusion of evidence offered by defendant to which defendant excepted" before the referee. The third exception to the referee's report was that he denied the motion for judgment in favor of defendant at close of plaintiffs' proofs; the fourth, that he overruled the [405] same motion at close of all the proofs; the fifth, the denial of a new trial by the referee. The other 14 exceptions alleged error on the part of the referee in specific findings of fact and conclusions of law.

Upon the hearing by the court of the exceptions filed by the respective parties, the exceptions of the defendant, like those of the plaintiffs, were overruled as a whole. To this the defendant excepted generally. Judgment was thereupon rendered against the defendant for the amount found by the referee to be due to the plaintiffs, to which the defendant excepted, without stating any objections, or assigning any reason for the exception. The bill of exceptions, which sets forth the report of the referee and the exceptions filed thereto, says that the court did "overrule said exceptions and confirm said report, . . . and enter judgment in favor

of the plaintiffs, to all of which the defendant then and there excepted." The order entering judgment recites the hearing before the court on exceptions to the report of the referee, and says that:

"The court, being advised, does overrule the exceptions of plaintiffs to said report, . . . to which plaintiffs except, and does overrule the exceptions of defendant to said report, . . . to which defendant excepts."

The order then proceeds in the usual form of judgment for plaintiffs, and closes with this sentence:

"To which finding and judgment the plaintiffs except, and to which findings and judgment the defendant excepts."

The record shows no exceptions taken by the defendant to any of the rulings or proceedings of the court, except this general exception to the court's order in overruling the 19 exceptions as a whole, and the exception "to entering judgment." The defendant sued out this writ of error, and assigns 20 errors. The first 19 respectively allege that the court erred in overruling the 19 exceptions to the referee's report, and the twentieth that:

"The court erred in entering judgment for the plaintiffs, to which the defendant then and there excepted."

At the threshold of our inquiry we are confronted with the question whether the record presents any error which we can properly review. Section 700 of the Revised Statutes is as follows:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." (4 Fed. St. Ann. 450.)

This provision now applies to District Courts. *Eastern Oil Co. v. Holcomb*, 212 Fed. 126, 128 C. C. A. 642; *Nashville Interurban Ry. v. Barnum*, 212 Fed. 634, 129 C. C. A. 170.

"Under these statutes and the established construction given them by the courts, the power of this court is limited to the determination of the question whether errors were committed by the trial court in its rulings during the progress of the trial, and whether the special findings made by the court [406] were sufficient to support the judgment." *Sayward v. Dexter*, 72 Fed. 758, 769, 44 U. S. App. 376, 19 C. C. A. 176, 186; *Churchill*

v. Buck, 102 Fed. 38, 42 C. C. A. 148; Mason v. Smith, 191 Fed. 502, 112 C. C. A. 146.

It is clear that the general exception mentioned is too indefinite to present any question for review by an appellate court. *Felton v. Newport*, 92 Fed. 470, 34 C. C. A. 470.

This was settled by the decision in *Boogher v. New York L. Ins. Co.* 103 U. S. 90, 26 U. S. (L. ed.) 310. In that case, by stipulation following the Missouri state practice, there was a waiver of jury in the lower court, reference to referee, testimony taken by the referee, rulings by the referee on admissibility of evidence, exceptions taken to such rulings, findings of fact and law by the referee, all of which were reported to the court, and to which the defendant filed 22 separate exceptions, including exceptions to the rulings of the referee on the admission of testimony and to his findings of fact and conclusions of law. These 22 exceptions were heard and overruled as a whole by the court, and defendant excepted generally. Judgment was entered in favor of plaintiff on the report of the referee. A bill of exceptions was taken. The writ assigned separate errors, based on the confirmation of the referee's report by the court. The proceedings and practice in that case, so far as affect the point decided, are so identical with those here considered that to recite them is but to repeat the situation here described. Mr. Chief Justice Waite, speaking for the Supreme Court in that case, in a unanimous opinion affirming the court below, says (103 U. S. 98, 26 U. S. (L. ed.) 310):

"The whole case, therefore, turns on the exception to the overruling of the objections to the report. This exception is a general one, to the single order overruling the 22 specific objections as a whole. We have uniformly held that 'if a series of propositions is embodied in instructions (to the jury), and the instructions are excepted to in a mass, if any one of the propositions is correct, the exception must be overruled.' *Johnston v. Jones*, 1 Black 66, 210, 17 U. S. (L. ed.) 117; *Rogers v. The Marshal*, 1 Wall. 644, 17 U. S. (L. ed.) 714; *Harvey v. Tyler*, 2 Wall. 328, 17 U. S. (L. ed.) 871; *Lincoln v. Claffin*, 7 Wall. 132, 19 U. S. (L. ed.) 106; *Beaver v. Taylor*, 93 U. S. 46, 23 U. S. (L. ed.) 797. The same rule should be applied to cases of this kind. Here are, so to speak, a series of propositions in respect to the report of the referee. They were overruled, and excepted to in a mass. If one of the propositions was correct, therefore, the exception will not be good. The party should, by his exception, direct the attention of the court to the specific proposition or propositions on which he relies, and separate it or them from the rest."

Boogher v. New York L. Ins. Co. supra, has often been cited with approval by the Supreme Court, and the rule there stated has never been changed. It would be difficult to find a case which would better illustrate the necessity for the rule than the one presented by this record. The defendant not only took 19 exceptions to the report of the referee, but the first of these was intended to be so broad that it should cover any one of 42 different exceptions taken by the defendant to rulings of the referee in admitting testimony offered by the plaintiffs. Twenty-four of the 42 were based on objections without any reason for the objections being stated, and most, if not all, of the other 18 exceptions were based on objections too general to be considered. *Patrick v. Graham*, 132 U. S. 627, 10 S. Ct. 194, 33 U. S. (L. ed.) 460; [407] *Boston, etc. R. Co. v. O'Reilly*, 158 U. S. 334, 15 S. Ct. 830, 39 U. S. (L. ed.) 1006; *Baltimore, etc. R. Co. v. Hellenenthal*, 88 Fed. 116, 60 U. S. App. 156, 31 C. C. A. 414; *Western Union Telegraph Co. v. Burgess*, 108 Fed. 26, 47 C. C. A. 168; *Merchants' Ins. Co. v. Buckner*, 110 Fed. 345, 49 C. C. A. 80; *Frie R. Co. v. Schomer*, 171 Fed. 798, 96 C. C. A. 458.

The exception to the overruling of the motion for a directed verdict at the close of plaintiffs' proofs was waived by introducing evidence in defense. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 1 S. Ct. 493, 27 U. S. (L. ed.) 266; *Accident Ins. Co. of North America v. Crandal*, 120 U. S. 527, 7 S. Ct. 685, 30 U. S. (L. ed.) 740; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321, 31 U. S. (L. ed.) 296; *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 U. S. (L. ed.) 497; *Robertson v. Perkins*, 129 U. S. 233, 9 S. Ct. 279, 32 U. S. (L. ed.) 686; *Columbia, etc. R. Co. v. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 U. S. (L. ed.) 405; *Bogk v. Gassert*, 149 U. S. 17, 13 S. Ct. 738, 37 U. S. (L. ed.) 631; *McCabe, etc. Constr. Co. v. Wilson*, 209 U. S. 275, 28 S. Ct. 558, 52 U. S. (L. ed.) 788. This is sufficient to show that the ruling of the court in overruling the exceptions filed by the defendant to the report of the referee was correct as to at least "one of the propositions," and therefore the general exception taken by defendant is not good. *Holloway v. Dunham*, 170 U. S. 615, 18 S. Ct. 784, 42 U. S. (L. ed.) 1165.

It is, however, well settled that no exception is necessary to raise the question whether, when a jury has been duly waived, the special findings of fact of the court are sufficient to support the judgment rendered thereon. *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 U. S. (L. ed.) 395; *Seeberger v. Schlesinger*, 152 U. S. 581, 14 S. Ct. 729, 38 U. S. (L. ed.) 560; *Webb v. National Bank of*

Republic, 146 Fed. 717, 77 C. C. A. 143; Chicago, etc. R. Co. v. Barrett, 190 Fed. 118, 111 C. C. A. 158; Guaranty Trust Co. v. Koehler, 195 Fed. 669, 115 C. C. A. 475. We have had some doubt as to whether the trial court can be said to have made special findings of fact within the meaning of the statute above quoted. The court neither itself framed special findings nor stated specifically that it made the findings of the referee its own.

The reference as made, to the special master, so called, was proper, under the inherent power of the court, at least where, as here, it was with the consent of the parties. *Hecker v. Fowler*, 2 Wall. 123, 17 L. ed. 759; *Fenno v. Primrose*, 119 Fed. 801, 56 C. C. A. 313. As was said in *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 356, 15 S. Ct. 886, 39 U. S. (L. ed.) 1015:

"This case was referred by consent to . . . a so-called 'master commissioner,' as referee, with instructions to report the testimony, with the findings of fact and of law, to the court. The fact that no such officer as master commissioner is known to the law does not impair the validity of the reference, as it is perfectly competent for the court to refer a case to a private person. *Hecker v. Fowler*, 2 Wall. 123, 17 L. ed. 759."

"While the federal statute makes no provision for such reference in a law action, it is a recognized practice in the federal jurisdiction to make such reference by consent of parties; and, after the coming in of the referee's report, before judgment is entered upon the findings, either party may interpose [408] objections thereto in writing, and the court may, upon request of either party, re-fer the matter for further findings, or proceed to verdict and judgment on the record as the evidence and the law may direct. *Hecker v. Fowler*, 2 Wall. 123-129, 17 U. S. (L. ed.) 759; *St. Louis Electric Light, etc. Co. v. Edison Gen. Electric Co.* 64 Fed. 997-1004." *Boatmen's Bank v. Trower Bros. Co.* 171 Fed. 966; *Fenno v. Primrose*, 119 Fed. 801, 56 C. C. A. 313.

And when special findings of fact, made by a master or referee to aid the court, are adopted by the court in such a manner as to show an intention to make such findings its own, such intention will be given effect by the appellate court, which will then consider the special findings, so adopted, as if they had been framed by the trial court. *Chicago, etc. R. Co. v. Clark*, 178 U. S. 353, 20 S. Ct. 924, 44 U. S. (L. ed.) 1099; *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 356, 15 S. Ct. 886, 39 U. S. (L. ed.) 1015; *Roberts v. Benjamin*, 124 U. S. 64, 8 S. Ct. 393, 31 U. S. (L. ed.) 334; *Paine v. Central Vermont R. Co.* 118 U. S. 152, 6 S. Ct. 1019, 30 U. S. (L. ed.) 193; *Shipman v. Ohio Coal*

Exch. 70 Fed. 652, 17 C. C. A. 313; *Hamilton County v. Sherwood*, 64 Fed. 103, 11 C. C. A. 507. As was said in the recent case of *Tiernan v. Chicago L. Ins. Co.* 214 Fed. 238, 241, 131 C. C. A. 284.

"It was at one time questioned whether there could be a review in an appellate court of the United States where the facts were found by a referee (*Boogher v. New York L. Ins. Co.* 103 U. S. 90, 95, 26 U. S. (L. ed.) 310), but it is now settled that when a jury has been waived in writing, and the findings of the referee have been confirmed by the trial court as reported, or as modified by it, the question whether the judgment rendered was warranted by the facts found will be reviewed by the appellate court as though the findings were wholly made by the trial court itself. *Chicago, etc. R. Co. v. Clark*, 178 U. S. 353, 364, 20 S. Ct. 924, 44 U. S. (L. ed.) 1099."

In the present case we think that by overruling all the exceptions of both parties to the referee's report, confirming such report, and rendering judgment for the exact sum found by such referee to be due, the court indicated an intention to adopt as its own the findings of the referee. Being satisfied that such was the intention, we have decided to treat such findings as those of the District Court.

We have also had difficulty in determining whether these findings of the referee were general or special within the meaning of the statute. The form in which they were framed by the referee is not to be commended. Instead of having a concise statement of the ultimate facts found, apart from recitals of evidence and conclusions of law, we are compelled, in order to discover such facts, to search through a voluminous report in and throughout which are mixed and interspersed findings of facts, conclusions of law, reference to evidence, and arguments of counsel. The following language is applicable here:

"It is not very easy to determine from this record whether the court's finding of facts was intended to be general or special. We call attention again to the very unsatisfactory practice that obtains in some of the Circuit Courts in the trial of cases before the court without a jury. The findings in such cases may be general, like the general verdict of a jury, or it may be special, like the special verdict of a jury. When the finding is special, the facts found should be stated as they would be in a special verdict of a jury. In stating the facts found, no reference whatever should be made to the evidence upon which those facts are found. Neither the evidence nor any discussion of it [409] should be injected into the ultimate finding of facts, upon which the court rests its judgment. The special finding of

facts should be a clean cut statement of the ultimate facts, without importing into it the evidence, or the reasoning by which the court arrived at its finding." *Minchen v. Hart*, 72 Fed. 294, 295, 18 C. C. A. 570, 571.

"The special finding contemplated by the statute is a specific statement of those ultimate facts upon which the law must determine the rights of the parties. It corresponds to the special verdict of a jury, is equally specific and responsive to the issues, and is spread at large upon the record, as part thereof, in like manner as is such a verdict." *U. S. v. Sioux City Stock Yards Co.* 167 Fed. 126, 127, 92 C. C. A. 578, 579.

It is, however, apparent that the present record presents no disputed question of fact. Defendant, indeed, admits in its brief that "the facts are undisputed and necessarily sustain the finding of fact." We think, therefore, that the facts stated in the report of the referee, called therein special findings, and adopted by the court, can and should be treated as at least constituting an agreed statement of facts, and consequently equivalent to the special findings contemplated by the statute referred to. *Mutual L. Ins. Co. v. Kelly*, 114 Fed. 268, 52 C. C. A. 154; *U. S. v. Cleage*, 161 Fed. 85, 88 C. C. A. 249; *Fellman v. Royal L. Ins. Co.* 185 Fed. 689, 107 C. C. A. 637; *Treat v. Farmers' Loan, etc. Co.* 185 Fed. 760, 108 C. C. A. 98. As was said by Lurton, C. J., speaking for this court, in *Kentucky L. etc. Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42:

"An agreed statement of facts, upon which a judgment is founded, will be taken, on appeal or writ of error, as the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based." *St. Louis v. Western Union Tel. Co.* 148 U. S. 92, 13 S. Ct. 486; *Lehmen v. Dickson*, 148 U. S. 73 [13 S. Ct. 481, 37 U. S. (L. ed.) 373].

"There was . . . an agreement as to certain facts, which, though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based." *St. Louis v. Western Union Tel. Co.* 148 U. S. 92, 13 S. Ct. 485, 37 U. S. (L. ed.) 380.

"The findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law." *O'Reilly v. Campbell*, 116 U. S. 418, 6 S. Ct. 421, 29 U. S. (L. ed.) 669.

In the words of the Supreme Court in *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 U. S. (L. ed.) 65, where counsel had agreed in the appellate court to certain portions of the opinion of the trial court as containing the material facts of the case:

"Inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made."

The only assignment of error specifically directed against the correctness of the judgment is the twentieth, which is as follows:

"The court erred in entering judgment for the plaintiffs, to which the defendant then and there excepted."

Such an assignment is insufficient to raise any question for review here. *Deering Harvester Co. v. Kelly*, 103 Fed. 261, 43 C. C. A. 225. [410] In the language of the court in *Felker v. Cincinnati First Nat. Bank*, 196 Fed. 200, 202, 116 C. C. A. 32, 34:

"The only other assignment is in effect that the court erred in rendering a judgment for the plaintiff. Unless we supplement this assignment by adding 'on the facts found,' it presents nothing for review by this court. *Bell v. Union Pac. R. Co.* 194 Fed. 366, 114 C. C. A. 326, just decided. Assuming therefore, that the assignment meant to challenge the judgment on the statutory ground that the facts found were insufficient to support it, it is entirely without merit, and cannot be sustained."

But several of the assignments of error raise questions which, in effect, involve the sufficiency of the facts found to support the judgment, and we have therefore concluded to consider such assignment as if they had specifically questioned such sufficiency, and we proceed to consider the questions thus presented.

1. Was bond 1318 renewed by bond 2071?

This suit involves two credit insurance policies, called bonds, issued by defendant to plaintiffs, the first bond, No. 1318, by its terms indemnifying them against loss of accounts due them from customers for goods shipped between January 1, 1903, and December 31, 1903, and the second bond, No. 2071, furnishing such indemnity on shipments between October 1, 1903, and September 30, 1904; both bonds being subject to certain terms and conditions hereinafter referred to. Bond 1318 contained the following clause:

"Outstandings Covered under Renewal Bond.

"Seventh. If this bond is renewed on or before the date of termination thereof by the issuance of a new bond, the losses occurring during the term of the renewal on goods shipped during the term of this bond

shall be included in the calculation of losses under said renewal, the same as if the goods had been shipped during the term of such renewal bond."

On December 4, 1903, and therefore before the date of the termination of bond 1318, bond 2071 was issued, and by its terms, as stated, covered losses on shipments between October 1, 1903, and September 30, 1904. It also contained the following clause:

"In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond 1318, but under the attached bond, subject to the terms and conditions thereof."

This was its only reference to the previous bond, from which it differed in several of its provisions.

Certain losses to plaintiffs occurred during the term of the second bond on shipments made prior to the commencement of such term and during the term of the first bond. And the question is raised whether bond 1318 was renewed by bond 2071, within the meaning of the clause quoted, so that losses occurring during the term of the latter bond on shipments made during the term of the former bond can be included in the calculation of losses under said latter bond. It is urged that because it is not recited in the latter bond that it is a renewal of the earlier one, and because there is no direct evidence that the parties agreed that it should be so considered, therefore it is not [411] such a renewal within the meaning of the first bond, and the losses last mentioned are not protected by it.

We are unable to agree with such contention. We think that by the clause quoted the parties intended to, and did, agree that if, on or before the expiration of this first bond, defendant should issue to plaintiffs a new bond, such clause should become operative. It is unnecessary to determine whether the second bond, is itself technically a renewal bond, because it is clear that the parties themselves have stipulated that such renewal should be effected "by the issuance of a new bond." It is obvious that these parties were not interested in, if they understood, the technical meaning of the term "renewal." What they were interested in, and unquestionably understood, was the protection to be extended to losses occurring after, on shipments made before, the termination of the old bond, "by the issuance of a new bond," on or before such termination. And when such new bond was so issued the "outstandings" referred to were thereby "covered."

2. Are the losses occurring during the term of the renewal bond, on shipments made during the term of the original bond, the

losses contemplated and defined by the original bond?

The kind of losses on shipments made during the period of the second bond recoverable thereunder differed materially from the kind of losses recoverable under the conditions of the first bond. Thus, the only losses against which plaintiffs were indemnified by the second bond were those "sustained on claims against debtors by or against whom, between the dates of the execution and termination of this bond, judicial proceedings of any kind have been taken, establishing such debtors' insolvency," while the first bond gave indemnity against losses arising on claims against the following debtors:

"A debtor for an amount not exceeding \$250, where the preliminary notice of loss has attached to it a report from the designated mercantile agency, or from some collection agency or attorney practicing in the place where the debtor did business, that the claim against such debtor is uncollectible through legal proceedings; . . . a debtor who has effected a compromise with his creditors; . . . a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the federal bankruptcy law or under some insolvency or assignment law of any of the United States or any territory thereof; . . . a debtor against whom an execution in favor of the indemnified or some other creditor has been returned unsatisfied," and losses arising under certain other circumstances mentioned in said bond.

It is contended by defendant that, if the first bond be considered as renewed by the second, so that losses on shipments during the term of the former, occurring during the term of the latter bond, may be included in the calculation of the losses under said latter bond, only such losses can be so included as are within the class of losses specifically covered by such bond when occurring on shipments made during its term.

We think that to so hold would require a forced and unnatural construction of the clause in question. It will be observed that by this clause it was agreed that "the losses occurring" during the term of the renewal, on shipments made during the term of the original policy, should be included in the calculation of losses under such renewal. In [412] the absence of any express definition of the word, we think it evident that by "the losses" was meant the losses against which plaintiffs were then being insured. And the basis for calculating these losses was then being fixed, in the language of the policy already quoted.

If the parties had desired to make the provability of such losses subject to the terms and conditions of the renewal policy, such

an intention could easily have been expressed in appropriate language, as was done by the insertion in the second bond of the following provision, above referred to:

"In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond No. 1318, but under the attached bond, subject to the terms and conditions thereof."

Even if the language of clause 7 alone is not sufficient to require the payment under the renewal policy of the "losses" as defined in 1318, incurred during its terms upon goods shipped before October 1, 1903, we think also that the language just quoted is a clear recognition by the parties that, except as expressly provided thereby, the losses mentioned in clause 7 are those "included under bond No. 1318," and not "under the attached bond, subject to the terms and conditions thereof."

Although counsel have not cited, and we have been unable to find, a case in which the facts were identical with those involved here, the same general situation was presented in two cases already decided by this court.

The case of *American Credit Indemnity Co. v. Athens Woolen Mills*, 92 Fed. 581, 34 C. C. A. 161, involved two credit insurance bonds quite similar to those involved here. By clause 8 of the first bond it was provided that:

"No loss can be proven after the expiration, provided, however, that in case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss resulting after such date of expiration, on shipments made during the term of this bond, may be proven during the term of the renewal bond next immediately succeeding."

Before the expiration of the bond complainant renewed it, paying the required premium, and received bond No. 2443 in renewal. In nearly all respects this bond was like the old. Its eighth condition was:

"In case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss resulting after said date of expiration, upon shipments made during the term of the bond, may be proven under such renewal bond, in accordance with the terms and conditions of such renewal. In case this bond is a renewal, and the premium has been paid at or before the expiration of the preceding bond, losses occurring during the term of this bond, on shipments made during the terms of said preceding bond, may be proven hereunder."

It was urged by the insurer that only such losses were carried over from the old to the new bond as were within the terms and con-

ditions of the latter bond. This court, speaking by Circuit Judge Taft, said:

"The question before us is one of construction. Is the loss guaranteed against under clause 8 of bond 1540, in case of a renewal, loss resulting from insolvency, as defined in that bond, or as defined in the renewal bond, 2443? If the former, then the judgment is supported by the averments of the bill; if [413] the latter, then, because the affairs of the debtor firm were in the hands of a receiver, a judgment, execution, and nulla bona return are not the test of insolvency, and the plaintiff's case is not made out. The exception as to the receivership was a new provision of bond No. 2443. Clause 8 of No. 1540 was of a somewhat illusory character. It did not become operative and binding until renewal, and it was of course, possible for the insurer to modify the effect of clause 8 by the terms of the very renewal upon which alone it became his contractual obligation. These contracts of indemnity are merely contracts of insurance, carefully framed, to limit as narrowly as possible the liability of the insurer, and doubtful expressions in them are to be construed favorably to the insured. *Catholic Knights of America v. Fidelity*, etc. Co. 11 C. C. A. 96, 63 Fed. 48; *Guarantee Co. of North America v. Mechanic's Sav. Bank*, etc. Co. 26 C. C. A. 146, 80 Fed. 766. Taking clause 8 of bond No. 1540 alone, it cannot be doubted that 'the loss resulting after such date of expiration on shipments made during the term of this bond,' which was to be proven during the term of the renewal bond, was intended to be the same kind of loss as that for which the bond was given, to wit, a loss resulting from insolvency, as in bond No. 1540 defined. This conclusion is enforced by the language of clause 11 in bond No. 1540, in which it is agreed that insolvency shall be returned of judgment executions unsatisfied during the term of bond or the renewal thereof aforesaid. Does clause 8 of bond No. 2443 indicate an intention to change the character of the loss upon goods sold during the life of the previous bond for which the insurer should become liable? The material words of that clause are: 'In case this bond is a renewal, . . . losses occurring during the term of this bond on shipments made during the term of said preceding bond may be proved hereunder.' Does proof, under the renewal bond, require that the insolvency shall be established according to the definition of that bond? Standing alone, it may be conceded that this would be the natural meaning of the words; but we are to construe this clause with clauses 8 and 11 of bond No. 1540. We are to consider that by that clause it was clearly intended to extend the benefit of the old bond to cover sales of

goods made under that bond, though losses thereon did not accrue during its life; and we ought not to defeat that intention and just expectation of the assured, unless the words of the renewal bond necessarily require it. Do they require it? We think not. In the light of the circumstances and the necessity for reconciling the clauses of the two bonds, the words of clause 8 of bond No. 2443 may be reasonably construed to mean merely that the formal proof of loss is to be made under the renewal bond and during its life, while clauses Nos. 8 and 11 of bond No. 1540 shall be given effect by holding that the fact of the loss is to be settled by the terms of the old bond."

In *American Credit Indemnity Co. v. Champion Coated Paper Co.* 103 Fed. 609, 43 C. C. A. 340, the same contention was made in reference to somewhat different provisions contained in bonds similar to those in the instant case. Lurton, C. J., speaking for this court, said:

"The initial loss and single debtor liability of the two bonds are irreconcilable, if we construe the conditions of the renewal bond as applicable to losses resulting from sales under the first bond. They are not so, if we limit the terms and conditions in respect of the initial loss and single debtor liability, found in the new bond, to sales occurring during its period. This is the most reasonable interpretation, and accords most nearly with the justice of the matter. In the case of *American Credit Indemnity Co. v. Athens Woolen Mills*, a cause decided by this court, and reported in 34 C. C. A. 161, 92 Fed. 581, we found a difficulty of the same general character arising out of a doubt as to whether the definition of insolvency found in a renewal policy applied to a loss which was provable under the renewal bond, though it arose from sales made during the currency of the preceding bond. . . . In the same case we held bonds of this character to be essentially insurance contracts, and that doubtful and ambiguous expressions were to be construed most favorably to the insured. Applying this rule, we have no hesitation in holding that the provisions which determine the amount . . . of the single [414] debtor liability applicable to claims resulting from sales during the period of the preceding bond are those found in the preceding bond."

We think that the losses on goods shipped during the period of the first bond, and before October 1, 1903, but occurring during the period of the second bond, which may be included in the calculation of the losses under the second bond, are not limited to the class of losses covered by said bond, but are the losses coming within the classes covered by the first bond

3. Should the amount of sales under the first bond be added to the amount of sales under the second bond, to determine the amount of initial loss to be borne by the insured?

The renewal bond contained the following provision:

"If between the date of the execution of this bond and the 30th day of September, 1904, both dates inclusive, on goods usually dealt in and at the time of shipment solely owned by the indemnified, shipped since the 1st day of October, 1903, the indemnified shall sustain actual losses in excess of \$5,000 hereinafter called the 'initial loss,' on sales and shipments not exceeding \$450,000, or, if such sales and shipments as aforesaid exceed such sum, as proportionally increased initial loss, the company agrees to pay such excess loss."

The first bond contained the same clause, excepting as to the dates mentioned. The contention is made by defendant that, if the losses on shipments during the first bond are carried over into the renewal bond, the amount of sales and shipments during the same period should also be carried over and added to the amount of sales and shipments made during the term of the latter bond; that, if this was done, said last-mentioned amount would exceed the maximum fixed, \$450,000; and that consequently the initial loss to be borne by the insured should be proportionately increased above \$5,000. It is a sufficient answer to this contention to point out that, while the parties might have made an agreement to that effect, they have not done so, and we cannot add to the contract which they have seen fit to make. By that contract it was specifically provided that:

"The losses occurring during the term of the renewal on goods shipped during the term of this bond shall be included in the calculation of losses under said renewal, the same as if the goods had been shipped during the term of such renewal bond."

No provision having been made for also carrying over the sales and shipments, we do not feel warranted in speculating on the question whether such provision should have been made. It should also be borne in mind that each bond, by its express terms, insured certain losses, in excess of an initial loss, on shipments made during a certain period, which period was different in each bond. And the amount of the initial loss to be borne by the insured under either bond, on the losses occurring during the period of such bond, depended, by the terms thereof, upon the amount of the shipments made during such period. Thus, the amount of the initial loss on the losses occurring during the period of the first bond, on shipments

made during such period, depended upon the total amount of such shipments. Consequently, if those shipments, or any part thereof, were carried over and used in computing the total amount of shipments under the second bond, the result would be that, [415] to that extent, the same shipments would be available twice as a basis for determining one initial loss, and the total loss to be borne by the insured would be proportionally increased beyond the sum agreed upon. We think that the contention of defendant cannot be sustained.

4. What has been said is also applicable to the contention that only losses, if any, in excess of \$5,000 on shipments made during the first bond, are covered by the renewal clause. This clause, however, specifically refers to losses, and not excess losses, and as the parties used plain language to express their agreement, we cannot substitute therefor other language of our own, which would alter the meaning of such agreement.

Moreover, as already pointed out, to adopt the contention of defendant in this regard would result in increasing the initial loss beyond the amount expressly agreed upon. The effect, in fact, would be that the insured would be obligated to bear one initial loss on losses on shipments made during the period of the first bond and occurring during such period, another similar initial loss on losses on the same shipments but occurring during the period of the second bond, and a third initial loss of the same amount on losses on shipments made during the period of the second bond and occurring during that period. That such a result, so inconsistent with the express provisions of the bonds governing the initial loss, was intended to be effected by the renewal clause in question, is hardly conceivable. Certainly no such intent was expressed by the language of such clause. While the other provisions refer to "losses in excess of" the initial loss, and to "excess loss," this clause mentions merely "the losses" occurring after, on shipments made before, the term of the first bond. We think that by the various provisions and clauses to which reference has been made the parties agreed: First, that defendants should indemnify plaintiffs against the losses defined by the first bond and occurring, in excess of the initial loss therein provided, on shipments made during such term, the total amount of the shipments made during such term being the basis for determining the amount of such initial loss; second, that the losses defined by the first bond, on shipments made during the term thereof (and therefore included in the basis for computing the initial loss thereunder), but occurring during the term of the second bond, should

be included in the amount of the losses defined by, and occurring during the term of, such second bond on shipments made during its term; and, third, that the defendant should indemnify the plaintiffs against the losses defined by the second bond and occurring, in excess of the initial loss therein provided, during the term thereof on shipments made during such latter term, the amount of such initial loss depending, and depending only, upon the amount of shipments actually made during such latter term, but the amount of the losses, that is, the gross losses, including not only the losses occurring on such shipments, but also the losses occurring during such latter term on the shipments made during the term of the first bond (which shipments had been already used, as shown, in computing the amount of the initial loss under the first bond). This contention, therefore, must be overruled.

[416] 5. Should the shipments of goods which were returned by customers to the insured have been deducted from the amount of sales and shipments, in determining whether the total amount of such sales and shipments exceeded the maximum fixed in each policy?

We think that, when goods shipped have been returned and accepted by the insured, no sale is consummated within the meaning of this policy. It does not appear, nor is it claimed, that any of the goods so returned were not accepted by the insured. It must therefore be assumed that such goods were shipped, but not sold, or else that any sales thereof were rescinded. In either event, no risk thereon was assumed by the insurer, and we think that the court did not err in refusing to include these shipments among the total amount of sales and shipments, in determining whether the maximum fixed had been exceeded.

6. Were plaintiffs insured against losses occurring between October 1, 1903, and December 4, 1903, the date of the execution of the renewal bond?

This bond contained the following clause:

"If between the date of the execution of this bond and September 30, 1904, . . . on goods . . . shipped since the 1st day of October, 1903, the indemnified shall sustain actual losses in excess of \$5,000, . . . provided: . . . (b) That such losses shall have been sustained on claims against debtors by or against whom between the dates of the execution and termination of this bond, judicial proceedings of any kind have been taken, establishing such debtor's insolvency."

The losses on three accounts, known as the Mandelstamen, Gammon, and Trigg claims, occurred between October 1, 1903, and such date of execution, which was December 4,

1903, and defendant contends that by reason of the language just quoted these losses were not covered by such bond. By reference to the schedules attached to the master's report we find that all the Gammon and Trigg shipments, and most of the Mandelstamen shipments, on which such losses occurred, were made before October 1, 1903. These losses, therefore, were covered by the renewal clause already discussed, and defendant's contention, if tenable, is inapplicable thereto. This leaves only a small part of the Mandelstamen shipments open to the objection last referred to. If the provisions here invoked by defendant were the only ones in the last bond relating to this question, the contention made might not be without some force. The same bond, however, contains the following language, already quoted in another connection:

"In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond No. 1318, but under the attached bond, subject to the terms and conditions thereof."

It is evident that the parties intended that the renewal bond should cover losses on goods shipped after October 1, 1903, and that the reference to the "date of the execution" of such bond was merely a printed clause designed to apply if the bond had taken effect at the date of its execution, instead of, as here, prior thereto. That the court committed no error in so holding is manifest from the rule of construction, applicable to such a case, to which reference is hereinafter made.

7. Among the losses insured by the first policy were losses—

"against a debtor for an amount not exceeding \$250 where the preliminary notice of loss has attached to it a report from the designated mercantile agency, or from some collection agency or attorney practicing in the place [417] where the debtor did business, that the claim against such debtor is uncollectible through legal proceedings."

Defendant objects to the allowance of any part of the loss on the account of Middleton, Chandler & Co. under this clause, because said account exceeded \$250, contending that said clause covers only a loss on an account not exceeding that sum, and no portion of an account which is in excess of the sum named.

It is unnecessary to construe this provision, because a reference to the findings and to certain exhibits mentioned therein discloses the fact that a petition in bankruptcy had been filed against the firm in question and defendant had duly filed a proof of claim therein. This loss was therefore insured, in any event, under the clause covering losses—

"against a debtor by or against whom a petition to be declared a bankrupt or insol-

vent has been filed under the federal bankruptcy law or under some insolvency or assignment law of any of the United States or any territory thereof."

8. Defendant assigns error on the allowance of the losses on the so-called Strauss and Henderson claims under the first bond, "for the reason that the record does not show that any event transpired during the term of either bond No. 1318 or No. 2071 which rendered said claims a provable claim under either of said bonds."

With respect to the Strauss account, the findings and evidence referred to therein show that plaintiffs duly sent defendant preliminary notice of loss, "because the debtor has been adjudged bankrupt according to the advices received from his brother," and that defendant replied by informing plaintiffs that:

"We have advices from our local attorney to the effect that this party was closed out under execution and nothing can be made out of him."

The schedule attached to, and made a part of, the findings, shows that said debtor was "closed out under execution." The loss was therefore covered by the policy, either as a loss on a debtor who had become a bankrupt, as a loss on a debtor duly reported uncollectible, or as a loss on "a debtor whose stock in trade has been sold in judicial proceedings." That formal notice of such facts was not specifically given in the preliminary proof of loss is immaterial, as defendant had prompt and sufficient knowledge of such threatened loss, and did not dispute liability on that ground. *American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* 95 Fed. 111, 36 C. C. A. 671; *Solman v. Mercantile Credit Guarantee Co.* 112 Mich. 258, 70 N. W. 886.

Regarding the Henderson account, it appears to be undisputed that a judgment was obtained thereon, that no property was found upon which execution could be levied, and that attorneys for defendant returned said claim to it uncollected. The loss was manifestly covered by the first bond, both as a loss on a debtor against whom an execution had been returned unsatisfied, and a loss on an account reported by an attorney as uncollectible.

It is, of course, well settled that credit insurance bonds, or policies, as they really are, like other insurance policies, if ambiguous in their language, are to be construed strictly against the insurer, by [418] whom they have been framed. *American Credit Indemnity Co. v. Champion Coated Paper Co.* supra; *Tebbetts v. Mercantile Credit Guarantee Co.* 73 Fed. 95, 38 U. S. App. 431, 19 C. C. A. 281; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 38 U. S.

App. 583, 19 C. C. A. 264, as was said in the case last cited:

"The bond, with its numerous conditions, being an instrument prepared by the insurer, we must apply to its construction the rule which was applied by this court in *Guarantee Co. v. Wood*, 15 C. C. A. 563, 68 Fed. 529: 'If the particular clause requiring interpretation cannot be brought into harmony with the rest of the contract, and the instrument, considered as a whole, is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured.'"

And the following language of the Supreme Court is applicable to our construction of these bonds:

"If the latter construction of the bond be not clearly right, it cannot be said to be inconsistent with its provisions. And it would be going very far to say that the construction given to it by the company was so clearly right that a different construction would be unreasonable or entirely inadmissible. We have, then, a contract so drawn as to leave room for two constructions of its provisions, either of which, it may be conceded, is reasonable, one favorable to the company, and the other favorable to the bank, and most likely to subserve the purposes for which the bond was given. In such a case the terms used must be interpreted most strongly against the party who prepared the bond and delivered it to the party for whose protection it was executed." *American Surety Co. v. Pauly*, 170 U. S. 160, 168, 18 S. Ct. 568, 566, 42 U. S. (L. ed.) 987.

Plaintiffs complain of certain rulings of the court; but, as they did not appeal from the judgment, they cannot in this court go beyond supporting such judgment and opposing every assignment of error. *Landram v. Jordan*, 203 U. S. 56, 27 S. Ct. 17, 51 U. S. (L. ed.) 88; *Southern Pine Lumber Co. v. Ward*, 208 U. S. 126, 28 S. Ct. 239, 52 U. S. (L. ed.) 420; *Texas Co. v. Central Fuel Oil Co.* 194 Fed. 1, 114 C. C. A. 21; *Swager v. Smith*, 194 Fed. 762, 114 C. C. A. 482; *O'Neil v. Wolcott Min. Co.* 174 Fed. 527, 98 C. C. A. 309, 27 L.R.A. (N.S.) 200.

We have carefully considered all the assignments of error raising questions which in effect involve the sufficiency of the facts found to support the judgment. No other questions have been properly presented for review. Nor do we intend to hold that without exceptions properly taken and directed to specific parts of a controversy of this complex character, or at least assignments of error specifically and clearly directed at the sufficiency of particular findings of facts to support the judgment rendered, this court will consider the details of the con-

troversy, searching the record as has been done in this case; but we have thought that course advisable here under the unusual conditions shown by this record.

As we find no error, the judgment is affirmed.

ON APPLICATION FOR REHEARING.

(April 16, 1915.)

PER CURIAM.—We are satisfied that whatever doubts exist as to the true mutual construction of the two contracts, as urged originally and as again presented by the rehearing application, are properly to be solved in favor of the insured by virtue of the rule pointed out in the opinion. The application for rehearing is denied.

NOTE.

Credit Insurance.

Introductory, 75.

Construction and Effect of Contract, 75.

Enforcement of Claims, 77.

Introductory.

The subject of credit insurance is discussed in the note to *Paskusz v. Philadelphia Casualty Co.* Ann. Cas. 1915A 652. This note reviews the recent decisions on that point.

Construction and Effect of Contract.

In *Henry A. Hitner's Sons Co. v. American Credit Indemnity Co.* 239 Fed. 689, a provision as to the renewal of a credit insurance bond was construed but was held to be inapplicable to a bond issued in lieu of a former one before its expiration. The court said: "We think the object of this clause is reasonably clear, and we agree with the credit company's discussion of the subject. We cannot do better than give the substance of what is said in the brief: The term of these credit bonds is usually for one year. The company does not agree to renew on the same terms, but (as an inducement to renew on some terms) it agrees that the new bond shall cover a loss occurring during the new term by reason of shipments made during the preceding term, and, moreover, it agrees that such mercantile rating of the debtor as would have justified a sale to him under the old bond shall still apply, although otherwise the new bond might require a higher rating. But these provisions evidently contemplate a new bond issued when the term of an old bond comes normally to an end. The new bond is a 'subsequent' bond; the company speaks of the 'twelve months next

prior' in describing the losses to be covered, and uses the phrase 'expiration of this bond' instead of 'termination'; the latter word being elsewhere used when the contract is dealing with the ending of the bond by other events that may bring its life to a close. Here the facts are different; the bond sued on was not issued when an old bond expired; it merely took the place of the first bond. They cover, not successive terms, but the same term, namely, from March 18, to March 17, and both are carried back to December 18. The first bond was surrendered and canceled at the wish of the insured, mainly in order to obtain a new bond that would increase the amount at risk to \$20,000. Naturally this doubled the premium, and for some reason that does not appear a change was also made in the rate of 'initial loss,' and an arbitrary date was agreed upon as the date when the premium should be regarded as paid. In a word, the bonds were not 'successive;' one was intended to be a substitute for the other, and therefore the clause just quoted does not have the application contended for by the plaintiff in error. Moreover, the conditions and limitations of the new bond are controlling, where they are inconsistent with the conditions and limitations of the old." See also the reported case as to renewal bonds.

Credit insurance contracts usually require the insured to bear an agreed initial loss before the insurer shall become liable. In *Blakeslee v. Ocean Acc. etc. Corp.* 166 App. Div. 587, 151 N. Y. S. 1038, such a provision was applied. The "rider" under consideration provided as follows: "In the event of the insolvency of any individual debtors coming within the terms and conditions of this contract, owing the guaranteed at the date of insolvency in excess of \$2,000.00 single account limit mentioned in the body of this contract, such excess, not exceeding \$1,000.00 (thereby increasing the single account limit to \$3,000.00), shall also be taken into calculation of losses under this contract, subject to the stipulated percentage of capital rating and all other terms and conditions of the contract; in that event, however, the guaranteed's initial or own loss of $\frac{1}{2}$ of 1 per cent not being less than \$750.00, as provided for in the body of this contract, shall be increased by such sum as will equal one-half of the difference between the original single account limit as above specified and the largest single account reported in excess thereof, within the limit above specified. All the terms and conditions of the contract to remain in force." The court said: "In so far as liability of the defendant is concerned, it seems equally clear that rider No. 2 merely increased defendant's liability upon each single account from \$2,000 to \$3,000 and in

that particular leaving the main contract otherwise unchanged. Such conception of the structure of this contract is borne out by the express provision above quoted, that from the net loss was to be first deducted the initial or own loss, borne by the guaranteed, and that the remainder, not exceeding the limit prescribed, was the amount of the liability of the defendant. It seems clear, therefore, that the deductions by way of initial or own loss, both under the main contract and under rider No. 2, are to be deducted not from the \$3,000 limit of liability, but from the amount of loss sustained by the assured on the single account, and that the defendant is to be liable for the difference up to the sum of \$3,000. The more serious question arises as to the additional initial loss provided for in rider No. 2. It will be noticed that this additional initial loss is therein prescribed to be one-half the difference between the original 'single account limit as above specified, and the largest single account reported in excess thereof, within the limit above specified.' The construction of this phraseology turns upon the meaning of the two expressions 'original single account limit' and 'largest single account reported in excess thereof, within the limit above specified.' The defendant contends that the expression 'original single account limit' refers clearly to the \$2,000 limit of liability prescribed under the original contract and in that connection calls attention to the fact that rider No. 2 deals exclusively with single account losses. It is further pointed out that in the same rider reference is made to the '\$2,000.00 single account limit mentioned in the body of this contract.' It concludes that necessarily, therefore, the original single account limit referred to is the \$2,000 limit originally in the contract and again referred to in this rider. Defendant further contends that the reference to the largest single account reported within the limit above specified must necessarily refer to the \$3,000 increased limit and that the largest account that could be reported within that limit would be \$3,000, and the defendant assumes that the account in question having exceeded that limit the computation provided for by this rider as an additional initial loss must necessarily be half of the difference between \$2,000 upon the one hand and \$3,000 upon the other, giving a result of \$500 to be added to the first initial loss. The plaintiff suggests the expression 'original single account limit' does not refer to the \$2,000 but to such an account as, after deducting the first initial loss, will leave the company liable for the full limit of \$2,000. In other words, that in this instance the original single account limit would be the sum of \$2,000 plus the first initial loss of \$1,055.23, or \$3,055.23.

The plaintiff upon the same reasoning construes the reference to the 'largest single account reported in excess thereof, within the limit above specified' to refer not to the sum of \$3,000, but to the account which will leave the company liable for just \$3,000, after deducting the first initial loss to be borne by the assured. Upon plaintiff's construction of the latter provisions of rider No. 2, the additional initial loss to be borne by assured amounts to \$406.93. Again referring to rider No. 2, the initial or own loss, provided in the original contract, was increased by 'one-half of the difference between the *original* single account limit as above specified (\$2,000) and the largest single account reported in excess thereof, *within the limit above specified* (\$3,000).' The italicizing and figures in parentheses are mine. It seems to me reasonably clear that the added initial or own loss, to be deducted, if we give effect to the italicized words above quoted, must mean just what the rider reads, viz., the difference between the original single account limit in the rider specified, which certainly was \$2,000, and the largest single account reported in excess thereof, within the limit specified in the rider, which was \$3,000. If I am right, the initial or own loss of nine-twentieths per cent on gross sales and shipments made by plaintiff during the year, which initial loss concededly amounted to \$1,055.23, was by rider No. 2 increased by \$500, that being one-half the difference between \$2,000 and \$3,000. This view leads to the holding in this case that the additional initial loss provided for by rider No. 2 amounts to \$500. This sum is to be added to the first initial loss of \$1,055.23, making the sum of \$1,555.23, total initial loss to be borne by the assured. This sum is to be deducted from the amount of the loss of \$3,869.08, leaving the amount of liability of the defendant \$2,313.85. This sum is within the liability limit of \$3,000, and, hence, plaintiff should have judgment for that amount, with interest thereon from February 23, 1912, together with the costs of the submission."

In *Knobel v. London Guarantee, etc. Co.* 163 N. Y. S. 977, another rider dealing with the same subject was passed on. The policy provisions were stated as follows: "The policy also provides that the plaintiffs themselves shall bear what is called an initial loss, or their own loss to the extent of 1 per cent, but not less than a minimum of \$1,750 of the plaintiffs' total gross sales and deliveries between the dates mentioned. The provisions above referred to are contained in the body of the policy, and concerning them there is no dispute between the parties. There is, however, attached to the policy a slip called a rider, which provides as follows:

'It is understood and agreed that losses of the insured occurring during the term of this policy, but after the payment of the premium therefor, on goods sold, shipped, and delivered by the insured between the 10th day of September, 1913, and the 8th day of February, 1914, both days inclusive, shall, if otherwise coming within the conditions of this policy, be covered by this policy, subject to its limitations and terms, the same as if its terms had included the period between said two dates: Provided, that only such sales, shipments, and deliveries shall be so covered as were made to debtors who were in sound financial condition at the time of the payment of said premium, and that this policy shall not cover a loss on any indebtedness which is overdue or under extension at the time of the payment of said premium, nor a loss on shipments made between said two dates to a debtor whose rating was detrimentally changed by the governing mercantile agency between the date of the first said shipments and the time of the payment of said premium. It is further agreed that the insured shall bear the same percentage of initial loss on the gross sales, shipments, and deliveries made between said two dates as the insured bears on shipments during the term of this policy.'

See also the reported case as to the scope of a provision respecting initial loss.

Enforcement of Claims.

An agreement between the insured and the insurer after a claim on a policy of credit insurance had been filed that the claim should await the termination of pending bankruptcy proceedings against the debtor in order that the amount of the loss might be determined therein has been held to waive a provision in the policy as to the time for bringing suit, and also to prevent the running of the statute of limitations. *Philadelphia Casualty Co. v. Thacher*, 236 Fed. 869, 150 C. C. A. 131.

It has been held that the fact that the agent of a credit insurer stated that the application was "a mere matter of form" did not preclude the insurer from defending on the ground of a misrepresentation as to the amount of outstanding debts which were past due. *Edward C. Moore Co. v. American Credit Indemnity Co.* 170 App. Div. 660, 156 N. Y. S. 737. In that case the effect of an examination of the books of the insured was also passed on, the court saying: "It is further contended now that the defendant was estopped owing to the fact that its auditor examined the books of the plaintiff some two months after the application was made, and thereby was afforded an opportunity to discover the manner in which the plaintiff

was doing business and the extent to which its accounts and bills receivable were outstanding; but it appears that that examination was not made with reference to this policy, but with respect to a policy issued for the preceding year. The auditor testified that he did not examine the condition of the outstanding accounts, and therefore it cannot be said that the defendant, with knowledge of the breaches of the warranties, ratified the policy."

In *L. Black Co. v. London Guarantee, etc. Co.* 216 N. Y. 560. 111 N. E. 241, a warranty that a statement of "losses" in the preceding year was correct was held to be broken by a failure to include therein a debt due from an insolvent from whom the insured had received certain property which was inadequate to meet the indebtedness, and that a mere nondisclosure was sufficient to constitute a breach of the warranty. The court said: "The respondent contends that the word 'losses' refers only to the losses which at the time the application is signed appear upon the books of the applicant. Whether or not there was a loss greater than that which the applicant stated is a question of fact and does not depend upon whether the entries in the applicant's books are in accord with the facts. The successful conduct of the business of credit insurance necessarily depends upon the insurer receiving correct information from the insured as to his losses. There are, we think, few business men who would not regard an account of an insolvent debtor as representing to some extent a loss, even though that debtor had made an assignment of his property for the benefit of his creditors. The statement in the application as to the 'losses' which the applicant had sustained cannot be limited to claims against insolvent debtors whose estates had been finally settled. The assignment by Edwards and the agreement of his creditors including the plaintiff to release him from liability and to look to his property for the pro rata payment of their debts was a 'loss' within the ordinary meaning of that term as used in an application for credit insurance. It is claimed on behalf of the respondent that the striking out of the printed application before signature of a clause which was designed to permit the applicant to state anything that he knew detrimental to the credit or standing of any customer brings this case within the rule that a breach of warranty cannot be predicated upon the mere failure to answer a question. The fallacy in this argument lies in the fact that no attempt is made to base the claim of breach of warranty upon the failure of the respondent to answer a question but rests entirely upon the fact that the applicant's answer to the question in relation

to its losses was not true. While the failure to answer a question will not of itself justify a claim of breach of warranty it does not excuse the making of a false answer. I think that it plainly appears from this record that at the time the plaintiff made the statement as to its losses, which made no reference to the Edwards accounts, the plaintiff had in fact sustained a loss upon that account."

As to notice of loss, see the reported case.

SCHULTZ

v.

DES MOINES MUTUAL HAIL AND CYCLONE INSURANCE ASSOCIATION.

South Dakota Supreme Court—July 24, 1915.

35 S. Dak. 627; 153 N. W. 884.

Insurance — Suspension for Nonpayment of Premium — Necessity of Notice.

Civ. Code, § 677, provides that no insurance policy shall be forfeited or suspended for nonpayment of any note or obligation taken for the premium or any part thereof unless the insurer shall give the required notice to the insured. Section 678 provides that the term "premium" includes policy fees and all other sums of money paid or agreed to be paid in consideration of a policy of insurance. Section 685 provides that the foregoing provisions shall apply to all insurance companies and associations, both stock and mutual, transacting the business of insuring property. It is held that one insured by a mutual hail and cyclone insurance association, who gave a note for the payment of the assessments to be levied each year, was entitled to the statutory notice before his policy could be suspended for nonpayment of any assessment, notwithstanding a provision in the by-laws of the company to the contrary, since that requirement was expressly made applicable to mutual insurance companies.

By-laws of Insurer — Conflict with Statute.

By-laws of a mutual insurance association, in conflict with express statutory provisions, cannot be sustained.

Hail Insurance — Time for Payment of Loss — Waiver of Provision in Policy.

A provision, in a hail insurance policy issued by a mutual company, that the loss should not be payable until a fixed time, is waived by a denial of all liability by the company.

[See note at end of this case.]

Same.

Officers of a mutual hail insurance company have authority to waive the provision

of the by-laws deferring the payment of losses by denying liability on the policy.
[See note at end of this case.]

Appeal from Circuit Court, Marshall county; McNULTY, Judge.

Action by Thomas Schultz, plaintiff, against Des Moines Mutual Hail and Cyclone Insurance Association, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Hall, Alexander & Purdy for appellant.
Sherin & Sherin for respondent.

[628] GATES, J.—In May, 1911, plaintiff made written application [629] to defendant for a policy of hail insurance, for the term of five crop years, upon his crops on a section of land; the amount of insurance aggregating \$4,000. The defendant, as its name implies, is a mutual insurance association and is organized under the laws of the state of Iowa. The application contained the following obligation:

"For value received, I promised to pay to the Des Moines Mutual Hail & Cyclone Insurance Association, of Des Moines, Iowa, an annual premium of 6 per cent on the face of my policy as follows: \$. . . . on or before October first, 1911, and the same amount on or before October first each year thereafter during the life of this contract. Or such portion thereof as may be annually assessed by said association, with interest at 8 per cent per annum, from date at the home office in Des Moines, Iowa. If paid when due no interest will be charged. This note is taken for insurance and is not negotiable. . . ."

The policy was issued. On September 15, 1911, a 5 per cent assessment was made, and plaintiff was notified of such assessment. He did not pay the assessment, and never has done so. Section 14 of the by-laws incorporated in the policy provided:

"When an assessment is made the secretary shall immediately notify by mail each member of his share of assessment, giving a list of losses and the name of each member sustaining a loss, and the member shall upon receipt of such notice remit within fifteen days to the secretary the amount of his assessment. As the expiration of twenty days if any member fail to remit his share of the assessment, then the secretary shall mail to the said member a second notice. Should any member fail to pay such assessment within ten days after second notice, the secretary shall then mail a third notice to said member by registered mail, adding a penalty of ten per cent of the original assessment. Should any member fail to pay his assessment within twenty days from date of first notice, he

shall stand suspended, and this association will not be liable to him for any loss that may occur before such assessment be paid in full. . . ."

It appears that the officers of the company complied with this section, with the exception that plaintiff denied having received a list of losses for 1911. On July 22, 1912, plaintiff suffered a severe loss by hail upon the crops for that year. The [630] company was promptly notified of the loss by the local agent. On July 23, 1912, the president of the company replied thereto as follows:

"Dear Sir: We have your letter of the 23d inst. reporting loss by hail under policy held by Thomas Schultz and on investigation we find that Mr. Schulz has not paid his 1911 assessment and therefore the company is not liable for the loss he claims."

On September 17, 1912, such president also wrote plaintiff's attorneys:

". . . But the premiums on policies No. 29757, Thomas Schultz. . . have not been paid, neither have they given us a note extending the time of payment on said premium, therefore, they are not entitled to recover as to the damage they claim."

On September 16, 1912, plaintiff was assessed 6 per cent for the year 1912, and was notified that he was owing:

"\$233.20—1911 Assmt. Pe. & Int.
\$240.00—1912 Assmt."

This action was begun October 7, 1912. Paragraph 5 of defendant's answer was as follows:

"Said defendant, further answering, alleges that it is a mutual insurance corporation organized under the laws of the state of Iowa, and that losses covered by policies issued by defendant are payable only by assessments made upon the members of such corporation, and that the by-laws of said corporation were contained in, and formed a part of, the said policy of insurance issued by the defendant to the plaintiff, and that section 10 of said by-laws so contained in, and forming a part of, said policy, was in part as follows: 'All losses shall be adjusted and paid on or before the 1st day of December of the same year, or as soon thereafter as the assessments can be collected.' Whereby no cause of action for failure to adjust or pay any loss covered by the policy of insurance mentioned in the complaint accrued prior to the 1st day of December, 1912, whereby this action was prematurely brought, all of which the said defendant hereby pleads in abatement of this action."

The testimony offered tended to show a hail loss of \$1,973. At the close of plaintiff's testimony, defendant moved for a directed verdict upon the ground specified in the above-recited paragraph of the answer, which motion was denied. At the close of [631] the

testimony, defendant moved for a directed verdict upon the ground that, by the failure of plaintiff to pay the 1911 assessment, the policy was suspended and not in force at the time of the loss, which motion was denied. The plaintiff thereupon moved for a directed verdict for the sum of \$1,973, with interest, which was granted, and verdict and judgment were accordingly entered. From the judgment and order denying a new trial, defendant appeals.

We shall first consider the question of suspension of the policy. Section 677, C. C., provides:

"No policy of insurance shall, by virtue of any condition, or provision thereof, be forfeited, suspended or impaired for nonpayment of any note or obligation taken for the premium or any part thereof, unless the insurer shall, not less than thirty days prior to the maturity of such premium, note, or obligation, mail, postage prepaid to the assured at his usual post office, a notice stating:

"1. The date when such note or obligation will become due.

"2. The amount of principal and interest that will then be due.

"3. The effect upon the policy of non-payment.

"4. Such notice shall further inform the assured of his right, at his own election, either to pay in full and keep the policy in full force, or to terminate the insurance by surrendering the policy and paying such part of the whole premium as it shall have earned, and must further state the amount which assured is lawfully required to pay, or which, on account of previous payment, may be due him, in case of his election to terminate the insurance on the day of the maturity of the premium, note or obligation."

It appears that items 1 and 2 of said section were complied with by appellant in September, 1911, but that items 3 and 4 were not embraced in the notice or notices. It is appellant's contention that this section applies only to stock company policies and can have no application to the policies of mutual companies. The Supreme Court of our sister state, in *Lamb v. Merchants Nat. Mut. F. Ins. Co.* 18 N. D. 253, 119 N. W. 1048, held that section 5951, N. D. Rev. Codes 1905, was not applicable to a mutual insurance policy, saying that it—

[632] "only applies where a note or obligation is given for the whole or a part of the premium, and has no bearing on this case."

That section is almost exactly the same as our section 677 C. C., but in the case before us, there was an obligation given which was specifically denominated by the insurer and insured as a "note." Again, section 678, C. C., provides:

"The term 'premium' within the meaning of this article, includes policy fees, in excess of

two dollars, on any one policy, and all other sums of money paid, or agreed to be paid, in consideration of a policy of insurance."

There is great force in the reasoning of appellant's counsel to the effect that section 677, C. C., ought not to be held applicable to a policy of insurance in a mutual company, and, if we were free to adopt such reasoning, we would be inclined to do so, but we are not permitted so to do. In the face of an express legislative act defining the scope of section 677, C. C., we may not interpret it according to the "rule of reason." Section 685, C. C. says:

"The foregoing general provisions of this article shall apply to all insurance companies and associations, both stock and mutual, incorporated or organized under the laws of this or any other state or territory of the United States, or foreign government, transacting the business of fire, cyclone, tornado, hail, marine, live stock or any other kind of insurance upon property in this state."

Article 16, c. 3, tit. 2, pt. 3, of the Revised Civil Code of 1903, embraces sections 664-685, inclusive, and is headed "General Provisions." And it would seem clear, beyond doubt, that the Legislature, in adopting the Revised Civil Code of 1903, intended to make section 677 applicable even to cases of mutual insurance. In this connection we may observe that we are unable to find a provision in the North Dakota Code of 1905 similar to our section 685, C. C. If it was there, it was not noted in the opinion in *Lamb v. Merchants' Nat. Mut. F. Ins. Co.* supra. That section originated in section 27, c. 69, Territorial Laws 1885. Such chapter did not contain a section corresponding to the present section 677, C. C. That section first appeared in chapter 69, Territorial Laws 1887; but when the Legislature of 1903 adopted the Revised Civil Code, as recommended by the Code Commissioners, [633] it expressly made the provisions of section 677 binding upon all mutual insurance companies. The wisdom or necessity of such act may not be made the basis of a decision by the courts. In *Peever Mercantile Co. v. State Mut. F. Ins. Co.* 25 S. D. 406, 127 N. W. 559, and 23 S. D. 1, 119 N. W. 1008, 19 Ann. Cas. 1236, this court arrived at the same conclusion at which we have arrived upon this branch of the case, wherein it was held that, by reason of section 1796, C. C., the provisions of section 1849, C. C., were binding upon a mutual company.

We are therefore compelled to hold that, inasmuch as respondent was not given the notice of assessment required by law, his policy of insurance was not, in point of law, suspended by reason of his nonpayment of his assessment, notwithstanding the provisions of the by-laws of the company. By-laws in conflict with express provisions of statute cannot be sustained. The law requires the officers of the

company to give a certain kind of notice. They did not do so. If they intended to suspend that policy, they should have given the notice pointed out in the statute. The fact that the policy was not suspended at the time of the loss, in 1912, was due to their negligence or ignorance of the provisions of our laws.

Appellant's claim that the action was prematurely brought must likewise be held for naught. In the late case of *Wondra v. National L. Ins. Co.* 126 Minn. 136, 147 N. W. 961, the Minnesota court said:

"The rule is well settled in this state, as elsewhere, that a provision of an insurance contract like that in this case, by which the insurance company is given a certain time within which to make payment of the loss, may be waived, and is waived, by the denial of liability by the company. *Hand v. National Live-Stock Ins. Co.* 57 Minn. 519, 59 N. W. 538; 3 Notes to Minnesota Cases, 1170."

This rule is set forth in 4 Cooley's Briefs on Ins. pages 3959-3962, where a long list of authorities is cited. To these may be added the following, among many other decisions rendered since the publication of that work: *Continental Casualty Co. v. Mathis*, 150 Ky. 477, 150 S. W. 507; *Clark Millinery Co. v. National Union F. Ins. Co.* 160 N. C. 130, 75 S. E. 944, Ann. Cas. 1914C 367; *Miles v. Casualty Co. of America*, 115 N. Y. S. 1, affirmed in 136 App. Div. 908, 120 N. Y. S. 1135. Such rule is practically [634] universally acknowledged, except in states, like Iowa, having statutory provisions which control.

Appellant's claim that the officers of a mutual company are powerless to waive the provisions of the by-laws set forth in their answer, above quoted, is likewise without merit. Many of the decisions cited in Cooley's Briefs on Ins. supra, were cases involving mutual companies, and this court has decided the principle involved, in the cases: *Schouweiler v. Merchants' Mut. Ins. Assoc.* 11 S. D. 401, 78 N. W. 356; *Norris v. Equitable F. Assoc.* 19 S. D. 114, 102 N. W. 306; *Bolte v. Equitable F. Assoc.* 23 S. D. 240, 121 N. W. 773.

The other assignments of error contained in an appellant's brief are not deemed of importance.

The judgment and order appealed from are affirmed.

NOTE.

Hail Insurance.

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Introductory.

The subject of hail insurance is considered in the note to *Boyer v. Farmers' Mut. Hail Ins. Co.* Ann. Cas. 1915A 671. The recent cases on that subject, which it is the purpose of this note to present, involve in the main questions different from those which arose in the earlier decisions, and adherence to the subdivisions of the earlier note is for that reason impossible.

Authority of Insurer.

In most of the recent cases involving a policy of hail insurance it appears either that the insurer was organized for the express purpose of insuring against loss by hail or its authority to write insurance of that kind was accepted without question. In *Ring v. Phoenix Assur. Co.* (Kan.) 164 Pac. 303, the authority of the insurer was discussed for a collateral purpose, the court saying: "It is suggested by the counsel for the plaintiff that, as the answer admits the authority of the company to write hail insurance in Kansas (although no such authority appears), and as section 2140 of the General Statutes of 1915 provides that any corporation organized under the laws of another country and authorized to do business in this state shall be subject to the same provisions, judicial control, restrictions, and penalties, except as therein provided, as corporations organized under the laws of this state, and as the defendant holds itself out as authorized, it ought to be treated like a home company. The plaintiff alleged, however, in his petition, that whether the defendant was authorized to write hail insurance he was not able to say, and could not ascertain definitely. While, therefore, it might be an act of ultimate and essential justice to penalize the defendant for doing unauthorized hail insurance business in this state no reason is apparent why a citizen who patronizes such a company instead of one organized at home should recover more than the statute and the settled law of the state permit him to recover."

Formation of Contract.

In *Van Arsdale-Osbourne Brokerage Co. v. Patterson* (Okla.) 154 Pac. 1131, it was held that where a crop was wholly destroyed by hail after an application for hail insurance thereon but before the issuance of the policy there was no insurance, and the premium note was without consideration. The court said: "The date of the application for this policy was April 26, 1906. On the night of

April 26, 1906, a hailstorm destroyed the wheat covered by this application; and the defendant immediately notified the plaintiff of this fact. But, regardless of this notice, the policy was issued on this application May 1, 1906. The defendant, under a mistaken idea that the liability of the company began on the date of the application, demanded that the company settle for the damage. The company declined to do this, but offered to return defendant's note if he would return the policy at once. He refused to return the policy, and in a lengthy correspondence covering several weeks insisted on the company settling the damage, which, in response to each of his demands, the company refused to do. When the note fell due defendant refused to pay it, and this suit was brought to collect the amount due under the terms of the note. The defendant for answer plead a failure of consideration. A trial was had to the court and a jury, which resulted in a verdict and judgment for the defendant, and from this judgment, the plaintiff appeals to this court. As we view the case, it narrows itself down to the sole question as to whether or not there was any consideration for the note. At the time the policy was issued the plaintiff had notice that there was nothing to insure, and should not have issued the policy. On the other hand, the defendant should have returned the policy under the offer of the company that, if he would do so, it would return his note. But the real test of the rights of the parties under these conditions is: Was the company injured, or did it incur any liability by the defendant's refusal to return the policy? We think not; for under the conditions, the defendant could not derive any benefit from the policy. And under the conditions the company could not incur any liability by reason of his failure to return the policy, for the reason that the subject-matter of the policy had been destroyed before the policy was issued. And the fact that the defendant had a mistaken idea of his rights, and thought he could hold the company liable for all damage from the date of his application, and therefore held the policy, and insisted on settlement on that theory, would not in reality change the relations or rights of the parties."

Effect of Error in Policy.

An insurance agent in inserting in a policy of hail insurance the description of the premises insured acts as the agent of the insurer, who cannot take advantage of his errors. *Mathoney v. Minnesota Farmers' Mut. Ins. Co.* (Minn.) 161 N. W. 217; *French v. State Farmers' Mut. Hail Ins. Co.* 29 N. D. 426, 151 N. W. 7, L.R.A.1915D 432. In the case first cited a suit for a reformation of the policy was sustained, and it was held that

a condition in the policy with respect to arbitration of differences had no application to a dispute as to the existence of such a mistake. In *French v. State Farmers' Mut. Hail Ins. Co.* supra, it was held that reformation was not necessary and that the insured could aver the facts as to the mistake and recover at law on the policy. After reviewing the authorities the court said: "A number of the authorities cited above are based upon the theory that the insurance company is estopped to deny the error of its agent, and that for that reason the plaintiff may sue upon the contract as issued, and, without any allegations in the complaint relative to the mistake, introduce testimony showing the knowledge of, and mistake made by, the agent of the insurance company in misdescribing the property. As we view the matter, however, the principle of estoppel should not be applied in a case where there is a misdescription of the property intended to be covered by the policy, but it is rather a case coming within the rule that parol evidence may be admitted for the purpose of showing that, by reason of a mistake, a written instrument does not truly express the intention of the parties. While there are cases holding that such evidence is only admissible in a court of equity, 'yet this rule is by no means universal, and, in fact, the weight of authority supports the doctrine that evidence of this character is also admissible in an action at law.' 9 Ency. of Evidence 344. This rule is supported by the weight of modern authority. 17 Cyc. 702; *Wigmore on Evidence*, §§ 2413-2415. See also *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93; *Gorder v. Hilliboe* [17 N. D. 281] supra. But, 'in order that parol evidence may be admissible to show a mistake in a written instrument, the existence of such mistake must have been alleged in the pleadings.' 17 Cyc. 703. It is established by the undisputed evidence in this case that the crops intended to be covered by the policy were destroyed; that the loss was adjusted by the adjuster of the defendant at the amount for which the trial court rendered judgment; and it is conceded that the plaintiff suffered a loss for at least the amount of the adjustment. It is inconceivable how defendant was in any manner injured by the mistake in the application and policy. It is not contended that there was any extra hazard in township 157, range 51, which did not exist in township 158, range 52."

Withdrawal from Mutual Association.

In *Mohler v. Guarantee Hail Assoc.* (Ia.) 161 N. W. 451, it was held that a member of a mutual hail insurance association could withdraw from membership on account of a fraud committed by the association, and that the conditions of the policy as to withdrawal had

no application. The action being by the member to cancel his membership, the contentions of the association were stated as follows: "First. That the evidence is not sufficient to show that the plaintiff was induced to become a member of the association through fraud. Second. That the attempt made by the plaintiff to have his policy canceled in June, 1911, was not sufficient, for the reason that plaintiff made no offer to pay his pro rata share of the losses and expenses up to the time, and that it was optional with the defendant as to whether or not it would cancel a policy during the months of June, July, and August. Third. That the plaintiff was guilty of laches, and is barred and estopped from making the claim of fraud and having his policy canceled because of the time intervening between the receiving of the policy and the commencing of the suit. The suit was commenced on the 7th day of May, 1913. Fourth. That the claim that the defendant's company has been mismanaged is not sufficient reason for canceling the policy without requiring him to pay his assessments." Passing on those objections the court said: "Taking up the first proposition relied upon, we agree with counsel that the proof of fraud alone is not sufficient. It must appear from the record that the fraudulent representations were the inducement to, and did bring about the act complained of; that the plaintiff would not have entered into the association if it had not been for the fraudulent representations made. We think the record not only shows the fraud charged, but that it induced the making of the application. As to the second proposition, we have to say that the policy was issued on the 14th day of April, 1911. On the 11th day of June, 1911, the plaintiff directed the company to cancel the policy. On June 12th, the company replied, acknowledging the receipt of the letter requesting cancellation and said: 'We return policy herewith and a copy of the Iowa law regarding cancellation. If you will read the same carefully, and especially the last four lines, you will see that hail insurance policies may be canceled, only at the option of the officers of the association carrying the risk, during the months of June, July and August. The officers of the association have decided not to cancel any policies for any reason during these months.' This seems to be all the communication directly with the company until this suit was brought. It appears that the plaintiff returned the policy to the company, with instructions to cancel; that the defendant refused to cancel it, and based its refusal on the ground that they would not cancel any policy during the month of June; that the officers had so decided, basing their right to refuse on the statute. It does not appear that any losses had occurred in the

meantime for which the plaintiff could be assessed, or that other policyholders would be affected by plaintiff's demands. We think the demand was timely. The third proposition we answer in the same way. As to the fourth proposition, it is apparent that if the policy was voidable for fraud practiced upon the plaintiff in securing it, and the plaintiff had a right to rescind at the time he returned the policy and demanded the cancellation of his policy, the policy itself had no binding force upon the plaintiff. He was not bound by any of its provisions as to the method of cancellation, or for the payment of any assessments made. Fraud vitiates all contracts. No rights can be required under a contract obtained in this way. Having demanded cancellation of his policy, and it being shown that the policy was obtained by fraud, it does not lie in the defendant's mouth to plead that he should have brought an action earlier to force them to do that which it was their duty to do, under the law, when demand was made upon them for cancellation. If he had a right to rescind the contract at the time he tendered rescission, then the contract became of no legal or binding force upon him, nor was he bound by any of its provisions. The contract being void for fraud practiced upon the plaintiff in procuring it, the company acquired no rights under the contract which it could enforce against the assured, after he had tendered rescission."

Assessment.

In *Minnesota Farmers' Mut. Ins. Co. v. Landkammer*, 126 Minn. 245, 148 N. W. 305, it was held that a mutual hail insurance company could not discriminate between districts with respect to the amount of assessments. The court said: "Plaintiff, a mutual hail and cyclone insurance company, issued a policy insuring defendant against loss of growing crops by hail for five years from April 1, 1909. The by-laws provide that 'each member shall be liable . . . for his pro rata share of all losses and expenses.' This provision is in accordance with the statute which provides, in section 3414, G. S. 1913, that 'every policyholder shall be liable to a ratable assessment for all losses and expenses incurred while a member,' and in section 3307, G. S. 1913, that the company shall make an assessment for losses and expenses 'ratably upon its members liable thereto.' In the present case assessments were made to pay the losses and expenses incurred in the years 1909, 1910, 1911 and 1912. In making such assessments plaintiff levied upon all policies covering crops grown upon lands lying west of range 29 one per cent more than it levied upon policies covering crops grown upon lands lying in range 29 or east thereof.

Defendant did not pay the assessments upon her policy, and plaintiff brought this action to collect the same. Defendant's land lies west of range 29, and she insists that the assessments are invalid, for the reason that they were not levied pro rata upon all members as required by the statute and by the by-laws of the company. In *Swing v. H. C. Akeley Lumber Co.* 62 Minn. 169, 64 N. W. 97, Chief Justice Start stated that 'the essential principle upon which mutual insurance companies are based is that each member will pay his proportionate share of the losses incurred during the time of his membership, and that he will not be required to pay any greater amount thereof than his pro rata share; and any assessment which violates this principle cannot be enforced against him.' Plaintiff does not question this rule nor contend that assessments can be sustained which were not levied pro rata upon all members of the company; but insists that the hazard as to crops grown in the western part of the state is greater than the hazard as to crops grown in the eastern part thereof, and that the company may take that element into consideration in determining what constitutes a pro rata assessment. It is sufficient to say that neither the statute nor the by-laws recognize a difference in the hazard as a reason for making a difference in the assessment. Counsel argue that such difference is a proper matter to take into account in fixing the amount of insurance premiums, but that is not the question presented. The question before the court is whether a contract of insurance which requires all assessments to be levied pro rata upon all members is violated by assessing those members living in one locality a greater per cent upon the amount of their insurance than those living in another locality. In our opinion such an assessment clearly violates both the contract and the statute, and cannot be sustained. The statute requires that the rates shall be uniform for all members. Whether this is the proper rule, or whether sufficient reasons exist for applying different rates to different localities, is a question for the legislature."

In *Dorwin v. North Wisconsin Farmers' Mut. Cyclone Ins. Co.* 160 Wis. 663, 152 N. W. 454, the following by-law of a mutual hail insurance company was construed: "Assessments for hail insurance losses shall be ten cents per acre each year or part of a year that such policy is in force, and the losses of one year, if in the aggregate they exceed the amount realized from the assessment on hail policies for such year and amount of hail insurance on hand, shall be paid pro rata from the amount so realized and on hand, which payment shall be in full for such loss." The court said: "The question involved on this appeal is whether the defendant had the right to pay the expenses incurred out of the

assessment made in 1912. The trial judge held that the policyholders were entitled to the entire proceeds of the assessment without deduction for expenses. In the final analysis the answer must depend upon the construction placed upon the by-law quoted in the statement of facts, and the case was decided on this basis. The by-law is susceptible of the construction given it by the circuit court, but we do not think it is the correct one. The reasonableness of the expenses paid is not called in question. The defendant was obliged to incur expenses in soliciting insurance and in adjusting losses and for other legitimate purposes. These expenses had to be met in some way, and the only practical way to meet them was by making an assessment to cover them. Under the construction adopted by the court it might well be that they could not be paid at all. We are of the opinion that the application, the policy, and the by-law all contemplate that indebtedness should not be carried over from one fiscal year to another and that the expenses should first be paid out of the assessment made and the balance used to pay losses, and that the policyholders should be entitled only to such balance."

As to forfeiture for failure to pay an assessment, see the reported case.

Notice of Loss.

In *Union Mut. Ins. Co. v. Huntsberry* (Okla.) 156 Pac. 327, it was held that a failure to give the statutory notice of loss precluded a recovery on a policy of hail insurance unless the failure was waived, and, reviewing the evidence, it was held that there was no waiver.

DURAND ET AL.

v.

DYSON ET AL.

Illinois Supreme Court—December 22, 1915.

271 Ill. 382; 111 N. E. 143.

Constitutional Law — Application of Fourteenth Amendment — Police Power.

The Fourteenth Amendment to the Federal Constitution [9 Fed. St. Ann. 384 et seq.] was not designed to interfere with the exercise of the police power of states.

Animals — Diseased Animal as Nuisance.

Cattle afflicted with a dangerous or contagious disease are public nuisances at common law, which nuisance cannot be legalized,

as it invades the peace and safety of the people.

Destruction of Diseased Animals — Validity of Statute Providing Compensation to Owner.

Laws 1915, p. 3, § 2, declares that it shall be the duty of the board of live stock commissioners to investigate all cases of communicable diseases among domestic animals, and to use all proper means to prevent the spread of such diseases, and provides for the extirpation thereof, authorizing the destruction of the diseased animals, as well as the premises in which they are housed. The section also authorizes the board to make agreements with the owner as to the value of the animals, and, in case such an agreement cannot be made, provides for the appraisal thereof. Section 8 declares that all claims arising from the slaughter of animals shall in no event exceed \$300 for any registered animal of the bovine species, or \$150 for any unregistered animal, and that the average shall not exceed \$250 per head for a herd of registered cattle, nor \$125 for unregistered cattle. It is held that as diseased cattle constitute a nuisance, and as Const. U. S. Amend. 14 is not intended to deprive states of their police power, the statute is valid, for in such case the determination of whether cattle are diseased, as well as whether they should be slaughtered, is properly left to an administrative board, as the board of live stock commissioners.

[See note at end of this case.]

Courts — Power to Nullify Statute.

A court of equity has no jurisdiction to declare void a legislative act which does not contravene either the state or Federal Constitution.

Constitutional Law — Police Power — Legislative Determination of Necessity.

In construing a statute authorizing the destruction of diseased cattle, it must be presumed that the legislature has carefully investigated and determined that the interests of the public require such legislation.

Animals — Destruction of Diseased Animals — Delegation of Power to Board.

Laws 1915, pp. 3, 5, §§ 2, 8, authorizing the destruction of diseased cattle, and providing for compensation of owners, is not an abuse of legislative discretion, though the determination of the question of disease be left to the board of live stock commissioners.

[See note at end of this case.]

Review of Decision of Board — Remedy of Owner.

As Laws 1915, pp. 3, 5, §§ 2, 8, authorizing the destruction of diseased cattle by the board of live stock commissioners, is valid, the remedy of a stockman whose cattle have been by the board determined to have a contagious disease and are about to be destroyed is at law, and not in equity, even though it is contended that the cattle are not afflicted with a contagious disease, and the evidence of experts is conflicting.

Injunctions — Motion to Dismiss — Effect as Admitting Allegations of Bill.

A motion to dissolve a temporary injunction and dismiss a bill may be treated as a demurrer, admitting all the facts in the bill well pleaded.

Appeal from Circuit Court, Lake County:
DONNELLY, Judge.

Action by Scott S. Durand et al., plaintiffs, against Oliver E. Dyson et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

Robert S. Iles and Charles J. O'Connor for appellants.

P. J. Lucey and Lester H. Strawn for appellees.

[383] DUNCAN, J.—Appellants, Scott S. Durand and Grace G. Durand, filed in the circuit court of Lake county a bill for an injunction to restrain Oliver E. Dyson, R. W. Patterson, B. J. Shanley and L. F. Brown, and their agents, employees and assistants, from slaughtering their herd of cattle. A temporary injunction having been awarded by the master in chancery without notice, appellees appeared in court and by agreement of the parties the record showed a motion, in substance, to dissolve the temporary injunction and to dismiss the bill for want of equity. The court, on consideration of the motion, dissolved the temporary injunction and dismissed the suit for want of equity. On motion of appellants, supported by affidavit, the court further ordered that the temporary injunction be continued in full force pending the determination of the appeal to the Supreme Court then and there prayed by appellants.

The averments in the bill are, substantially, that appellees R. W. Patterson, B. J. Shanley and L. F. Brown, individually and collectively as members of the Board of Live [384] Stock Commissioners of the State of Illinois, and Oliver E. Dyson, individually and as State veterinarian of Illinois, and various agents, employees and assistants of appellees, threaten and are about to kill sixty-one head of pure-bred and registered Guernsey cattle belonging to the appellants and located on their farm in the township of Shields, in said county, which are of the value of not less than \$35,000; that appellees, their agents and assistants, have no legal right or interest in said animals; that appellees represent the State of Illinois under and by virtue of an act of the legislature entitled "An act to revise the law in relation to the suppression and prevention of the spread of contagious and infectious diseases among domestic animals," which they claim authorizes them to

kill animals afflicted with or exposed to a dangerously contagious or infectious malady, and also insist that appellants' said cattle are afflicted with such a malady (known as the hoof and mouth disease), and that said statute authorizes them to kill all of said herd, and requires appellants to consent thereto and to accept therefor the sum of \$13,500, the valuation at which they have been appraised, and upon failure of appellees to so consent, that then appellees are authorized by the statute to take and kill said animals without any compensation whatever to appellants; that a large number of appellants' animals are entirely well of the disease of which it is claimed by appellees that they are afflicted and that the animals so recovered are immune; that the remainder of them not entirely cured are through the crisis and convalescing from the disease; that the animals cured are neither carriers of the disease nor liable to a recurrence of an attack therefrom; that said animals and the premises whereon they are situated can be fumigated, disinfected and as thoroughly cleansed as they could be after the death and burial of the animals, and that none of said animals are now afflicted with any malady that is dangerously contagious or infectious; that appellees are now digging trenches on appellants' [385] farm preparatory to burying said animals, and will kill them on finishing the same unless restrained; that if notice of the application for the injunction is given, appellees will kill the animals before the court will have an opportunity to pass upon the application; that by granting the injunction without notice and without bond no harm can come to anyone, as all the animals are kept in close quarantine. The bill further avers that said law is unconstitutional as construed and applied by appellees, in that it is an unreasonable exercise of the police power of the State and takes private property without due process of law, contrary to the express provisions of the constitution of the United States and of the constitution of this State, and because it violates other provisions of said constitution.

Motions were made in this court to set aside the order of the circuit court providing that the temporary injunction be continued pending this appeal, and that the cause be decided on its merits by this court before the adjournment of this term. Owing to the great importance of the case to the parties and to the public generally, the motions were taken and considered together and the order and decree of this court were entered in term time, with the announcement that the opinion of the court in the case would be filed later.

The material provisions of the statute referred to in appellants' bill, in so far as they are pertinent to the questions raised

on this appeal, are found in the amendments to sections 2 and 8 thereof, approved June 29, 1915, in force July 1, 1915. (Laws of 1915, p. 3.) Section 2 thereof provides: "It shall be the duty of said Board of Live Stock Commissioners to cause to be investigated any and all cases, or alleged cases, coming to their knowledge, of communicable diseases among domestic animals, within this State, and to use all proper means to prevent the spread of such diseases, and to provide for the extirpation thereof; and in the event of reasonable grounds for the belief that any such [386] communicable disease exists in this State, it shall be the duty of the person owning or having in charge any animal or animals infected with such disease, . . . to immediately notify said Board of Live Stock Commissioners, or some member thereof, . . . of the existence of such disease, and thereupon it shall be the duty of said board, or some member thereof, . . . immediately to cause proper examination thereof to be made, and if such disease shall be found to be a dangerously contagious or dangerously infectious malady, said board, or any member thereof, or the State veterinarian, or any assistant State veterinarian, shall order such diseased animals, and such as have been exposed to contagion, and the premises in or on which they are, or which may have been recently occupied by them, to be strictly quarantined; . . . which quarantine, and every quarantine established under the provisions of this act, shall remain in force and effect until removed by order of said board; and said board shall prescribe such regulations as they may deem necessary to prevent any such disease from being communicated from any such diseased animal or exposed animal or from the infected premises or through any other means of communication. In all such cases the said Board of Live Stock Commissioners, or in case the number of animals shall not exceed five, any member thereof, shall have power to order the slaughter of any or all of such diseased or exposed animals. The said board shall also have power to cause to be destroyed all barns, stables, premises, fixtures, furniture and personal property infected with any such communicable disease so far as in their judgment may be necessary to prevent the spread of such disease and where the same cannot be properly disinfected. . . .

"When the said board . . . determines that any animal is affected with, or has been exposed to, any dangerously contagious or infectious disease, the board or any member thereof, . . . may agree with the owner upon [387] the value of such animal or of any property that it may be found necessary to destroy, and in case such an agreement cannot be made, said animals or property shall

be appraised by three competent and disinterested appraisers. . . .

"Upon such appraisement being made, it shall become the duty of the owner to immediately destroy such animals and to dispose of the carcasses thereof, and to disinfect the premises occupied by such animals, in accordance with the rules prescribed by said board governing such destruction and disinfection. And upon his failure so to do, said board . . . shall cause such animal or animals or property to be destroyed and disposed of, and thereupon such owner shall forfeit all right to receive any compensation for the destruction of such animal or animals or property."

"Sec. 8. All claims against the State arising from the slaughter of animals as herein provided for, shall be made to the Board of Live Stock Commissioners, . . . and it shall be the duty of said board to determine the amount which shall be paid in each case on account of the animals so slaughtered and fix the fair cash value thereof in health if of the bovine species, for beef, dairy and breeding purposes, in no event to exceed three hundred dollars (\$300) for any registered animal and not to exceed one hundred fifty dollars (\$150) for any animal not registered; nor to exceed an average value of two hundred fifty dollars (\$250) per head for all registered animals in any herd and not to exceed an average value of one hundred and twenty-five dollars (\$125) per head for all non-registered animals in any herd, . . . and said board shall certify the same to the Governor for his approval, and if the Governor shall find that said appraisers have proceeded in accordance with law, he shall approve the same for payment, and the Auditor of Public Accounts shall, upon presentation of the same to him, thereupon issue his warrant upon the State Treasurer for the amount fixed by said appraisers in favor of the owner of the animals."

[388] If the decree of the court in this case denies to appellants any rights and privileges guaranteed to them under the constitution of the United States or under the constitution of this State, it must necessarily follow that the said statute is not a legitimate exercise of the police power of the State for the suppression and prevention of dangerously contagious and infectious diseases among domestic animals. It is the settled doctrine of the Supreme Court of the United States that the fourteenth amendment of the constitution (9 Fed. St. Ann. 384 et seq.) was not designed to interfere with the exercise of the police power of the State. (Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 U. S. (L. ed.) 253.) This court has also declared that "in the exercise of the police power the command, 'so use your own property as not

to injure others,' and the maxim, 'the safety of the people is the supreme law,' are to be observed and given effect." *Sings v. Joliet*, 237 Ill. 300, 86 N. E. 663, 127 Am. St. Rep. 323, 22 L.R.A. (N.S.) 1128.

In speaking of the extent and limits of what is known as the police power, the Supreme Court of the United States said in *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 385: "It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; . . . the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; . . . the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the [389] legislature to determine not only what the interests of the public require but what measures are necessary for the protection of such interests." The court then lays down the further rule that to justify the State in thus interposing its authority it must appear, first, that the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. While it is true that such legislation is subject to the supervision of the courts, it is only in such cases where the State arbitrarily and unnecessarily interferes with private business or imposes unusual and unnecessary restrictions upon lawful occupations that such legislation will be declared as in contravention of the fourteenth amendment.

Cattle afflicted with a dangerous and contagious disease are public nuisances as defined by the common law, and under the common law such a nuisance could not be legalized because it invaded the peace and safety of the people. (*Ferguson v. Selma*, 43 Ala. 399.) Prevention of the spreading of dangerous diseases among cattle is now universally recognized in this country as within the domain of the police power, as it is so essential to the public safety and health. It is also now generally recognized that where the dis-

case among cattle is so very dangerous and of so contagious or infectious as character as to be communicable to human beings through the consumption of the flesh or milk of such animals as have the disease, as the foot and mouth disease is generally considered to be, legislatures may, and should, confer upon boards or commissions the power to destroy animals afflicted with such a disease when thought to be necessary to public safety. (New Orleans v. Charouleau, 121 La. 890, 15 Ann. Cas. 46, 46 So. 911, 126 Am. St. Rep. 332, 18 L.R.A.(N.S.) 368; Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488, 73 N. W. 817; Houston v. State, 98 Wis. 481, 74 N. W. 111, 42 L.R.A. 39; Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 23 Am. St. Rep. 860, 10 L.R.A. 116, which is a case upholding [390] a statute authorizing summary proceedings to kill horses with the glanders.) There are numerous other cases that recognize the power of a State to order the destruction of valuable property without compensation to the owner when it has become a public nuisance. Adams v. Milwaukee, 144 Wis. 371, 129 N. W. 518, 43 L.R.A.(N.S.) 1066, 228 U. S. 572, 33 S. Ct. 570, 57 U. S. (L. ed.) 971; Lawton v. Steele, supra; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 15 Ann. Cas. 276, 29 S. Ct. 101, 53 U. S. (L. ed.) 195; Sings v. Joliet, supra.

Proceedings for the destruction of property in many cases must necessarily be summary and without a previous trial or hearing. It would certainly not be contended by anyone that a hearing ought to be had before demolishing a building in the path of a conflagration that was rapidly destroying a city, in case of the isolation and confinement of a person afflicted with small-pox or with the bubonic plague, or before the destruction of a dog suffering with rabies. In some cases hearings may be reasonably had before the destruction of property, but where the question is one regarding the destruction of animals or food which is not only unfit for human use but may be fatal to those who use it, the emergency is such that the legislature should have the entire disposition of the matter without being subject to being reviewed and their acts declared void by the courts. (North American Cold Storage Co. v. Chicago, supra.) We are therefore of the opinion that the act of the legislature in question is not in contravention of any constitutional provision.

A court of equity has no jurisdiction to declare void an act of the legislature that does not contravene either the constitution of this State or of the United States, and to restrain officers, by the writ of injunction, from performing their official duties under the law and to attach them for contempt in case they

violate the injunction of the court. Such a decree or judgment would not only be judicial legislation, but would interfere with one of the [391] highest prerogatives of organized government,—the preservation of the public health and the public safety.

Appellants have alleged, with great particularity, a number of grounds upon which they rely for their claim that the decree of the court should be reversed. All of these grounds are based upon the claim that the statute in question is an unreasonable exercise of the police power and that it authorizes the destruction of valuable property without due process and without full compensation. We have considered all of these grounds carefully. We do not deem it necessary to discuss them in detail. Our conclusion that the legislature had the constitutional right and power to enact all the provisions of the statute necessarily disposes of all questions raised by appellants. It must be presumed by this court that the legislature has carefully investigated and has properly determined that the interests of the public require legislation that will insure the public safety and the public health against threatened danger from diseased animals. The determination of that fact is the province of the legislature and not of the courts. It is also the province of the legislature and not of the courts to determine what measures are necessary for the protection of such interests. This court is not able to say that the legislature in this act has abused its discretion and that the measures it has adopted to prevent the spread of dangerous diseases among cattle are unnecessary and unreasonable. The investigation and determination of the question whether or not animals are afflicted with dangerously contagious and infectious diseases demand prompt action if the spread of the diseases is to be prevented, as well as the question whether or not the slaughter of the animals is necessary. To secure this prompt investigation and determination it is necessary and customary to lodge these duties with a board or commission. (King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89; North American Cold Storage Co. v. Chicago, supra.) All the questions raised by appellants by the averments in their bill are [392] therefore questions of fact to be settled by the legislature and by the Board of Live Stock Commissioners and not by a court of equity, when it is determined by the court that the act is not in contravention of any constitutional provision. Whatever remedy appellants may have, if any, is at law, as is clearly apparent upon the face of the bill; and in our determination of this case we have treated the motions to dissolve the injunction and to dismiss the bill as a demurrer, which admits all facts in the bill

well pleaded. *Smith v. Kochersperger*, 173 Ill. 201, 50 N. E. 187.

For the same reasons we hold that the court did not err in overruling appellants' motion to file their amended and supplemental bill, and in our consideration thereof have treated the motion as filed in apt time. That bill merely restates, in substance, the averments of the original bill and adds others of like character and others still that tend to weaken the force of the allegations rather than to strengthen them because of their inconsistency. Of this latter character of averments are the following: "That about August 16, 1915, a valuable bull of complainants became afflicted with a sore mouth; that a skilful veterinarian examined it and diagnosed said disease as not foot and mouth disease; that afterwards Dr. Lavery, an inspector for the bureau of animal industry of the United States, examined the said animal and said it was not afflicted with foot and mouth disease; that afterwards certain cows of complainants became affected in a slight degree with sore mouths similar to the bull; that an agent of the defendants came and examined said animals and said it was foot and mouth disease and the defendants then ordered all of complainants' cattle to be killed; . . . that the cattle of the complainants are so far recovered that no results now remain except certain extraneous infection of the feet of a few of said cattle, and that said infection is not of the nature of foot and mouth disease." It is also alleged in the bill that said foot and mouth disease is not a dangerously contagious [393] and infectious disease and is not communicable to human beings so as to render it dangerous to life and health. In still another part of the bill it is averred that three of appellants' cows died of the disease and that two of them so affected were killed by appellants. Many other evidentiary facts are alleged in the amended bill for the purpose of showing that the foot and mouth disease is not a dangerously contagious or infectious disease and that it is curable and that the public can be securely guarded against it by quarantine, and that many of appellants' cattle are cured and that the remainder are being cured. The amended bill discloses that experts are not agreed upon many of the questions therein raised, but for reasons aforesaid it was not the province of the court to settle and try the questions raised by the bill after settling the constitutional question against appellants, and the motion to file the amended bill was properly overruled.

The temporary injunction was therefore dissolved and the decree affirmed.

Decree affirmed.

Rehearing denied February 3, 1916.

NOTE.

Validity of Statute Providing for Destruction of Diseased Animals with Compensation to Owner.

The purpose of this note is to discuss the cases dealing with the validity of a statute providing for the destruction of diseased animals with compensation to the owner. For a discussion of the validity of a statute which makes no provision for compensation to the owner see the note to *New Orleans v. Charouleau* in 15 Ann. Cas. 46.

A statute providing for the destruction of diseased animals with compensation to the owner is valid as an exercise of the sovereign police power to protect the public from the spread of a disease among domestic animals. *Chambers v. Gilbert*, 17 Tex. Civ. App. 106, 42 S. W. 630; *Maynard v. Freeman* (Tex.) 60 S. W. 334. See also *Livingston v. Ellis County*, 30 Tex. Civ. App. 19, 68 S. W. 723, and see the reported case.

In *Crary v. U. S.* 44 Ct. Cl. 388, it appeared that a number of sheep were destroyed under an order of the Secretary of Agriculture pursuant to the federal act (26 Stat. at L. 414, § 8, 1 Fed. St. Annot. 20 Ed. 374) providing for the destruction of diseased animals or those exposed to infection and for compensation to the owner, for those not actually diseased. The court in construing the statute said: "The liability of the Government, however, does not rest on the unauthorized act of the customs officer in permitting the sheep to be brought into the United States before inspection in Mexico (though that was in a measure cured by the inspection and certificate of the Mexican veterinary inspector immediately after the sheep were unloaded in the stock yards at El Paso), but on the action of the Secretary of Agriculture in ordering, as he had the right to do under the law, the slaughter of sheep so diseased and infected to prevent further spread of the disease. (Act of August 30, 1890, sec. 8, 26 Stat. L. 414, 416.) Under said section of the act the Secretary of Agriculture was not only authorized to cause the sheep to be slaughtered as he did, but the act made it his duty to ascertain the value of sheep so exposed but not infected, either by agreement between himself and the owner, if practicable, or by two persons familiar with the character and value of sheep, to be appointed by the Secretary, whose decision, if they agree, the act provides 'shall be final, . . . and the amount of the value thus ascertained shall be paid to the owner thereof out of money in the Treasury appropriated for the use of the Bureau of Animal Industry.'" See also 22 Op. Atty.-Gen. 390.

In *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113, it was held that a statute permitting commissioners to determine ex parte that animals were diseased, without imposing on the commissioners the burden of establishing affirmatively the actual existence of such disease, was not a valid exercise of the police power of the state, but was a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law. Compare the reported case wherein it is held that the owner has no constitutional right to a hearing.

In *Rousseau v. U. S.* 45 Ct. Cl. 1, which was a proceeding to recover the value of horses killed under a mistaken belief that they were afflicted with glanders, the court said, obiter: "Just what authority the Department of the Interior had to order the destruction of claimant's property without notice or opportunity to defend has not been disclosed to the court. While we do not wish to be understood as saying no such authority existed, it has not been shown to the court in this case. No claim is made that the inspection and condemnation was made by order of the Department of Agriculture or in virtue of the many statutes governing this department's supervision and control of affairs of this character. The jurisdictional act under which we are proceeding recognizes the existence of the claim, and while it does not create a liability, its language is such as to import a strong intentment that one existed. The case is one disclosing the importance of great caution in the execution of summary law, and all the facts and circumstances in the record present a transaction wherein the claimant was greatly wronged and injured."

Where a state live stock inspector in pursuance of a statute ordered the killing of a diseased animal, and the compensation was assessed at a certain amount as prescribed by the act, it was held that the state officer had the right to destroy the animal under the police power and that the valuation fixed by him was final. *Lewis v. Shelby County*, 116 Tenn. 454, 92 S. W. 1098. The same principle was upheld in *Shipman v. Live-Stock Commission*, 115 Mich. 488, a mandamus proceeding to compel the State Live Stock Sanitary Commission to appraise certain condemned cattle at their market value. The court denied the writ saying: "The language of the statute is unmistakable. It provides for the destruction of and compensation for diseased, and not sound, cattle. The commission is the sole tribunal to determine whether the animals are diseased, and to ascertain the value, and is to be governed by the value at the date of appraisal. The only appellate jurisdiction

provided for by the statute is the governor, whose approval of the action of the commission is necessary. If the governor should refuse to approve the award of the commission, courts could not interfere to compel him to approve the finding."

In *Campbell v. Manchester*, 67 N. H. 148, 36 Atl. 877, it was held that the value for which compensation was to be made was that at the time of the appraisal; not the sound value of the animal.

It seems that a statute providing for the destruction of animals disabled and unfit for further use and suffering from noncontagious and noninfectious diseases is unconstitutional. See *Waud v. Crawford*, 160 Ia. 432, 141 N. W. 1041, wherein it appeared that a police officer of the Iowa Humane Society destroyed the plaintiff's horse and pleaded justification under a statute authorizing the killing of animals disabled or unfit for further use. The court said: "While the police power is very broad, and not capable of exact definition, it is not boundless, and, as a rule, is subject to constitutional limitations. Property may be destroyed under this power, without notice or opportunity to be heard, and without compensation to the owner, to prevent the spread of contagious diseases, to stay the progress of a devastating fire, and in other exigencies, where the public needs protection or defense. Under this power, public nuisances may sometimes be abated; but, in all such cases, the necessity for summary action must exist, and one who would justify on the ground of necessity must be able to convince a jury that the occasion was present which authorized his act. The section of the Code relied upon is very broad and comprehensive in its terms and seems to proceed upon the theory that disabled animals and those unfit for further use may be summarily dispatched. The thought of the legislature, doubtless, was the prevention of cruelty to animals rather than the safety or security of the public health or welfare. If the animal was inflicted with a contagious disease, which was likely to be communicated to man or beast, doubtless the killing would be justifiable; but the defendant does not so plead nor does the record tend to show any such state of facts. Moreover, if the animal had received some injury which entirely disabled it, as for example a broken leg, doubtless an officer might kill it without notice to the owner or an opportunity to be heard. . . . We are not as apprehensive, as counsel, over the results of holding the act in question unconstitutional. If an animal be disabled through accident or misfortune, and is manifestly unfit for further use, a police officer, or, doubtless, any citizen, may relieve it from its misery without fear of a successful

damage suit; but, if the animal be simply diseased, it does not comport with our understanding of the law to permit any one, whether an officer or not, without notice to the owner or an opportunity to be heard, to be both judge and executioner. Even in contagious diseases, the owner is entitled to a hearing and also to compensation for his damages, and no less should be given one whose animals are disabled by disease in the event they are of any real value."

In *Westchester Electric R. Co. v. Angevine*, 52 App. Div. 239, 65 N. Y. S. 376, it appeared that the Board of Health instructed the Society for the Prevention of Cruelty to Animals to inspect stables designated by the Board of Health and report all glandered horses. An officer of the Society destroyed the plaintiff's horses. In an action to recover damages the court held that the Board of Health had no power to delegate the exercise of its judgment to any officer of the Society.

GADOW ET AL.

v.

HUNHOLZ

Wisconsin Supreme Court—March 23, 1915.

160 Wis. 293; 151 N. W. 810.

Covenants — Against Incumbrances — What Constitutes Breach — Easement to Take Ice.

A covenant that the grantor was well seised of the premises as of a good, sure, perfect, absolute, and indefeasible estate of inheritance, and that the same are free from all incumbrances which the grantor will forever warrant and defend, is breached by a reservation of the right to harvest ice formed on a pond within the land, which also required party in possession to maintain the water at a certain height; for the title to ice formed on ponds and streams belongs to the owner of the bed.

Ice — Grant of Right to Take — Nature of Right.

A landowner covenanted that the premises were free from incumbrances, but his title was subject to the right of others to harvest ice from a pond thereon. The owner of the ice right refused to dispose of it to the grantee, but the grantee was not called upon to keep the water up to a certain level, as the reservation required. It is held that, though the covenant was breached when the deed was made, the right reserved was in the nature of an "easement" or a "profit à prendre," which is the right to take the soil

or a product thereof, and hence there was a constructive eviction entitling the grantee immediately to recover the amount of his damages.

[See note at end of this case.]

Appeal from Circuit Court, Milwaukee county: LUDWIG, Judge.

Action by William E. Gadow et al., plaintiffs, against John Hunholz, defendant. Judgment for plaintiffs. Defendant appeals. **AFFIRMED.**

[293] This is an action to recover damages for breach of a covenant against incumbrances contained in a deed from defendant to plaintiffs.

On December 24, 1904, the defendant and his wife (who joined to release her dower) conveyed by deed to the plaintiffs certain premises owned by them. The deed contains the covenant "that at the time of the sealing and delivery of these [294] presents . . . the same [premises] are free and clear from all incumbrances whatever." The defendant had obtained these premises from one Suckow and wife, who in turn had acquired them from one Henry Meyer, Jr. and wife. In this deed from Henry Meyer, Jr. and wife to Suckow and wife there appeared the following reservation:

"The parties of the first part reserve the perpetual and exclusive privilege of harvesting, cutting, and raising ice on said premises, which right they reserve to themselves, their heirs and assigns. In case the dam of the mill property as described above should wash away before ice cutting is commenced, it is hereby agreed that no damages can be collected by said first party against the said second party. The party of the second part agrees further to maintain the water during the ice-cutting season as high as the fall of the dam. This agreement binds the heirs and assigns of the respective parties."

The deed containing the above reservation was recorded in the office of the register of deeds of Washington county June 7, 1894. The rights and privileges so reserved by Henry Meyer, Jr. and wife were conveyed by deed to one Foster and by his deed to the Ozaukee Ice Company, and ultimately by several deeds the Wisconsin Lakes Ice & Cartage Company in December, 1898, became and now is the owner thereof. Two letters of the Wisconsin Ice & Cartage Company giving permission to others to cut and take the ice were admitted as evidence, although they were written prior to the time the property was deeded to the plaintiffs.

It appears that some people from that community did cut ice and haul ice away after plaintiffs took possession under their deed. The plaintiffs have never been called upon to

keep the water up to a certain level according to the rights of the reservation. Plaintiffs made several attempts to buy this reservation from the Wisconsin Lakes Ice & Cartage Company, but the latter refused to sell.

The circuit court submitted two questions to the jury which [295] in substance were: (1) What was the value of the premises at the time plaintiffs purchased them with the incumbrances thereon created by the deed of Henry Meyer and wife to Suckow? and (2) What was the value of the premises at this time without the incumbrances? The jury found that the premises were \$1,500 less in value with the incumbrance than when freed therefrom at the time of sale. Defendant's motion to set aside the verdict and for a new trial was denied. The court awarded judgment for the plaintiffs for the difference in the values, as found by the jury, namely, \$1,500. From such judgment this appeal is taken.

Samuel M. Field for appellant.

Lorenz & Lorenz and Rowan, Kalaher & Stoecker for respondents.

SIERECKE, J.—The trial court submitted to the jury only the question of damages. This necessarily implies that the court held that all other questions presented on the trial of the case involved propositions of law to be determined by the court. There is no dispute as to the reservation in the Meyer deed. The reservation is: “. . . the perpetual and exclusive privilege of harvesting, cutting, and raising ice on said premises,” and connected with this is the burden “. . . to maintain the water during the ice-cutting season as high as the fall of the dam.” There is no controversy but that this reservation is in breach of the covenants of the deed by which the defendant conveyed the premises to plaintiffs, that “they [grantors] are well seised of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple and that the same are free and clear from all incumbrances whatever, and that the above bargained premises in the quiet and peaceable possession of . . .” the plaintiffs, etc. “they will forever warrant and defend.” The situation thus presented shows that the [296] plaintiffs’ title is incumbered and burdened as shown by the reservation and constitutes a breach of the covenant that the fee title is free and clear from all incumbrances. This right to harvest ice and the burden of maintaining the water during the ice-harvest season is a right and an interest in the land in diminution of the fee title which passed by the defendant’s deed to the plaintiffs. It is recognized that the title to

ice formed on streams and ponds and which is subject to private ownership belongs to the owner of the bed. *Reysen v. Roate*, 92 Wis. 543, 66 N. W. 599; *Abbott v. Cremer*, 118 Wis. 377, 95 N. W. 387. The grant of a privilege to cut and harvest ice is therefore a grant of an interest conveyed which constitutes an incumbrance, and hence breaches the covenant in a deed conveying the premises in fee simple free and clear from all incumbrances. *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969.

Defendant’s contention that the court erred in awarding recovery of the damages found by the jury rests on the proposition that only nominal damages are recoverable for such a breach of the covenant against incumbrances occurring immediately upon delivery of the deed, and that substantial damages do not accrue until the grantee has either paid for the removal or extinguishment of the incumbrance or has been actually ousted from the premises conveyed. Reliance for this contention is placed, among others, on the cases of *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Eaton v. Lyman*, 30 Wis. 41; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764, and *In re Hanlin*, 133 Wis. 140, 113 N. W. 411, 126 Am. St. Rep. 938, 17 L.R.A.(N.S.) 1189. The basis for the claim for the recovery of nominal damages is as declared in *Eaton v. Lyman*, supra, “. . . that a covenant against incumbrances is broken if the land at the time of the conveyance is subject to an incumbrance not excepted in the deed, and that the covenantee may maintain an action for the breach, but can recover only nominal damages, unless it appears that he has sustained an actual injury.” The inquiry [297] is, What injury have the plaintiffs suffered? It is quite clear that they have suffered more than a nominal breach of the covenant against incumbrances. The record shows that the Wisconsin Lakes Ice & Cartage Company own the interest reserved by the deed of Henry Meyer, Jr. amounting to a “perpetual and exclusive privilege of harvesting, cutting, and raising ice on the said premises,” and connected therewith the burden of maintaining the water during the ice-harvest season at the full height of the dam. This right so carved out of the fee title is a valuable one. The present owners refuse to relinquish it and have asserted it hostilely to plaintiffs’ fee title, which defendant by his deed to the plaintiffs covenanted to convey free from incumbrances. This hostile assertion of the rights to the ice and the consequent right to enter on the plaintiffs’ premises to harvest it operates to deprive the plaintiffs of the fee title free from all interference and amounts to an eviction from enjoying the title and possession of the premises pursuant to the covenants of the

deed, and is an actual and substantial injury to them. The right reserved is in its nature and kind a grant to take something which is a part of the soil or a product thereof and is denominated a right in the nature of an easement. *Walker Ice Co. v. American Steel, etc. Co.* 185 Mass. 463, 70 N. E. 937; 14 Cyc. 1142; "Profits a Pendre," 6 Words & Phrases, 5666; *Kennedy Stave, etc. Co. v. Sloss-Sheffield Steel Co.* 137 Ala. 401, 34 So. 372; 2 Washb. Real Prop. (6th ed.) § 1227. The facts and circumstances show that the fee to the premises conveyed is subject to the right of cutting ice, that this right is asserted as a hostile one to plaintiff's rights and injuriously affects the title which defendant covenanted to convey, and naturally permanently diminishes the value of the estate which defendant purported to convey to plaintiffs. Under such circumstances the covenantee may bring his action immediately on breach of the covenant in the deed and recover compensation for the actual injury sustained by him. *Smith [298] v. Davis*, 44 Kan. 362, 24 Pac. 428; *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496, 135 Am. St. Rep. 971; *Geisler v. DeGraaf*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659. The circuit court properly held that the facts established a breach of the covenant against incumbrances, that the nature of the incumbrance showed that it diminished the value of the estate which defendant purported to convey to plaintiffs, and that the damage consisted in the difference, if any, of the market value of the estate conveyed by the deed with the existing incumbrance at the time of conveyance and the market value thereof without such incumbrance. This question was submitted to the jury, who found that such difference amounted to the sum of \$1,500. They found the market value of the property free from the incumbrance to be \$15,000, which was the amount the plaintiffs paid the defendant as purchase price. The court awarded judgment for the recovery of \$1,500 as damages for breach of the covenant in the defendant's deed of conveyance.

BY THE COURT.—The judgment appealed from is affirmed.

NOTE.

Nature and Effect of Grant of Right to Take Ice from Another's Premises.

It is generally held that the grant of a right to harvest ice amounts to more than merely a revocable license; that it constitutes a right in the nature of an easement appurtenant to the land, or a profit a prendre. *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969; *Smith v. Davis*, 44 Kan. 362, 24 Pac. 428; *Richards v. Gauffret*, 145 Mass. 486, 14 N.

E. 535, 5 N. Eng. Rep. 398; *Walker Ice Co. v. American Steel, etc. Co.* 185 Mass. 463, 70 N. E. 937; *Mitchell v. D'Olier*, 68 N. J. L. 375, 53 Atl. 467, 59 L.R.A. 949; *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652, reversing 26 Hun 496. And see the reported case. See also *Hinckel v. Stevens*, 35 App. Div. 5, 54 N. Y. S. 457, reversed on other grounds in 165 N. Y. 171, 58 N. E. 879.

Thus it has been held that where one conveyed part of land adjoining a pond, with the exclusive right in the grantee to carry on the ice business, as well as the right and privilege of access to the pond adjacent to the remaining part of the grantor's land, and thereafter the grantor conveyed the remaining land to the plaintiff, subject however to the right previously conveyed, the privilege to take ice was not revoked by the second conveyance. *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652. In that case in denying an injunction to restrain the defendant from entering the plaintiff's land to repair a dam which he used in his ice business, the court said: "The answer made by the respondent to this view of the case is threefold. Her counsel argue that the right in question was a mere license, and passed no estate in the land. But a license is revocable and disappears upon a conveyance, binding in no respect the new grantee, and the vendor did not so understand the right he had given, for when he conveyed he did so 'subject to the right heretofore conveyed to J. Howard Asher, of taking ice from the pond,'—a provision meaningless and unnecessary if referred to a license revocable at any moment. The grantee had no such intent or understanding, for he went on at once to construct his ice-house, and organize his business at an expense which must have been serious and considerable, and which he would not have done had he known that he held but a mere license which his grantor could at will revoke. . . . The whole question, thus, turns upon the inquiry whether the privilege granted was of such a character as to be in the nature of an easement and become, when exercised, an appurtenance. It does not concern or inhere in the land precisely like a right of way which is essential or convenient irrespective of the use to which the land is put, but does do so relatively to that use, as in the case of land used for a mill or for the manufacture of iron. In those cases, as in this, the use for which the land was bought, and which characterized the contract of purchase, became the essential element by which the privilege granted was to be measured and judged. The right to take ice from the pond was the one essential thing leading to the purchase of the half acre, justifying the building put upon it, and making possi-

ble the performance of the covenants for supply. We think that right passed to the present defendant."

A grant of the right to cut and remove ice that may be formed on certain premises, and a conveyance thereafter of the said premises to a third party "free and clear of all incumbrances" was held, in *Smith v. Davis*, 44 Kan. 362, 24 Pac. 428, to constitute an absolute unqualified and unconditional incumbrance on the premise so conveyed. The action being by the vendee of the premises to recover damages for the breach of covenant contained in the deed, the court in awarding the plaintiff substantial damages said: "This case is unlike a case where the incumbrance is a money lien of fixed amount upon the premises conveyed. In this case the amount of the damages resulting from the incumbrance is not ascertainable by any mere calculation, as it is when the incumbrance consists of a mere money lien; and neither can the incumbrance be removed at the will or pleasure of an interested party as it can when it consists of a mere money lien. We suppose that the ice mentioned in this case has actual value, and the right-of-way to procure such ice also has actual value; and the right to the ice and to the right-of-way, being in another than the owner of the land, depreciates the market value of the land as to such owner, and these values and this depreciation may be shown by evidence. We think the plaintiff in this case is entitled upon proper and sufficient proof to recover substantial damages, and that the court below erred in holding otherwise." In the case of *Weiss v. Binnian*, 178 Ill. 241, 52 N. E. 969, it was said that the grant of a right to cut and harvest ice constitutes an incumbrance and hence breaches a covenant conveying the premises free and clear from all incumbrances. To the same effect, see the reported case.

The grantee of a right to harvest ice may bring an action in tort against the lessor or a stranger, if his rights under his lease are interfered with. *Richards v. Gauffret*, 145 Mass. 486, 14 N. E. 535, 5 N. Eng. Rep. 398, wherein the court said: "By the lease, therefore, the plaintiff acquired a valuable right, and it would be a reproach to the law if it did not furnish him a remedy for an unlawful encroachment upon this right by a stranger. It is not necessary to discuss the somewhat nice questions whether the plaintiff had such an interest in the land that he could bring trespass *quare clausum*, or whether he had such property in the ice that he could maintain an action of trover against the defendants. He had an interest greater than a mere revocable license, and could bring an action against Daggett if he inter-

fered with his rights under the lease; he had, as we have said, a valuable right, and, if a stranger unlawfully encroached upon this right, we can see no reason why he might not maintain a proper action therefor."

Where, however, one purchases a right to cut and sell ice which may be formed on a pond, it has been held that the right is a mere license and does not pass title until it is executed or enjoyed, and then only to the extent to which it is executed or enjoyed. *Balcom v. McQuesten*, 65 N. H. 81, 17 Atl. 638. See also *Higgins v. Kusterer*, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160, wherein it was held that ice already formed on a pond is in the nature of personality, and as such, may be conveyed by parol.

In *Carville v. Com.* 192 Mass. 570, 78 N. E. 735, it appeared that a right was acquired orally to harvest ice from a pond, which pond was subsequently condemned for public use. It was held that since the petitioner had not been in adverse possession for twenty years before the commonwealth condemned it, an action for damages against the commonwealth would not lie. The court further said that, assuming the petitioner had acquired a right by adverse possession, it would be in the nature of an easement or profit a prendre, which is an interest in real estate, and as such he would have to bring suit within two years after condemnation under the statute of Massachusetts, which provision he failed to comply with. See also *Hoag v. Place*, 93 Mich. 450, 53 N. W. 617, 18 L.R.A. 39.

SCHWARTZ

v.

DENNIS.

IN RE MARKS.

Louisiana Supreme Court—January 24, 1916.

138 La. 848; 70 So. 357.

Exemptions — What Constitutes "Tool or Instrument" — Wagon.

A wagon used by a teamster in making his living is a "tool or instrument," exempt from seizure for rent, under article 2705 of the Civil Code.

[See note at end of this case.]

Costs — Liability of Intervener — Relief from Liability.

A subtenant who intervenes in a suit between landlord and tenant is liable for the costs of his intervention, but the supreme court has jurisdiction to relieve the sub-

tenant of costs of seizure where the sum due by the subtenant is too insignificant for consideration.

Application for writ of certiorari or writ of review.

Action by Joseph O. Schwartz, receiver of American Spring Manufacturing Company, plaintiff, against Joseph Dennis, defendant. Judgment for defendant affirmed by Court of Appeal. A. F. Marks, vice receiver, etc., applies for certiorari or writ of review. The facts are stated in the opinion. **AFFIRMED.**

Legier & Gleason and Jos. J. Ritayik for plaintiff.

A. Guilbault for intervenor Bost.

A. D. Danziger and P. H. Stern for defendant.

[849] LAND, J.—The questions of law presented for our consideration are stated in the plaintiff's application for a writ of review as follows:

"First, whether or not a wagon is subject to a lessor's lien and privilege and right of pledge under article 2705, C. C., where the lessee claims that he makes his livelihood with the wagon.

"Second, whether or not a subtenant's property, when seized by the lessor in satisfaction of the lessor's lien and privilege and pledge, is liable for the payment of the costs of the provisional seizure."

1. It is admitted that the defendant made a livelihood by using said wagon for the purpose of hauling sand, cement, bricks, etc., for hire.

The judge of the First city court held that the wagon was exempt from provisional seizure, and the judgment was affirmed by the Court of Appeal for the parish of Orleans.

Article 2705 of the Civil Code provides that the lessee shall be entitled to retain out of the property subjected by law to the lessor's privilege, among other things:

"The tools and instruments necessary for the exercise of the trade or profession by which he gains his living and that of his family."

Article 644 of the Code of Practice exempts from seizure under execution, among other property of the debtor:

"The tools and instruments necessary for the exercise of the trade or profession by which he gains a living."

[850] As the said articles relate to exemptions from seizure, the same words or phrases used in both should receive the same construction.

Article 644 of the Code of Practice has been construed to exempt the law books of an attorney (*Lambeth v. Milton*, 2 Rob. (La.)

81); books used and needed by a minister of the gospel (*State v. St. Paul*, 111 La. 71, 35 So. 389); commercial books and counting-house furniture and iron safes of a merchant (*Farmers'*, etc. *Bank v. Franklin*, 1 La. Ann. 393); printing press and material of a printer and editor (*Prather v. Bobo*, 15 La. Ann. 524). In *Hanna v. Bry*, 5 La. Ann. 651, 52 Am. Dec. 606, it was held that a horse used by a physician was not exempt under C. P. 644. It appears from the reasoning in that case that the court considered the use of the horse as a mere convenience. In *Prather v. Bobo*, 15 La. Ann. 524, the court said:

"In *Hanna v. Bry*, it was held that a doctor's horse could not be fairly comprehended under the denomination of tools and instruments necessary for the exercise of his profession."

In *Boston Belting Co. v. Ivens*, 28 La. Ann. 695, the court held that C. P. 644 did not apply to the multifarious machinery and implements constituting an extensive factory.

In the course of the opinion, the court, in commenting on the cases cited *supra*, said that the underlying principle or object of C. P. 644 is to secure to the debtor the means of laboring at his trade and profession, the tools and instruments required by him in his own manual labor. The court cited *Bouvier's dictionary*, *verbo* tools, to wit:

"Those implements which are commonly used by the hand of one man in some manual labor necessary for his subsistence."

The court endeavored to draw a distinction between tools and implements used by the debtor himself, and the multifarious machinery of an extensive factory requiring the labor of a large number of skilled operatives.

[851] There is nothing in that case which militates against the proposition that the defendant's wagon is exempt as "a tool and instrument" necessary for the exercise of his trade or calling as a teamster.

Among other things included in the word "tools," *Bouvier* places "a gin and gristmill," "a net and boat," musical instruments, etc.; and states that, "as used in exemption laws, it includes any instrument necessary for the prosecution of trade." See *Rawle's Revision* of 1897, *verbo*. Hence the argument that the word "tools," as used in our Codes, should be restricted to such as are used by mechanics, is without merit. It is to be noted that our Codes use the term "tools and instruments." If a wagon be either, it falls within the statute.

In *Rice v. Wadsworth*, 59 N. H. 100, the court said:

"In this case the referee found, as a matter of fact, that the wagon, cart, sled, and har-

nesses were tools of the plaintiff's occupation. We do not see why the team, wagon, sled, and harness of a person engaged in the business of teaming are not as much tools of his occupation as the plow, cart wheels, and chains of a farmer (*Wilkinson v. Alley*, 45 N. H. 551); a fisherman's net and boat (*Sammis v. Smith*, 1 *Thomp. & C.* (N. Y.) 444); . . . a musician's cornet (*Baker v. Willis*, 123 *Mass.* 194, 25 *Am. Rep.* 61); a printer's press, cases, and types (*Patten v. Smith*, 4 *Conn.* 450, 10 *Am. Dec.* 166); or a mechanic's tools used by a farmer in repairing his farming implements."

We therefore are of opinion that the relator's first assignment of error is without merit.

2. The horse and harness of a subtenant was seized with the property of the lessee under the writ of provisional seizure, but was released on bond. The provisional seizure was maintained as to the horse and harness to the extent of only 77 cents, with interest and costs of intervention. The insignificant sum recovered by the plaintiff may well justify the application of the rule de minimis, and this court has jurisdiction to award costs as may be deemed proper in the administration of justice.

[852] In our opinion, the relator's second assignment of error is without merit.

It is therefore ordered that the judgment of the Court of Appeal herein be affirmed, and that the plaintiff pay costs in this court.

NOTE.

Vehicle as "Tool," "Implement" or "Instrument" within Exemption Statute.

Exemptions, at least so far as they concern tools and implements of trade, are wholly of statutory origin. See 11 *R. C. L.* tit. *Exemptions*, p. 489. The question whether such an exemption includes a vehicle, to the discussion of which this note is devoted, is therefore one of statutory construction. Some courts, giving the statutes a liberal construction, hold that vehicles used by a debtor in the course of his trade or occupation are exempt as tools or implements; others construing the statutes more strictly arrive at a contrary conclusion. Whether the vehicle is a necessity or merely a convenience in the pursuit of the debtor's occupation enters however to some extent into the solution of the problem.

Whether an automobile is within an exemption of a "vehicle" is discussed in the notes to *Gassenheimer v. District of Columbia*, 6 *Ann. Cas.* 920; *State v. Dunklee*, *Ann. Cas.* 1913B 754, and *Lames v. Armstrong*, *Ann. Cas.* 1916B 511.

In some jurisdictions, vehicles have been judicially declared to be "tools or implements" under the respective statutes in force therein. *Lavell v. Richings* [1906] 1 *K. B.* (Eng.) 480, 4 *British Rul. Cas.* 475, 75 *L. J. K. B.* 287, 54 *W. R.* 394, 94 *L. T. N. S.* 515, 22 *Times L. Rep.* 316 (cabman's cab); *Watson v. Lederer*, 11 *Colo.* 577, 19 *Pac.* 602, 7 *Am. St. Rep.* 263, 1 *L.R.A.* 854 (miner's wagon); *Wilhite v. Williams*, 41 *Kan.* 288, 21 *Pac.* 256, 13 *Am. St. Rep.* 281 (insurance agent's buggy); *White v. Gemeny*, 47 *Kan.* 741, 28 *Pac.* 1011, 27 *Am. St. Rep.* 320 (hotel keeper's bus); *Jackman v. Lambertson*, 71 *Kan.* 138, 80 *Pac.* 55 (farmer's thrashing separator and traction engine); *Reeves v. Bascue*, 76 *Kan.* 333, 91 *Pac.* 77, 123 *Am. St. Rep.* 137 (traction engine); *Parshley v. Green*, 58 *N. H.* 271 (wood cart-er's sled); *Rice v. Wadsworth*, 59 *N. H.* 100 (teamster's wagon, cart and sled); *Richards v. Hubbard*, 59 *N. H.* 158, 47 *Am. Rep.* 188 (physician's buggy); *Hall v. Nelson*, 59 *N. H.* 573 (showman's wagon); *Johnson v. Lang*, 71 *N. H.* 251, 51 *Atl.* 908, 93 *Am. St. Rep.* 509 (wagon). And see the reported case. In *Reeves v. Bascue*, 76 *Kan.* 333, 91 *Pac.* 77, 123 *Am. St. Rep.* 137, a statute granting to a resident of the state who was the head of a family an exemption of the "necessary tools and implements of any mechanic, miner, or other person, used and kept in stock for the purpose of carrying on his trade or business, etc.," was before the court for consideration. It was held that a traction engine was within the meaning of the statute, the court saying: "It will be observed that the fact that the tools and implements are large and heavy does not take them out of the operation of the statute. Nor is there any limit placed on the number, character or value of the tools and implements protected by the exemption. It is enough that they belong to the mechanic, miner or other person, that they are necessary, and are personally used for the purpose of carrying on his trade or business. If he uses the tools and implements in person and performs a considerable portion of the work himself, it would seem to be immaterial whether he is called a manufacturer or a mechanic." In *Richards v. Hubbard*, 59 *N. H.* 158, 47 *Am. Rep.* 188, in determining that a buggy claimed to be exempt by a physician was to be considered as a "tool of his occupation" within the statute, the rule and the reason therefor were stated as follows: "The court cannot say, as a matter of law, that a wagon or a harness is a tool of the physician's calling, and so exempt to all physicians; nor can they say that it is not such a tool. The most that can be said, as a matter of law, is that it may be a tool of his profession, if, in the particular case, it is reasonably necessary for him to use it

as a tool. If it should appear that his practice was confined to his office, or that he was a physician or surgeon in a hospital, attending to no cases outside of the institution, or that he was a surgeon on ship-board, or that he went on foot, or on horseback, or on the cars, to visit his patients, a wagon and harness would not be exempt under our statute, because they would be of no use to him as tools in his practice. They might be of use to him in other respects, as in going to church, or in carrying his children to school, or in visiting friends, or as a means of recreation and pleasure; but these uses are manifestly not within the legitimate scope of the technical duty of a physician. Not coming within the strict definition of the term tools, and not being reasonably necessary as tools for him in his practice of his profession, they would not be tools within the meaning of the statute, and so would not be exempt as such. But if it should be found that the physician claiming the exemption could not practice his profession with reasonable success without a team with which to visit his patients; that he was located in a country town, for example, where it was necessary for him to ride a large part of the time in order to accomplish anything professionally,—a wagon and harness might properly be found to be reasonably necessary for him as tools of his occupation. But the finding would be one of fact, so far as the reasonableness of the use is concerned; and it would not be said that these articles are exempt to every physician, or to physicians generally, but only to the debtor in the particular case. If there is any doubt whether an article claimed to be exempt from attachment is a tool under the statute, the question should be submitted to the jury whether its use as a tool by the debtor in his business is reasonably necessary. If it is, it is exempt; otherwise, it is not exempt." In *Parshley v. Green*, 58 N. H. 271, it was held that a sled used by the debtor for the purpose of drawing wood and timber to the market for sale was exempt as a "tool of his occupation," but the court further held that a wagon belonging to the same debtor, which was not a necessity in his trade but might have been a convenience, was not so exempt.

In some jurisdictions, vehicles have been held not to come within a statutory exemption of "tools or implements." *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430 (coal carter's wagon); *Meyer v. Meyer*, 23 Ia. 359, 92 Am. Dec. 432 (farmer's thrashing machine); *Dalley v. May*, 5 Mass. 313 (farmer's cart and plough); *Gibson v. Gibbs*, 9 Gray (Mass.) 62 (coupling vendor's wagon); *Morse v. Keyes*, 6 How. Pr. (N. Y.)

Ann. Cas. 1917D—7.

18 (mason's lumber wagon); *Eastern Mfg. Co. v. Thomas*, 82 S. C. 509, 64 S. E. 401 (automobile); *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401 (architect's bicycle); *Cates v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224 (insurance agent's buggy); *In re Baldwin*, 71 Cal. 74, 12 Pac. 44 (farmer's thrashing rig). Overruling a claim by one engaged in the business of carting coal that his horses and wagons were exempt under the statute exempting "implements of a debtor's trade" it was held in *Enscoe v. Dunn*, 44 Conn. 93, 26 Am. Rep. 430, that the law intended to keep exemptions within narrow limits and that there was no reason for conceding to the transportation of merchandise protection for unlimited investments in horses and wagons. In *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401, the appellant, an architect, contended that his bicycle, being necessary to his business, was exempt as a tool or apparatus, under a statute which exempted among other things "all tools, apparatus, etc., belonging to any trade or profession." The court in denying that contention said: "Taking this as true, does it follow that a bicycle is a 'tool' or 'apparatus,' that belongs to the 'trade' or 'profession' of 'an architect and building superintendent?' It may be, and doubtless is, quite a useful and convenient mode of locomotion, but being such does not constitute it as 'tool' or 'apparatus' belonging to that trade or profession. If it could be so held, then by the force of the same logic, a bicycle could be held to belong to every known trade and profession where means for locomotion is useful and convenient in that trade or profession. Being useful and convenient is not the criterion by which the exemption of property is determined. While the statutes do not enumerate what belongs to any particular trade or profession, but leave it for judicial determination still it is definite enough to show that it is only such tools and apparatus as properly belong thereto and are essential to the conducting of the business." Compare *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767 (drayman's dray). In *Morse v. Keyes*, supra, it was held as a matter of law that a wagon was not exempt as a "tool or implement" even though it might be necessary for the debtor to use it in his business. Compare *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Wolf v. Farley*, 16 N. Y. S. 168; *Van Buren v. Loper*, 29 Barb. (N. Y.) 388, 389. Where a debtor changes his occupation to one where his wagon is not ordinarily used, he cannot claim an exemption thereof under a statute exempting "tools and implements ordinarily used in the debtor's occupation." *Wright v. Hollingshead*, 23 Ont. App. 1.

MORROW

v.

BELL.

Iowa Supreme Court—April 8, 1915.

170 Iowa 17; 151 N. W. 1084.

Appeal and Error — Jurisdiction — Amount in Controversy — Effect of Counterclaim.

Under Code, § 4547, declaring that no appeal to the district court from the final judgment of a justice shall be allowed when the amount in controversy does not exceed \$25, a suit in which the petition claimed \$20, which was denied by answer counterclaiming for \$6.50, which was denied by plaintiff, does not involve more than \$25, so that the justice's judgment for \$20 against defendant is not appealable to the district court.

[See note at end of this case.]

Appeal from District Court, Harrison county: WOODRUFF, Judge.

Action by Porter Morrow, plaintiff, against John Bell, defendant. Judgment for plaintiff in justice court. Appeal by defendant dismissed by district court. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Cochran & Barrett for appellants.

L. W. Fallon for appellee.

[17] PRESTON, J.—The suit was brought in justice court. Plaintiff's petition claimed \$20.00, which was denied by the answer, and defendant claimed \$6.50 on a counterclaim, which was denied by plaintiff. Judgment was rendered by the justice for \$20.00 against defendant, and defendant appealed to the district court. Plaintiff filed a motion to dismiss the appeal on the ground that the amount in controversy was less than \$25.00, and the motion was sustained. The trial court allowed a certificate of appeal to this court.

The argument for appellant is that Sec. 4547 of the Code provides, in reference to appeal from justice court, that no such appeal shall be allowed when the amount in controversy [18] does not exceed \$25.00. And appellant says that this section has been construed by the Supreme Court as meaning the amount in controversy as claimed by the pleadings, using the plural and thereby referring to the petition and answer. They cite: *Nichols v. Wood*, 66 Ia. 225, 23 N. W. 641; *Lundak v. Chicago*, etc. R. Co. 65 Ia. 473, 21 N. W. 783; *Perry v. Conger*, 65 Ia. 588, 22 N. W. 688.

They argue that the amount in controversy, therefore, as shown by these pleadings,

would be \$20.00 plus \$6.50, or \$26.50, and that, upon this theory, the motion to dismiss should have been overruled.

The point decided in the cases cited is that the amount in controversy should be determined from pleadings in the case, and not from the judgment rendered by the justice. In the last case, the plaintiff's claim was for \$100.00 damages, but on the trial, plaintiff recovered judgment for five cents damages, and the costs, which were taxed at \$27.00. The trial court dismissed the appeal on the ground that the amount in controversy was less than \$25.00. The plaintiff had claimed \$100.00, and on appeal was entitled to retrial of the questions involved, and it was held that, if plaintiff could establish the whole amount of his claim, he would be entitled to judgment for that amount. The amount in controversy must be determined by the pleadings. Ordinarily this is determined by the amount claimed by plaintiff in his petition.

It is stated in Cyc. that, broadly the amount involved in controversy is the highest sum, according to the statutory limitation, for which judgment can be rendered. 2 Cyc. 555.

It is also said, at page 558, same volume of Cyc., that it is not always the sum demanded or claimed which controls, but that which is actually in controversy between the parties as the case stands in the appellate court, to ascertain which the appellate court may look into the entire record; or, as otherwise stated, the amount is determined by the case as it stands in the appellate court rather than by the amount in controversy in the lower court. As bearing somewhat upon this, see also *Pierce v. Wade*, 100 U. S. 444, 25 U. S. (L. ed.) 735.

[19] The fact that a counterclaim is filed has a bearing. While it is true, in a sense, as claimed by appellant, that plaintiff is demanding \$20.00 and the defendant \$6.50, and that this entire matter is in controversy, yet the largest judgment that could possibly be rendered would be \$20.00, and that would be in case the plaintiff succeeded and the defendant was unsuccessful. If both established their claim, the amount would be \$13.50, because the recovery by defendant on his counterclaim would necessarily have to be offset against the plaintiff's recovery.

But, after all, we think the question is ruled by our Iowa cases. The precise point presented has not been determined. But Sec. 4110 of the Code, in regard to appeals to the Supreme Court, provides that no appeal shall be taken in any case in which the amount in controversy between the parties, as shown by the pleadings, does not exceed \$100.00, etc. This statute uses the words "as shown by the pleadings," using the

plural, just as appellant contends in regard to Sec. 4547 and the cases cited. Under the section referred to, in regard to appeals to the Supreme Court, it has been held that the amounts of the original claim and counterclaim cannot be added together in determining the amount in controversy. *Madison v. Spitsnogle*, 58 Ia. 369, 12 N. W. 317; *Fox v. Duncan*, 60 Ia. 321, 14 N. W. 358. See also: *Thurston v. Lamb*, 90 Ia. 363, 57 N. W. 875; *Central City v. Treat*, 101 Ia. 109, 70 N. W. 110.

The judgment of the district court is—
Affirmed.

Deemer, C. J., Evans and Salinger, J.
concur. J.

NOTE.

Amount in Controversy for Appeal Where Defendant's Purpose of Counterclaim. Amount Has Filed

The purpose of this note is to discuss the recent decisions passing on the amount in controversy for the purpose of appeal where the defendant has filed a counterclaim. The earlier cases are collected in the note to *Northern Pacific R. Co. v. Shoemaker*, Ann. Cas. 1914A 1040.

Where the right of appeal depends by statute on a specified sum being "in controversy," "in dispute," or "in demand," though the amount of the plaintiff's claim is insufficient to confer appellate jurisdiction, the defendant may appeal from a judgment adverse to the counterclaim if the amount of the counterclaim confers appellate jurisdiction. *West v. Littleton* (Del.) 98 Atl. 564. In *Mahaney v. Lee* (Tex.) 171 S. W. 1093, the court said: "Appellees have suggested that seventy-five dollars was the only amount in controversy and that therefore this court is without jurisdiction to entertain this appeal. We are of the opinion that as against the general demurrer the petition was sufficient to warrant a recovery of the forty-one dollars, which was specifically alleged to be due for ginning cotton, as well as for the seventy-five dollars, the value of the horse. Furthermore, defendant urged a counterclaim for \$154, which we do not think was abandoned, as appellees insist, since we find in the record that evidence was introduced to sustain it." In *Ford v. Johnston* (Tex.) 164 S. W. 424, it was said: "The statement of the case made in the briefs failed to mention that the defendant C. E. Ford sued on a counterclaim against the plaintiff Johnston for \$113. As a consequence we were misled as to the record. There was error in dismissing this appeal for want of jurisdiction, and the former

judgment is here set aside. The counterclaim sought here is to have payment for Thompson v. M. Cansland, 137 La. 13, 68 So. 196, it was held that where the amount of the reconvention is within the jurisdiction of the appellate court, the plaintiff may appeal from the judgment rendered on the plaintiff's reconvention although the amount of the plaintiff's claim is insufficient to confer appellate jurisdiction. In *Bertles v. Hawkins Motor Car Co.* (Wash.) 163 Pac. 3, it was held that a defendant will not be permitted to amend its counterclaim on appeal and increase its amount so as to confer jurisdiction on the appellate court where the amount in controversy is insufficient in amount to permit an appeal.

Though neither the plaintiff's claim nor the counterclaim equals the amount which the statute requires to be "in controversy," "in dispute," or "in demand," in order to confer appellate jurisdiction, the weight of authority is that appellate jurisdiction exists if the aggregate of the sum recovered and that for which recovery is denied exceeds such amount. *Harten v. Löffler*, 212 U. S. 397, 29 S. Ct. 351, 53 U. S. (L. ed.) 568; *Export, etc. Lumber Co. v. Port Banga Lumber Co.* 237 U. S. 388, 35 S. Ct. 604, 59 U. S. (L. ed.) 1009; *Morgan v. Johnson*, 158 Ky. 417, 165 S. W. 649; *Ford Lumber, etc. Co. v. Cornett*, 171 Ky. 404, 188 S. W. 460. And see *Wilson v. Fisher*, 92 Kan. 786, 142 Pac. 241. The right to aggregate the plaintiff's claim and the counterclaim in order to determine the amount in controversy on appeal was denied in *Bertles v. Hawkins Motor Car Co.* (Wash.) 163 Pac. 3. See also *Farnsworth v. Crabb* (Ia.) 159 N. W. 1042, and the reported case.

It is a general rule that where the defendant files a fictitious counterclaim or set-off which is legally insufficient on the face thereof in order to confer appellate jurisdiction an appeal does not lie. *Barton-Parker Mfg. Co. v. Wheeler*, 164 Ky. 452, 175 S. W. 980; *Rose v. O'Brien* (W. Va.) 87 S. E. 378. In *Jaklewicz v. Lenhart*, 86 Wash. 138, 149 Pac. 642, the court said: "It is thoroughly obvious that appellant's alleged counterclaim stated no semblance of a cause of action or counterclaim against respondent. . . . We do not feel inclined to establish a precedent whereon a practice may grow imposing jurisdiction upon this court in appeals when none exists in substance under the law. On the face of his pleading, appellant's alleged counterclaim was purely fictitious, so far as any legal liability of respondent was concerned." In *Farnsworth v. Crabb* (Ia.) 159 N. W. 1042, it was held that where a defendant abandons his counterclaim and fails to introduce evi-

dence to support it, it will not be considered in determining the amount in controversy on appeal.

—
NICHOLS

v.

HOUGHTON CIRCUIT JUDGE.

Michigan Supreme Court—May 10, 1915.

185 Mich. 654; 152 N. W. 482.

New Trial — Time for Motion — Effect of Failure to File in Time — Power of Court of Own Motion.

Comp. Laws, § 11963, providing that the court in which an indictment has been tried may, "at the same term or at the next term thereafter," on motion of defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, gives such court no power to grant a new trial on its motion at a time later than defendant has a right to file a motion.

Amendment of Motion.

An amendment of a motion for new trial, setting up a new ground, is a motion for new trial within Comp. Laws, § 11963, limiting the time for filing it.

[See note at end of this case.]

Waiver of Failure to File Motion in Time.

Consent or waiver by the people as to filing a motion for new trial after the time limited by Comp. Laws, § 11963, is immaterial; such statute making jurisdiction to grant a new trial dependent on seasonable filing of the motion.

Original application for writ of mandamus. George E. Nichols, relator, and Richard C. Flannigan, Houghton County Circuit Judge, respondent. The facts are stated in the opinion. **WRIT GRANTED.**

Anthony Lucas for relator.

George E. Nichols in pro. per.

O. J. Larson and Hanchette & Lawton for respondent.

[655] **PER CURIAM.**—An order having been made that the respondent, circuit judge presiding in the twelfth judicial circuit, show cause why a peremptory writ of mandamus should not issue to compel him to set aside and vacate an order made by him in a cause recently pending before him in the circuit court for the county of Houghton entitled the "People of the State of Michigan v. James Cooper, Arthur Davis, William Goff, and Edward Polkinghorne," wherein

said respondent by said order, dated the 19th day of January, 1915, directed that the verdict and judgment finding the above-named defendants guilty of the [656] crime of manslaughter be vacated, and that a new trial be granted, and the defendants remanded to the custody of the sheriff of Houghton county, and enter an order granting the motion of relator made on the 25th day of March, 1915, wherein the said relator prayed the respondent to set aside his said order of the 19th day of January, 1915, granting a new trial in said cause, and, further, that said respondent be directed to remand the above-named defendants so convicted to the custody of the warden of the State House of Correction and Branch of the State Prison in the Upper Peninsula at Marquette, Mich., to serve out the remainder of their sentence, and, the said respondent having made due return to said order, the following undisputed facts appear:

At the January, 1914, term of said circuit court the said case in which said defendants were charged with the murder of one Stephen Putrich was tried before said respondent, and on February 15, 1914, the said defendants were found guilty of manslaughter by the jury therein. Immediately following the verdict and before sentence, a motion for a new trial, based upon a number of enumerated grounds, was made, argued, and denied, and thereupon, on February 16, 1914, the respondent sentenced each of said convicted defendants to imprisonment in the said prison at Marquette, and immediately thereafter said defendants were taken to said prison, where they began serving their several terms of sentence so imposed. The January term of said circuit court began on January 6, 1914, and ended on April 5, 1914, and said cause was tried and said defendants sentenced during said term of court. The April term of said court began April 6, 1914, and ended on September 5, 1914. The September term began September 6, 1914, and ended on the 1st day of November, 1914. On July 29, 1914, counsel for said convicted defendants filed a motion for [657] leave to move, and did move for a new trial upon 25 specified grounds relating to the charge and the weight of the evidence, and said motion came on to be heard before respondent September 4, 1914, and he took the same under advisement, and said motion was undecided and undetermined on September 29, 1914. On the last-named day counsel for said defendants filed in the office of the clerk of said court a motion entitled in said cause for permission to amend the motion for a new trial theretofore filed, by adding another reason to said motion, to stand as reason No. 26, as follows:

"26. For the reason that each and all of the respondents were unfairly prejudiced before the jury by the prosecution, at the opening of the rebuttal by said prosecution, when Mr. Nichols, the assistant prosecuting attorney, made the following remark: 'I would like to offer in evidence the deposition of John Callaghan, taken in New York, on the part of the respondents, if they have no objection.'"

Thereafter, and on November 4, 1914, counsel upon both sides appeared, and the matter was submitted to the respondent upon the merits, as to the alleged error committed by the assistant prosecuting attorney in offering such deposition in evidence in the presence of the jury, and thereupon respondent took the matter under advisement. On December 30, 1914, the respondent filed with the clerk of said circuit court his findings and opinion upon said motion, and decided and determined that the motion so far as originally filed upon July 29, 1914, should be denied, and did deny the same; but in relation to said matter of offering said deposition in evidence, respondent held and determined that it was prejudicial error, and upon that sole ground granted a new trial. On January 19, 1915, respondent, presiding in said court, caused to be entered a formal order, vacating the verdict and [658] judgment, and granting a new trial in said cause and directing the warden of said prison to deliver said convicted defendants to the sheriff of Houghton county, to be held until delivered by due course of law. Subsequently the said sheriff, in pursuance of said order, took said defendants into his custody, where they now are, unless they have been admitted to bail, of which last matter this court is not advised. On March 25, 1915, relator, believing that the order granting said new trial was void and without authority of law, filed a motion in said circuit court, praying the court to set aside said order for the reason that the circuit court for the county of Houghton had no power, authority, or jurisdiction to grant said defendants a new trial upon January 19, 1915, or upon December 30, 1914, for the reason that the ground upon which said order was based was not filed in said cause until after the expiration of the term following the conviction of said defendants, and because the court had no power or authority to grant a new trial except at the same term, or the next term, after the conviction of said defendants; and, the defendants having been convicted in January, 1914, term of said court, the respondent, in order to retain jurisdiction so to do, was obliged and required to grant a new trial within that term, or the April term following, and the order granting the new trial was not made until after the lapse of more

than two terms. Said motion also stated as a further reason for vacating the order for a new trial that no error was committed in offering said deposition, and that respondent in granting a new trial did so without jurisdiction in the premises, and that such action was an abuse of judicial discretion. Said motion was heard on April 2, 1915, by respondent presiding in said circuit and was denied. In his opinion denying the motion to set aside the order granting a new trial (and which is [659] referred to in his return and made part thereof), after referring to the argument of the motion of July 29th, respondent said:

"On November 4, at Marquette, the people were again represented by both the prosecuting attorney and his assistant, and, upon the motion for leave to amend coming on to be heard, the people, in open court, expressly consented to the granting thereof, and the same was thereupon granted. The original motion was then, and was thereafter, treated by the court and counsel as amended accordingly. The twenty-sixth ground was then argued upon its merits. At the conclusion of such argument the people asked for time to file a brief touching the twenty-sixth ground, whereupon it was agreed between counsel, and ordered, that the people should have a reasonable time to file and serve their brief touching the twenty-sixth ground, and that the respondents should have a reasonable time thereafter, to file and serve their brief in reply.

"Respecting the filing of such briefs, counsel for both sides were reasonably prompt, but the trial of cases in the twenty-fifth circuit left no time after the briefs were received for consideration of the motion until the lull occasioned by the holiday season. During the holiday recess the authorities were examined, the matter was finally considered, and the findings were drawn up, and filed December 30, 1914. Then followed necessary correspondence with Mr. Nichols regarding the appointments to prosecute, and as soon thereafter as the business of the twenty-fifth circuit admitted of the absence of the judge, which was January 19, 1915, the formal order for a new trial, and for delivery of the respondents by the warden of the prison to the custody of the sheriff, was entered, and on the return of the respondents to Houghton and their presence in court the following day, orders appointing Mr. Nichols to prosecute, and Mr. Lucas to assist, and letting the respondents to bail, were entered.

That the motion of July 29th was not filed in time, or that the motion to amend was not filed in time, or that the court was without power to grant a new trial after the conclusion of the term succeeding the term

[660] of conviction, was not raised or suggested, directly or indirectly, by or on behalf of the people, at any time until the filing of the pending motion, and not only were the orders granting leave to move for a new trial and to amend the motion by adding the twenty-sixth ground expressly consented to by the people, but the court was explicitly assured that any objection which the people might interpose to the granting of such orders might be considered as waived, and that no objection was, or would be, made to the granting thereof. The limitation of the statute was not specifically mentioned by court or counsel, but the court had the right to and did suppose that counsel had it in mind."

After referring to the orders of April 2, 1915, one *nunc pro tunc* as of September 4, 1914, granting leave to file motion for a new trial; and one *nunc pro tunc* as of November 4, 1914, granting leave to amend the motion, and reciting that both orders were made by the express consent, in open court, of the people, they waiving any objection to the granting thereof, the respondent in his opinion further says:

"In the brief filed on behalf of the people in support of the pending motion, it is conceded the motion for a new trial of July 29th was filed in time, and that if a new trial had been granted for any reason therein set forth, it would not be subject to attack on jurisdictional grounds. The pending motion, as is said in the brief of the people, 'is directed simply to the so-called twenty-sixth ground of the motion, and the action of the court thereon.'

"The contention of the people is that, the twenty-sixth ground, on which the motion was granted, having been added to the motion under the order of November 4, 1914, after the conclusion of the term following the term of conviction, it should not be treated as relating back to the date of the motion of July 29th, but as a new and independent motion which was filed out of time. In other words, the claim is that a motion for a new trial of a criminal case which was filed in time, cannot be amended by adding an additional ground, after the time specified in the statute for filing the motion has expired, with or without the consent [661] of the people. That the court may, in its discretion, allow such amendment after the time has passed is sustained in *Tores v. State*, 74 Tex. Crim. 37, 166 S. W. 523, and denied in *Missouri (State v. Hunt)*, 141 Mo. 626, 43 S. W. 389, and that the court has such discretionary right respecting the amendment of motions for a new trial in civil cases, is affirmed in *Georgia*, *Kentucky*, *Minnesota*, *Ohio*, *South Dakota*, *Texas*, and *Canada*, and is denied in *Iowa* and *Kansas*, and also in *Nebraska*

and *Missouri*, except as to grounds the movant was unavoidably prevented from including, at the time of filing the motion. See 29 Cyc. p. 959, and notes."

The opinion of respondent in full is too lengthy to warrant us in inserting it here, but it has been duly considered. It concludes as follows:

"The time limit of the statute relates only to motions for new trial made by the convicted person. None of the cases in this State involving the statute touch the right of the trial court to grant a new trial on its own motion. As the statute reads, the trial court may, on its own motion, grant a new trial 'when' (whether before or after the term succeeding the term of conviction) 'it appears to the court that justice has not been done.' If the position of the people on this motion is given full credit, it only establishes that a respondent himself has no right to file a motion out of the statutory time, or out of the statutory time to amend a motion filed in time, by adding a new ground, but it does not follow that the court on its own motion may not, at any time, suggest new ground and act thereon, which practically was what was done in this case."

It is the claim of counsel for the respondent that the statute (section 1193, 3 Comp. Laws, 5 How. Stat. [2d ed.] § 15134), relating to the granting of new trials in criminal cases, is directory, and that a strict observance thereof, so far as time is concerned, is not a condition precedent to the granting of a new trial. The statute is as follows:

"The court in which the trial of any indictment [662] shall be had, may at the same term, or at the next term thereafter, on the motion in writing of the defendant, grant a new trial, for any cause, for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court shall direct."

In *People v. Marble*, 38 Mich. 309, it was said that, at common law, a new trial was not granted in cases of felony, and that the provisions in this State allowing it are purely statutory. In that case the statutory time for making the motion had expired, and this court said:

"In this instance a new trial has been refused by this court on exceptions, and by the circuit court on a motion heretofore made in season. We think the statute fixing the time for such a motion cannot be enlarged in its operation; and, as there is no such remedy at the common law, the party is confined to the statutory remedy, which is now barred by lapse of time."

See also *Frazer v. Recorder's Ct.* 112 Mich. 469, 70 N. W. 1042.

In *Hubbard v. State*, 72 Neb. 62, 100 N. W. 153, 9 Ann. Cas. 1034, it was held that the provisions of the statute limiting the time within which a motion for a new trial, in a criminal case, must be made, are mandatory. The reason for the rule is there stated as follows:

"We find no authority for saying the district court possesses the inherent or common-law power to grant a new trial in a criminal case, outside of statutory authority, as justice may demand. The authorities point rather to the contrary. In *Dodge v. People*, 4 Neb. 220, it is declared in the headnotes:

"At common law courts had no power to grant new trials in cases of felony, and it was held that they had no power to revise or correct their judgment in such cases."

In the opinion it is said by Maxwell, J.:

"At common law the finding of the jury of the guilt of [663] the accused was conclusive of that fact, and the court possessed no power to set the verdict aside and grant a new trial on the merits, on the motion of the accused, even where the verdict was clearly against the weight of the evidence' (citing *Hilliard*, *New Trials* [2d ed.] 114; *Reg. v. Bertrand*, 1 L. R. P. C. (Eng.) 520; *King v. Fowler*, 4 B. & Ald. 275, 6 E. C. L. 481; 1 Ch. C. L. 653).

"And continues the author:

"Therefore the utmost caution was required in capital trials, in favor of life, and if an irregularity materially affecting the trial occurred, to the injury of the accused, the court usually represented such matter to the crown, and a pardon was granted' (citing *Comp. v. Green*, 17 Mass. 515).

"The authority of the district courts to grant new trials in criminal cases, and especially after the term at which a conviction is had, must, we think, if existent, be found in the statute; and, if not there, the remedy is by an appeal to the executive who is clothed with the pardoning power. As reason for differentiating regarding relief against judgments in civil and in criminal cases, it may be observed that the judgment in the civil case, when rendered, becomes fixed and a finality, except as the courts possess jurisdiction at law or in equity to grant relief against it in a proper case, while the judgment in a criminal case, in so far as its effectiveness is concerned, is always open to modification or annulment by an appropriate appeal to the pardoning power, against the exercise of which time does not run."

If the views expressed by the learned circuit judge are correct, then the circuit court may, at any time "when it shall appear to the court that justice has not been done," grant a new trial on its own motion. We do not so understand the statute. The words

last above quoted are limited and controlled by the preceding clause: "at the same term, or at the next term thereafter." Otherwise the circuit court would never lose jurisdiction of the case, and might grant a new trial, on its own motion, years after the conviction. Such we think was not the intention of the legislature in the enactment of the statute. It must be conceded [664] that the twenty-sixth ground of motion for new trial was a new ground and in no way germane to the grounds set forth in the original motion. Leave to file it was granted on November 4, 1914, which was after the close of the third term of that year, and the conviction was had in the first term.

In *People v. Swartz*, 118 Mich. 292, 76 N. W. 491, the respondent, having been convicted at the May term, applied for a new trial, which was denied at the October term. In July following he made a motion to have the application for a new trial reheard, upon the ground of newly discovered evidence. It was held that this were practically an application for a new trial, made more than a year after the case was tried, and came too late (citing the statute and the *Marble and Frazer Cases*). This statute was again referred to in *Hayes v. Ionia Circuit Judge*, 125 Mich. 277, 280, 84 N. W. 141, 142, where it was said:

"The statute authorizing a new trial in criminal cases limited the time in which the application must be made."

To the same effect are the following cases: *Register v. State*, 12 Ga. App. 688, 78 S. E. 142; *Kinch v. State*, 70 Tex. Crim. 419, 156 S. W. 649; *Parker v. State*, 10 Okla. Crim. 541, 139 Pac. 708; *State v. Adams*, 84 Mo. 310; *State v. Hunt*, 141 Mo. 626, 43 S. W. 389.

In the last-cited case the court said:

"If a motion for a new trial can be amended, or a supplemental motion filed after the expiration of four days after the trial [the statutory time] then for the same reason it can be done any number of days thereafter, which is contrary to the plain letter of the statute."

The same point was also ruled in *Mt. Vernon Bank v. Porter*, 148 Mo. 176, 49 S. W. 982, and *State v. Mason*, 18 Mont. 362, 45 Pac. 557.

[665] In civil cases the same rule has been applied where there were statutory provisions. See *Mirrieles v. Wabash R. Co.* 163 Mo. 470, 63 S. W. 718; *Gullion v. Traver*, 64 Neb. 51, 89 N. W. 404; *Perry v. Eaves*, 4 Kan. App. 26, 45 Pac. 718; *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987; *Dutton v. Scervers*, 89 Ia. 302, 56 N. W. 398; *Blue Creek Land, etc. Co. v. Anderson*, 35 Utah 61, 99 Pac. 444.

Other cases might be cited to the same effect. While there are cases holding the

contrary view, we think that the great weight of authority is to the effect that an amendment containing grounds for a new trial, not germane to those stated in the original motion, cannot be introduced or permitted after the statutory period for making the motion has expired.

Was there consent or waiver by the people? Upon this point the relator says:

"It is not a fact that the people consented to and waived the question of the statute of limitations, but did consent to the filing of the so-called amendment and the presentation of the question upon the merits. But, assuming for the sake of the argument that a full, free, and complete consent was registered for the court to hear this matter upon the merits, and a waiver of the question of time of presenting the motion was announced, yet I contend that such consent and waiver conferred no jurisdiction upon the court to grant this motion for a new trial, where it had none without the consent or waiver."

This court has never held that jurisdiction of the subject-matter can be conferred by consent or waiver. In the recent case of *People v. Swift*, 172 Mich. 473, 138 N. W. 662, the respondent was convicted in the December, 1910, term. The first motion for a new trial was dated April 26, 1911, and the second September 5, 1911. The February term intervened before the first motion was made. Counsel for the respondent there said:

[666] "Unless the failure of the prosecuting attorney to raise this point in either the circuit or the Supreme Court is a waiver of the right of the people to insist upon the time limit for making motions for a new trial, the court may feel that, under former decisions, the motion was made too late" (citing *Frazer v. Recorder's Ct.* 112 Mich. 469, 70 N. W. 1042).

Justice STEERE, speaking for this court, said:

"In view of the facts that counsel for the prosecution have remained silent upon the subject, while counsel for the defense have so frankly called attention to it, and that both sides have fully briefed the motion, we have thought it best to treat the same as though the point was waived, although not satisfied under the case above cited that this can be done."

In *Ex p. Holmes*, 21 Neb. 324, 32 N. W. 69, the statute fixed the time within which a motion for a new trial in a criminal case might be filed to be during the term at which the verdict was rendered, and, except for newly discovered evidence, within three days after the verdict was returned, unless unavoidably prevented.

It was held that the filing of a motion for a new trial, by leave of the court, and by

the consent of the district attorney, at a term of the court subsequent to the term at which defendant was tried and convicted, and six months after he had been imprisoned, conferred no authority upon such court to set aside the verdict and judgment and grant a new trial; and in such case, where the motion was sustained and a new trial granted, the order being void, it was held that the warden of the prison had no authority to surrender the prisoner to the sheriff, and a writ of habeas corpus was denied the prisoner. The decision of the case was placed squarely upon the ground that the court had lost jurisdiction of the case. The authority is uniform that jurisdiction of the subject-matter cannot be conferred by consent of the parties, [667] or by want of objection, upon a court, where, by statute, it has none. 1 Bishop's New Criminal Procedure, 123, states the rule as follows:

"Jurisdiction comes solely from the law, in no degree from consent of litigants. So that neither consent nor anything else can authorize a court to act in a cause outside the sphere which the law has ordained for it."

Many cases are cited by the author, including *Com. v. Adams*, 92 Ky. 134, 17 S. W. 276. See, also, 12 Cyc. p. 222, and cases cited.

This question of jurisdiction by consent of parties was discussed and decided in *Perkins v. Perkins*, 173 Mich. 690, 140 N. W. 161, and many cases cited.

We must therefore hold that the consent of the people to the filing of the amendment (which was in fact a new motion), and to the argument of the motion upon the merits, on November 4, 1914, did not confer any jurisdiction upon the court to grant a new trial, that the statute is mandatory, and that the order of the court was beyond its jurisdiction. It is unnecessary to discuss the other question.

It follows that the writ of mandamus must issue, vacating the order for a new trial and directing that the prisoners be returned to the Marquette prison, and remanded to the custody of the warden of that institution, to be dealt with in accordance with said sentence.

NOTE.

Amendment of Motion for New Trial.

Generally, 105.

After Statutory Time for Motion:

In General, 106.

Addition of New Ground:

View that New Ground May Be Added, 107.

185 Mich. 654.

View that New Ground May Not Be Added, 108.

View that New Ground Must Be Germane to Original Motion, 109.

Generally.

Within the time limited for the filing of a motion for a new trial, a motion previously made may ordinarily be amended. Thus in *Thompson v. Thompson*, 109 Mo. App. 462, 84 S. W. 1022, the court said: "The essential facts are that the amended motion was filed within the time given by the statute, and contained additional causes for a new trial, and one that was not known to the mover before. We refer to the ground of newly discovered evidence. We think it was within the competency of the court to grant a new trial on the amended motion." See to the same effect, *Kentucky Journal Pub. Co. v. Brock*, 140 Ky. 373, 131 S. W. 1. See also *Lincoln v. Beckman*, 23 Neb. 677, 37 N. W. 593. In *State v. Musick*, 101 Mo. 260, 14 S. W. 212, it was said: "It is insisted that error was committed by the trial court in refusing defendant permission to file a supplemental motion for new trial, within the statutory four days, but if, as already seen, no error had been committed in the previous rulings of the court, it is not readily seen how any subsequent action of the court relative to such supplemental motion could have prejudiced the defendant."

In *Girardey v. Bessman*, 62 Ga. 654, the court said that a motion for a new trial might be amended at any time until it had been disposed of finally. See to the same effect *Snelling v. Darrell*, 17 Ga. 141; *Tifton, etc. R. Co. v. Chastain*, 122 Ga. 250, 50 S. E. 105. Compare *Riggins v. Brown*, 12 Ga. 271. And in *Kreielsheimer v. Nelson*, 31 Wash. 406, 72 Pac. 72, the court said that there was no error in allowing a motion for a new trial to be amended.

In *Walter v. Rowland* (Tex.) 189 S. W. 981, wherein it appeared that the appellant filed a motion for a new trial and afterwards filed an amended motion the court said: "The filing of the amended motion for new trial as in the case of any other pleading, had the effect of eliminating the original motion, and nothing could be considered except what was pleaded in the amendment." See also *Southern R. Co. v. Hixon*, 135 Ga. 150, 68 S. E. 1100. In *Clark v. Rauer*, 2 Cal. App. 259, 83 Pac. 291, wherein the trial court permitted the respondents to amend their statements on a motion for a new trial by inserting certain specifications of error and particulars, it was held that the court did not abuse its

discretion and that it was proper and right for the court to allow the amendment so that the motion might be presented on its merits.

In *McLeod v. Morris*, 120 Ga. 756, 48 S. E. 188, it was held that an amendment to a motion for a new trial assigning as error that the verdict was excessive and did not cover the issues or dispose of all the property of a partnership, should have been allowed.

In *Lunsford v. Sutton*, 3 Ga. App. 94, 59 S. E. 334, it was held that an amendment to a motion for a new trial for the purpose of adding the name of the claimant which had been inadvertently omitted from the face of the motion should have been allowed.

In *Lester v. Savannah Guano Co.* 94 Ga. 710, 20 S. E. 1, it was held that the court's refusal to allow an amendment, on the ground that it was immaterial, was not error. See also *Andis v. Richie*, 120 Ind. 138, 21 N. E. 1111; *Furlong v. Reid*, 12 Ont. Pr. 201. In *Shailer, etc. Co. v. Corcoran*, 11 Ohio Cir. Dec. 599, 21 Ohio Cir. Ct. 639, it appeared that a motion for a new trial was made and when it was about to be argued by counsel, the defendant company asked leave to file an amendment or supplement thereto, setting up certain alleged threats made by the plaintiff against the defendant company to the defendant's counsel when about to argue the motion for a new trial to the effect that "something would happen out there which would cost the company more than five times the amount of the verdict unless they paid that up, etc." Holding that the application was properly overruled the court said: "The application to amend was denied by the court of common pleas as relating to matters occurring after the rendition of the verdict and which were not claimed to have influenced counsel in arguing the motion for a new trial."

In *Spears v. Mt. Ayr*, 66 Ia. 721, 24 N. W. 504, it appeared that on the next day after a verdict was returned the defendant filed a motion for a new trial, and alleged as grounds therefor that the verdict was excessive, and was contrary to the instructions given by the court to the jury. On the same day the following order was entered of record: "And now, on this thirteenth day of April, 1883, it is ordered by the court that defendant has twenty days from the rising of court to prepare and file motion for a new trial, and plaintiff twenty days from the time of defendant's filing theirs to prepare and file a showing of resistance to said motion, and the same submitted in vacation." On the second day of May, 1883, the defendant filed an amendment to its motion for new trial on several grounds, one of which was newly-discovered evidence. This last ground of the motion was supported by the

affidavits of five persons. On the twenty-first day of May, 1883, the plaintiff filed the affidavits of six persons in resistance of that ground of the motion founded on newly-discovered evidence. The defendant afterward filed a counter affidavit, and the motion was submitted to the court, and was overruled at the next term of the court. The plaintiff insisted that the amendment to the motion for a new trial could not be considered, and the ruling thereon could not be reviewed, because it was not filed within three days after the verdict, as required by the Code. The court said: "If the record merely disclosed that the amendment to the motion was filed more than three days after verdict, and the plaintiff had not appeared thereto without objection upon that ground, the point made by counsel might be well taken. But the time for filing the amendment to the motion was fixed by an order of the court, in which the plaintiff was given time to make resistance to the motion. To this the plaintiff not only made no objection, but accepted the provisions of the order by making the resistance above mentioned, and the record does not show that any objection was made at any time to the extension of time for filing the amendment to the motion. Under these circumstances it should be presumed that the plaintiff assented to the order made by the court. Any other ruling would be inconsistent with the acts of the plaintiff in the court below."

In *Robert Portner Brewing Co. v. Cooper*, 116 Ga. 171, 42 S. E. 408, wherein it appeared that a motion for a new trial and the rule nisi thereon were served on the respondent, and an amendment was subsequently filed and approved by the judge who overruled the amended motion on its merits, it was held that the court could not refuse to consider the amendment because of its not being served on the respondent.

In *Mundee v. Freeman*, 23 Fla. 529, 3 So. 153, the court said: "The application to amend the motion made after it has been decided and filed, and thus insert an entirely new ground in it, is, in effect, a second and independent motion for a new trial, and if we should allow it, we would, by doing so, extend the time allowed by the statute for making motions for new trials from ten to at least forty days. We have no such power." So in *Sinsheimer v. Edward Weil Co. (Tex.)* 129 S. W. 187, in passing on a supplemental motion made after the original motion was denied, the court said: "We know of no law authorizing or permitting the filing of any such motion, and it was too late to raise any such question." In *Palmer v. Whipple*, 83 Conn. 477, 76 Atl. 1002, it appeared that the trial judge refused to permit the petitioners to amend their petition for a new

trial after a demurrer thereto had been sustained, and it was held that he acted within the limits of his discretion.

In *Jung v. Theo. Hamm Brewing Co.* 95 Minn. 367, 104 N. W. 233, after the motion for a new trial had been granted, an application for rehearing was made to the trial judge, and counsel for the defendant then applied for leave to amend the notice of motion by inserting therein, as an additional ground of the motion, "misconduct of the prevailing party." The action of the court in permitting this amendment was assigned as error. The appellate court said: "It is clear that the trial court had the power and authority to permit the amendment at the time it was made, and defendant was in no way prejudiced thereby."

After Statutory Time for Motion.

IN GENERAL.

In *Fouse v. State*, 83 Neb. 258, 119 N. W. 478, wherein the trial court refused to permit the defendant to amend his motion for a new trial, it was held that the ruling was right for the reason that the application to amend was made more than three days after the return of the verdict. See also *Lillie v. State*, 83 Neb. 268, 119 N. W. 476. So in *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330, the defendant filed his motion for a new trial within the time prescribed by law and fourteen days after the rendition of the verdict asked leave of the court to file what was denominated a supplemental motion for a new trial, which the court refused, and this was assigned for error. The appellate court said that a refusal to grant a new trial on a motion made more than four days after the trial as provided by statute was not error. Compare *Reamer v. Morrison Express Co.* 93 Mo. App. 501, 67 S. W. 718, as to an amendment to correct a formal defect.

In other jurisdictions it is within the discretion of the trial court whether an amendment to a motion for a new trial shall be allowed after the statutory time. *Kirkland v. State*, 70 Fla. 584, 70 So. 592; *Hopcraft v. Kittredge*, 162 Mass. 1, 37 N. E. 768; *Carusales v. State*, 47 Tex. Crim. 1, 82 S. W. 1038; *Kinney v. State*, 65 Tex. Crim. 251, 144 S. W. 257; *Banks v. State (Tex.)* 186 S. W. 840; *Gill v. Hecht*, 13 Utah 5, 43 Pac. 626. See also *Tores v. State (Tex.)* 166 S. W. 523. Thus in *Banks v. State*, *supra*, the court said: "Had an original motion for new trial been filed within the two days allowed by law, the court could permit it to be amended at a later day." In *Kirkland v. State*, 70 Fla. 584, 70 So. 592, wherein it appeared that a section of the General Stat-

utes provided that a motion for a new trial should be made within four days after the rendering of the verdict, the court said that the rule seemed to be very generally adopted that in extraordinary cases to be judged of by the court in its discretion a motion for a new trial might be amended after the expiration of the four days after rendition of the verdict and before the hearing on the original motion, to correct some patent or flagrant error to the end that substantial justice might be done. In *Carusales v. State*, 47 Tex. Crim. 1, 82 S. W. 1038, wherein the trial judge struck out an amended motion, it was within the sound discretion of the court to permit an amended motion for a new trial to be filed after the two days allowed by law had expired. And in *Gill v. Hecht*, 13 Utah 5, 43 Pac. 626, the court said: "We are of the opinion that the trial court, upon a proper showing, had the discretionary power to allow the amendment proposed, under section 3256, Comp. Laws 1888; but we do not hold that the failure of the trial court to exercise such discretion and grant the motion to amend was such a gross abuse of discretion as to warrant the interference of this court in such a case as is presented by the record."

It has been said generally that a motion for a new trial may be amended at any time before it is passed on. *Girardey v. Bossman*, 62 Ga. 654. See also *Snelling v. Darrell*, 17 Ga. 141; *Tifton*, etc. R. Co. v. *Chastain*, 122 Ga. 250, 50 S. E. 105. So in *Kreiesheimer v. Nelson*, 31 Wash. 406, 72 Pac. 72, the court in holding to be proper an amendment, the time of making which does not appear from the report, cited as controlling a case holding that the court may extend the statutory time for moving for a new trial.

In *State v. Kimes*, 30 Ohio Cir. Ct. Rep. 403, it was held that although the time had passed for the filing of a proper motion for a new trial, the court had a right to permit an amendment of the motion by insertion of the words, "and for a new trial."

In *Mann v. Tallapoosa St. R. Co.* 99 Ga. 117, 24 S. E. 871, wherein it appeared that a motion for a new trial not signed by the movant or his counsel was duly filed, the court said that there was no error in allowing the counsel to amend the motion for a new trial by signing his name to the motion after the time within which it could have been legally filed. See to the same effect *Reamer v. Morrison Express Co.* 93 Mo. App. 501, 67 S. W. 718.

ADDITION OF NEW GROUND.

View that New Ground May Be Added.

In some jurisdictions an amendment of a motion for a new trial containing new

grounds is allowed although the statutory time for filing an original motion has elapsed. *Preble v. Bates*, 37 Fed. 772; *Valentine v. Stewart*, 15 Cal. 387; *Loucks v. Edmondson*, 18 Cal. 203; *Moore v. Ulm*, 34 Ga. 565; *Dennis v. State*, 103 Ind. 142, 2 N. E. 349; *Andis v. Richie*, 120 Ind. 138, 21 N. E. 1111; *Niswonger v. State*, 179 Ind. 653, 102 N. E. 135, 40 L.R.A. (N.S.) 1; *Houston v. Kidwell*, 83 Ky. 301; *Wooldridge v. White*, 105 Ky. 247, 48 S. W. 1081, 20 Ky. L. Rep. 1144; *Million v. Million*, 104 S. W. 768, 31 Ky. L. Rep. 1156; *Seagrave v. Hall*, 6 Ohio Cir. Dec. 497, 10 Ohio Cir. Ct. 395; *Bell v. Walnitzch*, 39 Tex. 132; *Covington v. State*, 51 Tex. Crim. 48, 100 S. W. 368; *Day v. Goodman* (Tex.) 17 S. W. 475; *Vary v. Muirhead*, 2 U. C. Q. B. O. S. 121. See also *Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 14 Ky. L. Rep. 455, 18 L.R.A. 63. Compare *Northcutt v. Buckles*, 60 Ind. 577; *Miller v. State*, 165 Ind. 566, 76 N. E. 245; *Reed v. Miller*, 1 Bibb. (Ky.) 142; *Bell v. Howard*, 4 Litt. (Ky.) 117; *Cincinnati, etc. R. Co. v. Barr*, 6 Ky. L. Rep. (abstract) 450. Thus in *Loucks v. Edmondson*, supra, the court said: "The amendment to the statement, by the addition of the grounds upon which a new trial would be moved, was properly allowed." In *Preble v. Bates*, 37 Fed. 772, the defendants filed a motion for a new trial within two days after the verdict against them under a rule of the court. At a subsequent date they filed another motion for a new trial, asking that the verdict should be set aside on the additional ground of newly-discovered evidence. The plaintiff moved to dismiss these motions, on the ground that the first motion was waived by the filing of the subsequent motion, and that the subsequent motion was irregular, because not filed within the time allowed under the rule. Holding that the defendants preserved their rights under the rule by filing a motion within the two days allowed, and that the second motion, so called, should be construed to be in amendment of, or in addition to, the first motion, rather than a distinct motion for a new trial, the court said: "It would be going too far, perhaps, to say that a party must set out within the limited time specified by the rule all the grounds upon which he bases his motion. He may not with the utmost diligence be able to discover within two days every ground he can fairly take. For example, in this case, as I understand it, the alleged newly-discovered evidence did not come to the knowledge of defendants' counsel until some days after the expiration of the time allowed by the rule. The rule should receive a reasonable construction; and provided a party has filed his motion for a new trial within the two days, setting out his reasons in the light of the

knowledge he then possesses, he should not be deprived of the right of bringing forward additional grounds, which he could not have known at the time, because the facts were not within his knowledge."

So in *Dennis v. State*, 103 Ind. 142, 2 N. E. 349, it was held that there was no error in the action of the court in entertaining a supplemental motion. The appellate court said that the question was one which addressed itself to the sound discretion of the trial court, and that, in any case of felony, involving the life or liberty of a defendant, it would be an absolute abuse of such discretion to refuse to entertain a supplemental motion for a new trial, founded on matters occurring after final judgment, bearing strongly on the guilt or innocence of the defendant, and reasonably supported by affidavits filed therewith. See also *Niswonger v. State*, 179 Ind. 653, 102 N. E. 135, 40 L.R.A. (N.S.) 1.

Likewise in *Andis v. Richie*, 120 Ind. 138, 21 N. E. 1111, it appeared that after a motion for a new trial had been made, and after it had been pending over one term of court, the plaintiff asked leave to amend the application by inserting the affidavits of other witnesses, in which were set forth other facts to which they would testify. Leave to amend was refused. The appellate court said: "We are inclined to the opinion, that if pending a motion for a new trial it should be made to appear that the moving party had discovered other material evidence, not embraced in his original motion, and that he had not been lacking in diligence, it would be an abuse of discretion to refuse permission to amend. But the other newly discovered evidence in the present case was probably deemed immaterial. The court might well have so considered it. There was no error."

In *Moore v. Ulm*, 34 Ga. 565, it was insisted that a motion for a new trial could not be amended so as to include matter that had arisen since the making of the original motion. The court said that as an application might be made for a new trial in extraordinary cases, after the term at which the trial was had, new grounds might be inserted, which originated subsequently to the term at which the trial took place, and after the original application for a new trial was made. So in *Covington v. State*, 51 Tex. Crim. 48, 100 S. W. 368, the court holding that the allowance of an amendment of a motion for a new trial was within the sound discretion of the court said: "If merit is shown in the amended motion, although new reasons should be assigned therein, and reasonable cause for delay or failure to file the same sooner is alleged, it is the duty of the court to consider the amended motion." But in *Northcutt v. Buckles*, 60 Ind. 577, the court said:

"Under section 354 of the practice act, these additional reasons for a new trial, not having been filed at the term at which the finding was made, could not have been considered, either by the court below or by this court, if they had been objected and excepted to at the time, by the appellees."

View that New Ground May Not Be Added.

In other jurisdictions an amendment of a motion for a new trial containing new grounds is not allowed after the statutory time for filing an original motion has elapsed. *Perry v. Eaves*, 4 Kan. App. 26, 45 Pac. 718; *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461; *State v. Hunt*, 141 Mo. 626, 43 S. W. 389; *Mt. Vernon Bank v. Porter*, 148 Mo. 176, 49 S. W. 982, *reversing* 65 Mo. App. 448; *Mirrielees v. Wabash R. Co.* 163 Mo. 470, 63 S. W. 718; *State v. Simenson*, 263 Mo. 264, 172 S. W. 601; *Monahan v. Finn*, 13 Mo. App. 585; *Holmes v. Strayhorn-Hutton-Evans Commission Co.* 81 Mo. App. 97; *Hesse v. Seypp*, 88 Mo. App. 66; *Brinton v. Thomas*, 138 Mo. App. 64, 119 S. W. 1016; *State v. Ellison*, 256 Mo. 644, 185 S. W. 369, *quashing* judgment in *Iba v. Chicago*, etc. R. Co. 172 Mo. App. 141, 157 S. W. 675; *Sullivan v. Helena*, 10 Mont. 134, 25 Pac. 94; *State v. McDaniel*, 39 Ore. 161, 65 Pac. 520. See also *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106. Thus in *State v. Hunt*, *supra*, the court said: "If a motion for a new trial can be amended, or a supplemental motion filed after the expiration of four days after trial, then for the same reason it can be done any number of days thereafter, which is contrary to the plain letter of the statute."

In *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461, it was held that the trial court was correct in not allowing the defendant to file, after the expiration of the four days allowed by law for filing such motions, an amended motion for a new trial setting up the improper interference of one of the state's attorneys in summoning talesmen to serve on the jury.

Likewise in *Monahan v. Finn*, 13 Mo. App. 585, it was said: "It is not error for a trial court to refuse, four days after the trial, leave to amend a motion for a new trial so as to allege a surprise."

In *State v. McDaniel*, 39 Ore. 161, 65 Pac. 520, after briefly reviewing the facts, the court said: "After the time in which to file a motion for a new trial had expired, the defendant filed what is called a 'supplemental motion,' based on the alleged misconduct of the jury and bailiff in charge thereof. But, as the motion came too late, it was, we think, properly disregarded by the trial court."

In *Rice v. Folsom*, 32 Okla. 496, 122 Pac. 236, the court said: "The amended motion

for new trial, filed twenty days later, does attempt to set up several alleged errors; but, in our judgment, while the original motion for new trial might have been amended by a clearer or more appropriate statement of the grounds alleged in it, a motion for a new trial cannot, under the guise of 'amendment,' set up new and independent grounds therefor, after the statutory time allowed for filing such motion has passed." See to the same effect, *Rogers v. Quabner*, 41 Okla. 107, 137 Pac. 361; *Wiggins v. Jackson* (Okla.) 153 Pac. 879; *Potts v. Rubesam* (Okla.) 156 Pac. 356.

In *Aultman v. Leahey*, 24 Neb. 286, 38 N. W. 740, the plaintiff, after the expiration of the three days allowed by the statute for filing a motion for a new trial, applied to the court, and obtained leave to amend his motion. The appellate court refused to consider the matters set out in the amendment, and with respect to the power of the court in such cases said: "Section 316 of the Code of Civil Procedure provides that 'the application for a new trial must be made at the term the verdict is rendered, and, except for the cause of newly discovered evidence, shall be within three days after the verdict was rendered, unless unavoidably prevented.'" See to the same effect *Gullion v. Traver*, 64 Neb. 51, 89 N. W. 404; *Davis v. Taylor*, 92 Neb. 769, 139 N. W. 687.

In *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987, it was claimed that the court below erred in refusing to permit the defendant below, plaintiff in error, to amend his motion for a new trial by alleging "errors of law occurring at the trial, and excepted to by the defendant." The appellate court, holding that no error was committed, said: "A motion for a new trial, including such a ground, must be filed within three days after the verdict is rendered, unless the party desiring to file the same is unavoidably prevented from filing it within that time."

View that New Ground Must Be Germane to Original Motion.

In a few jurisdictions it has been held that an amendment of a motion for a new trial containing a new ground is not permissible after the statutory time for filing an original motion has elapsed, unless the new ground is germane to those of the original motion. *Sowden v. Craig*, 20 Ia. 477; *Harnett v. Harnett*, 59 Ia. 401, 13 N. W. 408; *Dutton v. Seever*, 89 Ia. 302, 56 N. W. 398; *Smith v. Smith*, 160 Ia. 111, 140 N. W. 659; *Wiar v. Wabash R. Co.* 162 Ia. 702, 144 N. W. 703; *Hall v. Feagins*, 169 Ia. 495, 151 N. W. 481; *State v. Anderson* (Ia.) 80 N. W. 430; *Blue Creek Land, etc. Co. v. Anderson*, 35 Utah 61, 99 Pac. 444. See also *Reed v. Wells-*

burg (Ia.) 161 N. W. 660. And see the reported case. *Compare Trade Discount Co. v. Miller* (Ia.) 136 N. W. 680.

Thus in *Sowden v. Craig*, *supra*, it was held, under a statute, that a motion for a new trial filed within three days might be amended afterwards, provided the amendment was germane and proper to the object and purpose of the original motion, and could not in any legitimate sense be regarded as a new motion. And in *State v. Anderson* (Ia.) 80 N. W. 430, wherein relator was permitted to amend her motion for a new trial over the defendant's objections, the court said that as the matter contained in the amendment was germane to that stated in the original motion, there was no error.

RUMMELL ET AL.

v.

BLANCHARD ET AL.

New York Court of Appeals—November 30, 1915.

216 N. Y. 348; 110 N. E. 765.

Sales — Vendor's Lien — Loss — Transfer of Warehouse Receipt.

General Business Law (Consol. Laws, c. 20, § 125, McKinney's Consol. Laws, Book 19), provides that a person to whom a negotiable warehouse receipt is duly negotiated thereby acquires such title as the person negotiating the receipt or the person to whose order the goods were to be delivered by the terms of the receipt had, or had ability to convey to a purchaser in good faith for value, and also the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Section 126 provides that if the receipt is nonnegotiable, the transferee acquires the right to notify the warehouseman of the transfer, and thereby acquire his direct obligation to hold possession of the goods for him according to the receipt, but that prior to such notification his title and such right may be defeated by the levy of an attachment or execution by a creditor of the transferor, or by notice to the warehouseman of a subsequent sale by the transferor. Section 133 provides that where a negotiable receipt has been issued, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom the receipt has been negotiated. Personal Property Law (Consol. Laws, c. 41, McKinney's Consol. Laws, Book 40), § 135, added by Laws 1911, c. 571, provides that the unpaid seller of goods who is in possession of them is entitled to retain possession until payment in the cases therein

specified. It is held that from the moment that a negotiable receipt is negotiated, or from the moment of notice of the warehouseman in the case of the negotiation of a nonnegotiable receipt, the warehouseman holds possession for the transferee of the receipt, and with the transmutation of possession the vendor's lien of the transferor is at an end.

[See note at end of this case.]

Stoppage in Transitu — Loss of Right — Transfer of Warehouse Receipt.

Under Personal Property Law, § 139 (Consol. Laws, c. 41, McKinney's Consol. Laws, Book 40), added by Laws 1911, c. 571, providing relative to a seller's right of stopping goods in transitu that goods are in transit from the time they are delivered to a carrier or bailee for transmission to the buyer, until the buyer takes delivery from the carrier or bailee, and that goods are no longer in transit if the buyer obtains delivery before the arrival of the goods at their destination, or if, after their arrival, the carrier or bailee acknowledges to the buyer that he holds the goods on his behalf, a seller of goods, transferring a negotiable warehouse receipt therefor to the buyer, cannot thereafter regain possession by the exercise of the right of stoppage in transitu, as merchandise is not in "transit" unless delivered to a bailee for the purpose of transportation, and if the transformation of the warehouseman's possession from a possession for the seller to a possession for the buyer by the transfer of the receipt was equivalent to a transit of the merchandise, the same act which marked the beginning of the transit marked also its end, and where the process of transportation has been completed and the bailee has undertaken to keep the goods as agent of the buyer, the right of stoppage is extinguished.

Rummell v. Blanchard, 167 N. Y. App. Div. 654, affirmed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Action by Jacob Rummell et al., plaintiffs, against Archibald Blanchard et al., defendants. Judgment for defendants at Special Term of Supreme Court. Judgment affirmed by Appellate Division of Supreme Court. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

David Michelsohn and *Milton Dammann* for appellants.

Joseph M. Hartfield and *James J. Porter* for respondents.

[350] CARDOZO, J.—The action is replevin. The plaintiffs sold to George A. Alden & Company and the New York [351] Shellac Company two hundred cases of shellac. At the time of the sale the shellac was stored in a warehouse, and the plaintiffs held ware-

house receipts, issued in their name, and negotiable in form. These receipts the plaintiffs indorsed and transferred to the purchasers. This was done on February 13, 1913. On February 14, 1913, one of the purchasers, the New York Shellac Company, tendered the receipts to the warehouseman and requested that new receipts be issued. This was refused because the charges of the warehouseman were not paid. A few days later both purchasers became bankrupts. The shellac has never been paid for, and the plaintiffs on learning that the buyers were insolvent paid the warehouse charges and demanded delivery. This demand was refused; an action of replevin against the warehouseman followed; and thereafter the trustees in bankruptcy of the buyers were substituted as defendants. They have demurred to the complaint, the demurrer has been sustained, and the question whether a cause of action has been certified to this court.

The plaintiffs insist that the merchandise was never brought into the possession of the purchasers, and, hence, that they have never lost their lien as vendors for the payment of the price. The effect of the indorsement of warehouse receipts is now prescribed by statute. Where the receipts are negotiable in form, the holder to whom they have been negotiated acquires thereby "(a) such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and (b) the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him" (General Business Law [Cons. Laws, [352] ch. 201, § 125; McKinney's Consol. Laws, Book 19). Where the receipts are not negotiable the holder "acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt," but "prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor" (Gen-

eral Business Law, § 126). In brief, the warehouseman who issues a negotiable receipt agrees in advance to hold the goods for the account of any person to whom the receipt is negotiated, and by the very act of negotiation loses his position as bailee for the vendor, and is transformed, without further assent, into a bailee for the vendee. The warehouseman who issues a non-negotiable receipt does not become the bailee for the transferee of the receipt until notice of the transfer. From the moment of the negotiation in the case of a negotiable receipt, and from the moment of notice in the case of a non-negotiable receipt, the holder of the receipt is the bailor, and the warehouseman's possession is for the account of the new owner.

The significance of this statute will become manifest when we consider the law as it stood before the statute was enacted. It was long a mooted question whether the transfer of a warehouse receipt divested a vendor's lien unless the warehouseman had consented to become the bailee for the vendee. Some courts held the view that such a consent was necessary. It might be given in advance, but unless it was given in some form, either before or after the event, the warehouseman, it was [353] thought, remained the bailee of the vendor, and the transfer of the receipt, though effective to change the title, left the possession undisturbed (Williston on Sales, p. 739; Benjamin on Sales [5th ed.] pp. 216, 846, 853; *Farina v. Home*, 16 M. & W. (Eng.) 119; *Bentall v. Burn*, 3 B. & C. 424, 10 E. C. L. 139; *Hallgarten v. Oldham*, 135 Mass. 1, 9, 10, 11, 46 Am. Rep. 433; *Selliger v. Kentucky*, 213 U. S. 200, 205, 29 S. Ct. 449, 53 U. S. (L. ed.) 761; *Union Trust Co. v. Wilson*, 198 U. S. 530, 536, 25 S. Ct. 766, 49 U. S. (L. ed.) 1154; *Keeler v. Goodwin*, 111 Mass. 490). Whether the transfer of bills of lading had any greater effect is a question not before us. It is true that the rule which we have stated has been criticized (see, e. g., *Conrad v. Fisher*, 37 Mo. App. 352, 367, 8 L.R.A. 147); indeed, until the enactment of this statute, we may doubt whether it had been fully adopted in this state (*Rochester Bank v. Jones*, 4 N. Y. 497, 503, 55 Am. Dec. 290; *Willeys v. Hatch*, 132 N. Y. 41, 44, 30 N. E. 251, 17 L.R.A. 193. See also *Gibson v. Stevens*, 8 How. 384, 399, 12 U. S. (L. ed.) 1123); but in many jurisdictions it was settled law. The critics of the rule maintained that the transfer of a warehouse receipt ought to be deemed equivalent to an actual delivery even without the warehouseman's assent; but never was it doubted that a change of possession resulted where the bailee or agent of the

seller had given his assent, and had thereby been converted into a bailee or agent for the buyer. Less may perhaps have been required, but assuredly not more.

When the statute is read in the light of these decisions, its meaning is not doubtful. It charges every warehouseman who issues a negotiable receipt with a direct obligation to any one and every one to whom the receipt has been negotiated. It charges every warehouseman who issues a non-negotiable receipt with a like obligation after notice of the transfer. In the one case, the holder acquires "the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him." In the other case, the holder acquires a like right upon giving notice of the transfer. [354] The assent of the warehouseman to act as bailee is thus written by the law into the contract embodied in the receipt. "By a receipt in that form the bailee assents in advance to becoming bailee for any one who is brought within the terms of the receipt by an endorsement of the same" (*Union Trust Co. v. Wilson*, supra, p. 536; *Selliger v. Kentucky*, supra). The moment that a receipt, negotiable in form, is indorsed and delivered, a new relation of bailor and bailee springs into being, and with the birth of that relation the possession, once held by the bailee for the account of the vendor, is transmuted into a possession for the account of the vendee. The result "is a real delivery to the same extent as if the goods had been transported to another warehouse named by the pledgee" (*Union Trust Co. v. Wilson*, supra. See also: *Mills v. Charlesworth*, 25 Q. B. D. (Eng.) 421, 425). With the transmutation of possession the vendor's lien is at an end (*Personal Property Law* [Cons. Laws, ch. 41], § 135, *McKinney's Consol. Laws*, book 40).

We think there is nothing in section 133 of the General Business Law (L. 1909, ch. 25) at war with this conclusion. That section provides: "Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage *in transitu*. Nor shall the warehouseman be obliged to deliver or be justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation." The provision that the lien shall not be enforceable unless the receipt is surren-

dered, reinforces our holding that the lien is at an end when the receipt has been negotiated.

The plaintiffs insist that if they have lost their lien, they may none the less regain possession by the exercise of the [355] right of stoppage *in transitu*. This claim need not long detain us. Merchandise is not in transit unless it has been delivered to a bailee for the purpose of transportation (Rosenthal v. Weir, 170 N. Y. 148, 154, 63 N. E. 65, 57 L.R.A. 527; Harris v. Pratt, 17 N. Y. 249, 252). This merchandise was never delivered to a bailee for that purpose (Williston on Sales, § 524; Personal Property Law, § 139, McKinney's Consol. Laws, book 40). Since no transit was ever begun, there was none to intercept. It is true that the possession of the bailee was transformed from a possession for the account of one bailor into a possession for the account of another. If this change of the bailee's relation could be deemed equivalent to a transit of the merchandise, the same act which marked the beginning of the transit marked also its end. We may concede that while merchandise is still in course of transportation, the right of stoppage may be exercised against warehousemen as well as against carriers (Harris v. Pratt, *supra*). The warehouseman, in such circumstances, is an intermediary in the process which culminates in delivery. But where that process has been completed, and the warehouseman has undertaken to keep the goods as agent of the vendee, the merchandise is then at rest, and the right of stoppage is extinguished (Williston on Sales, *supra*; 25 Halsbury's Laws of England, p. 251).

The order should be affirmed with costs, and the question certified answered in the negative.

Willard Bartlett, Ch. J., Hiscock, Chase, Collin, Seabury and Pound, JJ., concur.

Order affirmed.

NOTE.

Transfer of Warehouse Receipt as Divesting Vendor's Lien.

This note deals with the transfer of a warehouse receipt as divesting a vendor's lien. As to the negotiability of warehouse receipts see the note to National Union Bank v. Shearer, 17 Ann. Cas. 664.

Where goods held in a warehouse are sold and the warehouse receipt is transferred to the vendee with intent thereby to complete the sale, the seller loses his vendor's lien, a transfer of a negotiable warehouse receipt being considered as a constructive delivery of the goods. Parker v. Byrnes, 1 Lowell

539, 18 Fed. Cas. No. 10,728; Barrett v. Goddard, 3 Mason 107, 2 Fed. Cas. No. 1,046. And see the reported case. In Parker v. Byrnes, *supra*, the court said: "But I take the modern doctrine to be, that if the buyer stops payment before the seller has actually parted with possession, though after he has parted with the title, if no rights of innocent third persons have intervened, his lien revives, if he is able to give up the note received for the price, and that an assignee in bankruptcy stands in this, as in all other cases not involving fraud, on the precise footing of the bankrupt himself. Arnold v. Delano, 4 Cush. (Mass.) 33. So that if it were true, as assumed by the defendant in his letter of the ninth of February, that the possession was still in him, he had a lien somewhat analogous to the right of stoppage in transitu, which he might enforce against the bankrupt, and against the present plaintiff. In the case of the two lots entered, and warehoused by Oakes, it is now admitted that there was no scintilla of possession left in Byrnes. And it seems to me equally clear that Oakes was in possession of the Ashton salt. The defendant had made over all the papers necessary for the withdrawal of this salt from the warehouse; the warehouseman had agreed to look to Oakes as his principal, and the order itself shows that the salt was all that remained of a certain cargo, and so must have been separate and distinct from all other goods. This was all the delivery that the nature of the case required, and Naylor & Company thereby became the agent of Oakes, and ceased to be the agent of Byrnes, which is the usual test."

In Conrad v. Fisher, 37 Mo. App. 407, 8 L.R.A. 147, the court in discussing the various ways in which a vendor's lien may be divested, said: "Still another exception, having its foundation, in this country, in the general usages of trade, of which the courts take judicial notice (Gibson v. Stevens, 8 How. 384, 399, 12 U. S. (L. ed.) 1123), but confirmed in nearly all the states of the union by statutes, relates to symbolical transfers of personal property in warehouses, by the transfer of warehouse receipts. Following the precedent set by the great case of Lickbarrow v. Mason, 2 T. R. (Eng.) 63, 1 Smith Lead. Cas. 388, it is now the recognized law of this country that the owner of goods, or one having the legal right to sell or to pledge them, may invest another with the full title and constructive possession of them, by transferring to him a bill of lading or a warehouse receipt which has been issued as their symbolical representative, either by a carrier or a warehouseman in whose custody they are, so as to discharge the vendor's lien or his right of stoppage *in transitu*, if the transferee of the bill of lading

or warehouse receipt receives it bona fide and for a valuable consideration."

It seems that where a vendor who is himself the warehouseman sells to a person who becomes bankrupt before the goods are removed from the warehouse, the vendor is not divested of his vendor's lien and the assignees in bankruptcy cannot recover. *Townley v. Crump*, 24 Ad. & El. 58, 31 E. C. L. 23; *Grice v. Richardson*, 3 App. Cas. (Eng.) 319, 24 Moak 214. But see *Barrett v. Goddard*, 3 Mason 107, 2 Fed. Cas. No. 1,046.

POWELL

v.

POWELL

Wisconsin Supreme Court—April 13, 1915.

160 Wis. 504; 152 N. W. 168.

Set-off — Counterclaim for Tort in Action for Tort.

Under St. 1913, § 2656, authorizing a counterclaim arising out of the transaction set forth in the complaint, defendant, in an action for slander, may plead as a counterclaim a slander by plaintiff arising at the same time and place as the slander alleged in the complaint, for the word "transaction" includes the entire word encounter.

[See note at end of this case.]

Appeal from Circuit Court, Sauk county: O'NEILL, Judge.

Action by Ed Powell, plaintiff, against Clarence Powell, defendant. From judgment rendered, plaintiff appeals. **AFFIRMED.**

[504] This action was brought to recover damages for slander. The complaint sets up three separate causes of action. The defendant answered, setting up two counterclaims, to each of which the plaintiff demurred.

The court sustained the demurrer as to the second counterclaim and overruled it as to the first.

The plaintiff assigns error in overruling the demurrer to the first counterclaim, which is as follows:

"Further answering the allegations of the first cause of action in said complaint contained, and as for a counterclaim thereto, the defendant alleges that on the 6th day of May, 1913, at the time and place and as a part of the conversation therein referred to, the said plaintiff in the presence and hearing of one Floyd Darrow, Lula Powell, Ann. Cas. 1917D—8.

Elmina Powell, Albert Wagner, and other persons, did maliciously speak and publish to, of, and concerning this defendant the following false and scandalous defamatory words, to wit: 'You are a pup, the biggest pup that ever lived;' thereby charging and intending to charge that this defendant was a person of low, mean, and disreputable character and habits. That in addition to said false and defamatory words, and on the same date and under the same circumstances and in the hearing of the same persons, the plaintiff did maliciously speak and publish to, of, and concerning the defendant the following false, scandalous, and defamatory words, to wit: 'Where is that watch you stole from your father?' thereby charging and intending [505] to charge that the defendant stole his father's watch; and defendant further shows as a part of his said counterclaim that by reason of the utterance of such false and defamatory words the defendant has suffered great damage to his reputation and great mental anguish, all to his damage in the sum of two thousand dollars (\$2,000)."

Grotophorst, Evans & Thomas for appellant.

James A. Stone and *John A. Aylward* for respondent.

KERWIN, J.—The first cause of action charged that on May 6, 1913, "in the town of Excelsior, county of Sauk, state of Wisconsin, the defendant, in the presence and hearing of Floyd Darrow, Lula Powell, the plaintiff's wife, and others, maliciously spoke of and concerning the plaintiff the following false and defamatory words: 'You stole straw from your mother. You are a thief.' "Further complaining, plaintiff alleges that by reason of the utterance of such false and slanderous words the plaintiff has suffered a great damage to his reputation and has suffered a great mental anguish, and has been damaged in the sum of two thousand dollars (\$2,000)."

To this cause of action the defendant set up the counterclaim set forth in the statement of facts.

The decisions of this court construing the Code favor settling all controversies, so far as may be, in one action. In an action by plaintiff for assault and battery committed by the defendant on him, an assault by plaintiff on defendant in the same affray was held pleadable. *Pelton v. Powell*, 96 Wis. 473, 71 N. W. 887; *Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L.R.A. 744. If in the same encounter, in an action by plaintiff for assault and battery, defendant may counterclaim for assault and battery committed on him, it seems clear that [506] in a slander

action the defendant may plead a slander arising at the same time and place as the slander set up in the complaint. It has been held by this court that the word "transaction" in sec. 2656, Stats. as applied to assault and battery cases, includes the entire physical encounter. *Pelton v. Powell*, supra; *Gutzman v. Clancy*, supra. It seems plain, therefore, that in slander cases "transaction" must include the entire word-encounter.

In *Pelton v. Powell*, supra, it was sought to limit "transaction" to contract relation, but that contention was overruled. Page 475. If the counterclaim grows out of the same transaction and also defeats or modifies the plaintiff's claim, it may be pleaded under Wisconsin decisions. *Dietrich v. Koch*, 35 Wis. 618; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Heckman v. Swartz*, 55 Wis. 173, 12 N. W. 439. As to meaning of "transaction" as defined by this court, see *Emerson v. Nash*, 124 Wis. 369, 382, 102 N. W. 921; *McArthur v. Moffet*, 143 Wis. 564, 128 N. W. 445, 33 L.R.A.(N.S.) 264. True, there is some conflict of authority, as pointed out in *Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L.R.A. 744, and *Wrege v. Jones*, 13 N. D. 267, 3 Ann. Cas. 482, 100 N. W. 705, 112 Am. St. Rep. 679. We think, however, that this case is ruled by former decisions of this court heretofore cited, therefore the order of the court below is right and must be affirmed.

BY THE COURT.—The order appealed from is affirmed.

NOTE.

Counterclaim for Tort in Action for Tort.

General Rule.

In accordance with the holding in *Wrege v. Jones*, 13 N. D. 267, 3 Ann. Cas. 482, the majority of the recent cases hold that under a statute allowing a counterclaim on a cause of action arising out of the transaction set forth in the complaint or connected with the same subject-matter, one tort cannot be set off in an action for another tort. *Edge v. Weigel*, 97 L. T. N. S. (Eng.) 447; *Replogle v. Toledo*, etc. R. Co. 184 Ill. App. 338; *Adams v. Schwartz*, 137 App. Div. 230, 122 N. Y. S. 41; *Pettis v. Schwartz*, 137 App. Div. 242, 122 N. Y. S. 50; *McCormick v. Schtrenck* (Tex.) 130 S. W. 720; *Dees v. Thompson* (Tex.) 186 S. W. 56; *Smith v. Alvord*, 31 Utah 346, 88 Pac. 16. And see *Craig v. Chicago*, etc. R. Co. 97 Neb. 586, 150 N. W. 648.

In *Edge v. Weigel*, supra, the plaintiff, a dealer in automobiles, brought an action for

libel against the defendant for making certain statements in a paper derogatory to him as a manufacturer of a certain type of car. The defendant while admitting the fact that he had written the articles counterclaimed to the effect that an agent of the plaintiff had published a statement in a paper setting forth that he was a man of no honor and therefore it was not safe to have dealings with him. The court held that the defendant was not entitled to his counterclaim, because it did not relate to the same cause of action within the meaning of a statute providing that such a pleading must seek "relief relating to or connected with the original subject of the cause or matter." The court said: "It is as plain as can be that it is of the essence of a counterclaim that there should be certain rights in the defendant against the plaintiff to an action. But you can have a counterclaim by the defendant to an action against a person not already a party to the action, for the subsection goes on to say this: 'And also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose.' That is to say, a defendant is not entitled because he may have a cause of action against the plaintiff to drag into that litigation any third person who may be connected with the plaintiff. It can only be done, as it seems to me, out of manifest justice to the third person, if the relief sought against the third person is 'relief relating to or connected with the original subject of the cause or matter.' Those are not words which are susceptible of very precise legal definition or meaning, but they are reasonably clear, at least as applied to the case now before us."

In *Replogle v. Toledo*, etc. R. Co. 184 Ill. App. 338, which was an action brought against the defendant company for the death of a horse and sheep alleged to have been caused by the failure of the defendant to maintain fences along its tracks and cattle guards at crossings, the railroad company counterclaimed for injury to its locomotive caused by the live stock running against its sides. The court held that this counterclaim could not be pleaded under the statute, as the torts were separate and distinct acts.

In *Craig v. Chicago*, etc. R. Co. 97 Neb. 586, 150 N. W. 648, an action for the death

of the plaintiff's wife resulting from a collision between her carriage and a train of the defendant company, the latter counterclaimed for damages to its locomotive and cars from the negligent driving of the deceased. While the court refused to allow the counterclaim for another reason it was questioned whether a tort could be set off against another tort even had the feature which controlled the decision been absent.

In *Adams v. Schwartz*, 137 App. Div. 230, 122 N. Y. S. 41, in which the original cause of action was false imprisonment and malicious prosecution, the defendant counterclaimed for the acts for which the prosecution was had, viz. a trespass on his property and the posting of an advertisement without his permission. It was held that the counterclaim was not a good one, because the torts were of a different kind and did not arise from the same transaction as required by the statute (Code Civil Procedure, § 501) which defines a counterclaim as "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." The court said: "It is now well settled that in an action either on contract or on tort a counterclaim may be interposed based upon either contract or tort, provided it answers the other requirements of sections 501 and 502 of the Code of Civil Procedure, namely, that it arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action, or, if the action be on contract, is any other cause of action arising on contract and existing at the time the action was commenced. (*Deagan v. Weeks*, 67 App. Div. 410; *Rothschild v. Whitman* [132 N. Y. 472], *supra*; *Ter Kuile v. Marsland* [81 Hun 420], *supra*, and *Thomson v. Sanders* [118 N. Y. 252], *supra*.) If the facts necessary to the proof of either cause of action involve an inquiry concerning the same transaction or matter, that is regarded by many of the authorities as a material consideration, but it is not controlling unless from the nature of the counterclaim it may fairly be said that it arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is necessarily or directly connected with the subject of the action." See also *Pettis v. Schwartz*, 137 App. Div. 242, 122 N. Y. S. 50, a case based on the same state of facts and decided the same way.

In *McCormick v. Schtrenck* (Tex.) 130 S. W. 720, the plaintiffs, who were husband and wife, brought an action against the defendant for an assault and battery on the wife, while the defendant counterclaimed for as-

sault made on him by the husband on a subsequent occasion. It was held that these assaults were two separate and distinct acts between different persons and occurring at different times, and could not be set off against each other. The court said: "And this, we think, would be true, even if these separate assaults were between the same parties. The refusal to countenance such a procedure on the part of our courts is based upon the idea that it would be contrary to public policy to permit one who had committed an assault upon another, and against whom a civil prosecution had been instituted, to plead in offset to the action that the plaintiff had committed a similar assault upon him on another occasion." In another Texas case, *Dees v. Thompson* (Tex.) 166 S. W. 56, an action for damages for shooting and killing the plaintiff's horse, the defendant counterclaimed for damages suffered in several trespasses by the horse and expenses sustained in feeding the animal during one of those trespasses. The court held that the counterclaim could not be pleaded since it was an independent cause of action, in no wise incident to or connected with the plaintiff's cause of action. The court said: "In an action upon tort, the defendant cannot set off or reconvene for damages resulting from a tort previously committed by the plaintiff. The statute relating to this matter does not cover disconnected claims for damages arising in tort."

In the case of *Smith v. Alvord*, 31 Utah 346, 88 Pac. 16, the plaintiff brought an action in equity to restrain the defendant from digging a ditch close to his property thereby injuring a fence belonging to him, and also killing his shade trees on the boundary of his land by exposing the roots. Among other matters of defense, the defendant counterclaimed for damages from the act of the plaintiff in cutting down certain other trees growing upon the boundaries after the restraining order had been issued, throwing their limbs on his (defendant's) land and destroying his fence. It was held that the counterclaim could not be properly pleaded because both causes of action were torts and it was an attempt to meet one tort by another. The court said: "The great weight of authority on this subject, as well as the reason of the thing, under statutes permitting counterclaims, is to the effect that a tort cannot be counterclaimed against another tort."

Exception to Rule.

On the other hand it has been held that under some circumstances one tort may be set off against another where they are so closely connected as to form one transaction.

Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128. And see the reported case.

In Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128, it appeared that the plaintiff had leased a room in a building owned by him to the defendant for the purpose of keeping a cigar store. The defendant occupied the premises for a year, and then on the refusal of the plaintiff to rent it again to him, moved out before the expiration of the lease. The plaintiff took possession and had new locks placed on the doors, whereupon the defendant and his employees drove him out forcibly. The plaintiff then brought action for \$100 damages and to have the defendant restrained from interfering with his possession of the building. The defendant counterclaimed that the lease had not yet expired and that the plaintiff had broken into the room and converted his goods to the value of \$500. The court held that the two acts arose at the same time and out of the same transaction, and that though the actual conversion of the defendant's stock occurred after the action commenced, yet as the entry and wrongful exclusion of the defendant had taken place previous to that time, the counterclaim was proper.

In the reported case, it is held that in an action for slander, the defendant may counterclaim for a slander committed at the same time and place; the word "transaction" in the Wisconsin statute including the entire encounter between the parties.

BOGER

v.

CEDAR COVE LUMBER COMPANY.

North Carolina Supreme Court—May 13, 1914.

165 N. Car. 557; 81 S. E. 784.

Attachment — Bond — Signature in Wrong Place — Effect.

Under Revisal 1905, § 763, directing the officer issuing a warrant of attachment to require a written undertaking on the part of plaintiff with sufficient surety, it was immaterial that the surety, by mistake, signed his name to the justification of the undertaking, instead of to the undertaking itself, since, the statute prescribing no rule as to the execution of the undertaking, a signing and delivery is sufficient, and, where the statute requires an instrument to be signed, but does not require it to be subscribed, it is not necessary for the signature

to appear on any particular part of the instrument, if written with intent to become bound.

Amendment of Bond.

If an attachment undertaking was invalid where the surety signed his name to the justification, instead of to the undertaking, the court had power, on a motion to vacate, to permit the filing of a proper undertaking.

[See note at end of this case.]

Appeal from Superior Court, Burke county: WEBB, Judge.

Action by Derr Boger, plaintiff, against Cedar Cove Lumber Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[557] This action was commenced on 30 December, 1911, returnable on 30 January, 1912, to recover the sum of \$67, due by account, with interest. At the same time a warrant of attachment was issued, returnable on the same day as the summons, and on the return day judgment was rendered by said justice, for the sum of \$70.35, interest and costs.

On 1 February, 1912, a notice was issued to the Drexel Furniture Company to show cause on 3 February, 1912, why the conditional judgment rendered against it should not be made absolute, and to answer on oath what was due from it to the Cedar Cove Lumber Company, the defendant.

The furniture company appeared in answer to the notice, and at the same time the lumber company entered a special appearance, and moved the court to set aside the judgment rendered in the action and to vacate the attachment issued and to dismiss the action upon the following grounds:

[558] (1) That no proper undertaking on the part of the plaintiff, with sufficient surety, conditioned as provided by section 763 of the Revisal of 1905, was required or taken by the justice's court before issuing the warrant of attachment therein as required by said section.

(2) That there has been no proper publication of the summons and warrant of attachment herein, as required by section 776 of the said Revisal.

The said justice having found as a fact that by oversight and mistake, R. R. Boger, the surety on the attachment bond or undertaking, had signed the verification of said bond or undertaking, but had failed to sign the bond or undertaking itself, made the order denying the motion of the Cedar Cove Lumber Company to vacate the attachment and dismiss the action, and allowed the said R. R. Boger to sign as surety on said bond or undertaking, on said 8 February, 1912;

and the said Cedar Cove Lumber Company, having excepted, appealed to the Superior Court.

The appeal was heard at the December Term, 1913, of the Superior Court, and the Cedar Cove Lumber Company again put in a special appearance and renewed the motion to vacate the attachment and dismiss the action made before the justice.

The court, upon appeal, found as a fact that proper advertisement of the attachment proceedings, when issued before the justice of the peace, was made, and notice relative to same posted and given as the law directs; that the justice of the peace had the right and power under the statute to allow the said Boger to sign the bond at the time he did sign it, and that it was a mere inadvertence on the part of Boger not signing the bond in the proper place at the time the attachment proceedings were issued; that at the time the said Boger verified the said bond it was his intention to sign the bond at the proper place, and he really thought he had done so.

The motion of the defendant was denied, and it excepted.

Judgment was rendered in favor of plaintiff, and the defendant appealed.

Avery & Ervin for appellant.
S. J. Ervin for appellee.

[559] ALLEN, J.—His Honor has found as a fact that the summons and warrant of attachment have been duly served, and there is no exception to the finding.

The only irregularity, therefore, in the proceeding is that the surety on the undertaking of the plaintiff signed his name to the justification of the undertaking instead of to the undertaking itself, and as to this his Honor finds that it was the result of a mistake, and that it was the intention of the surety to sign the undertaking, and he thought he had done so.

The statute (Rev. sec. 763) directs the officer issuing a warrant of attachment to "require a written undertaking on the part of the plaintiff, with sufficient surety," but it fails to prescribe any rule as to its execution, and a signing and delivery would be sufficient.

The authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity in reference to the first class that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and as to the second class, that the name must be at the end of the instrument.

In *Richards v. W. M. Ritter Lumber Co.* 158 N. C. 56, Ann. Cas. 1913D 313, 73 S. E. 485, dealing with this question, the Court said: "It is well settled in this State that when a signature is essential to the validity of an instrument it is not necessary that the signature appear at the end, unless the statute uses the word 'subscribe.' *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. 902, 12 L.R.A. 205. This has always been ruled in this State in regard to wills, as to which the signature may appear anywhere. If this is true of a 'signature,' it must also be true of the word 'countersign.' It has been often held that the place of signing is a matter of taste. *Adams v. Field*, 21 Vt. 264; 36 Cyc. 441."

We are therefore of opinion that the surety signed the undertaking when it was first filed, and that it was then valid and binding on him.

[560] We are further of opinion that if invalid, the court had the power to permit it to be filed afterwards. *Pharr v. Cabarrus County*, 165 N. C. 523, 81 S. E. 782.

Affirmed.

NOTE.

Right to Amend Attachment Bond.

Amendment Allowed:

Under Statute Expressly Authorizing Amendment, 117

Under Statute Not Expressly Authorizing Amendment, 118

Amendment Not Allowed, 119

Amendment Allowed.

UNDER STATUTE EXPRESSLY AUTHORIZING AMENDMENT.

Under the authority of statutes which in express terms authorize amendments to attachment bonds, in many jurisdictions where in the giving of a prescribed bond or undertaking is a prerequisite to the issuance of an attachment writ, attachment bonds have been held to be amendable subsequent to the issuance of the writ either by the giving of a new bond or by a correction of the old.

Alabama.—*Sims v. Jacobson*, 51 Ala. 186 (names of individual members of several partnerships, plaintiff and defendant omitted); *Ex p. Nicrosi*, 103 Ala. 104, 15 So. 507 (failure properly to describe party, there being no mistake as to identity); *McKissack v. Witz*, 120 Ala. 412, 25 So. 21 (addition of name of new party defendant allowed).

California.—*Bone v. Trafton*, 31 Cal. App. 30, 159 Pac. 819 (word "free" or "house"

omitted before the word holder in affidavit of sureties attached to undertaking). *Compare* Tibbet v. Sue, 122 Cal. 206, 54 Pac. 741 (decided previous to enactment of statute).

Georgia.—Oliver v. Wilson, 29 Ga. 642 (bond not attested); Irvin v. Howard, 37 Ga. 18 (amount of bond insufficient); Kent v. Downing, 44 Ga. 116 (error in designation of term of court to which attachment was returnable); Long v. Hood, 46 Ga. 225 (plaintiff's name signed by one who failed to designate that he signed as attorney); Sutherlin v. Underwriter's Agency, 53 Ga. 442 (obligee's name omitted); Lockett v. De Neufville, 55 Ga. 454 (amount of bond insufficient). See also Smith v. Joiner, 27 Ga. 65; Blake v. Camp, 45 Ga. 298; Guckenhimer v. Day, 74 Ga. 1. *Compare* Copeland v. Monroe, 16 Ga. App. 586, 85 S. E. 789 (paper purporting to be bond but containing no security).

Illinois.—Lea v. Vail, 2 Scam. 473 (bond having no seal or scrawl). See also Hunter v. Ladd, 1 Scam. 551; Schmitt v. Devine, 63 Ill. App. 289.

Iowa.—Elliott v. Stevens, 10 Ia. 418 (bond insufficient in amount); Holmes v. Budd, 11 Ia. 186 (mistake as to designation of court in which proceedings were being had); Hamble v. Owen, 20 Ia. 70 (bond insufficient in amount); Gourley v. Carmody, 23 Ia. 212 (bond insufficient in amount); Griffith v. Milwaukee Harvester Co. 92 Ia. 634, 61 N. W. 243, 54 Am. St. Rep. 573 (bond insufficient in amount). See also Bretney v. Jones, 1 G. Greene 366; Churchill v. Fulliam, 8 Ia. 45; Cheever v. Lane, 9 Ia. 193.

Mississippi.—Greenwood Grocery Co. v. Bennett, 101 Miss. 573, 58 So. 482, 598 (failure to describe corporation signing bond as such). *Compare* Houston v. Belcher, 12 Smedes & M. 514 (decided previous to enactment of statute).

Missouri.—Van Arsdale v. Krum, 9 Mo. 397 (bond not conditioned for payment of damages accruing by reason of any "process or proceeding in the suit" as required by statute); Beardslee v. Morgan, 29 Mo. 471 (plaintiff's name signed by attorney without authority); Henderson v. Drace, 30 Mo. 358 (words "under seal" omitted from body of bond). See also Wood v. Squires, 28 Mo. 528.

Tennessee.—Brooks v. Hartman, 1 Heisk. 36 (firm name signed, instead of names of firm members). See also Alexander v. Lisby, 2 Swan 107; Lillard v. Carter, 7 Heisk. 604; Hart v. Dixon, 5 Lea 336.

Where amendments are expressly authorized by statute some decisions not only hold that the plaintiff may exercise that right on request, but go further and make it the duty of the court to give an opportunity for

amendment before quashing the attachment proceedings. Lowry v. Stowe, 7 Port. (Ala.) 483; Planters', etc. Bank v. Andrews, 8 Port. (Ala.) 404; Alford v. Johnson, 9 Port. (Ala.) 320; Lowe v. Derrick, 9 Port. (Ala.) 415; Jackson v. Stanley, 2 Ala. 320; Irvin v. Howard, 37 Ga. 18; Tevis v. Hughes, 10 Mo. 380; Jasper County v. Chenault, 38 Mo. 357; McDonald v. Fist, 53 Mo. 343. See also Scott v. Macy, 3 Ala. 250; Conklin v. Harris, 5 Ala. 213; Hyde v. Adams, 80 Ala. 111; Lillard v. Carter, 7 Heisk. (Tenn.) 604. *Compare* Alexander v. Lisby, 2 Swan. (Tenn.) 107.

Where an amendment is allowed either by correcting the original undertaking or by substituting a new one, the effect is to validate the proceeding from its inception. Bone v. Trafton, 31 Cal. App. 30, 159 Pac. 819; State Branch Bank v. Morris, 13 Ia. 136; Brooks v. Hartman, 1 Heisk. (Tenn.) 36. See also Greenwood Grocery Co. v. Bennett, 101 Miss. 573, 58 So. 482, 598.

UNDER STATUTE NOT EXPRESSLY AUTHORIZING AMENDMENT.

Defective attachment bonds have been held to be amendable in some jurisdictions subsequent to the issuance of the writ in respect to matters not considered to be of a substantial character under authority of statutes authorizing the allowance of amendments to bonds and undertakings generally. Anonymous, 2 Mich. N. P. 118 (lacking one surety); Kidd v. Dougherty, 59 Mich. 240, 26 N. W. 510 (lacking one surety); Adams v. Kellogg, 63 Mich. 105, 29 N. W. 679 (bond while purporting to be made by plaintiff in attachment as principal was not signed by him, but only by two sureties); Bell v. Moran, 25 App. Div. 461, 50 N. Y. S. 982 (affidavit of justification on undertaking appeared to have been subscribed by surety, while in body it purported to have been made by one of plaintiffs).

But where the bond is a nullity, because jurisdictionally defective, a cure cannot be effected by amendment or the filing of a new undertaking. Horne v. Mitchell, 7 Bush (Ky.) 131 (bond not executed in presence of clerk as required by statute). See also Anonymous, 2 Mich. N. P. 118; Adams v. Kellogg, 63 Mich. 105, 29 N. W. 679. *Compare* Finn v. Mehrbach, 30 Civ. Pro. 242, 65 N. Y. S. 250.

In several jurisdictions in which there is no express statutory authority for amending an attachment bond, it has been held that amendments of defective bonds subsequent to the issuance of the writ are allowable under statutes authorizing generally in furtherance of justice the amendment of any pleading,

process, or proceeding. *Pierse v. Miles*, 5 Mont. 549, 6 Pac. 347 (failure of plaintiff to sign bond); *Kissam v. Marshall*, 10 Abb. Pr. (N. Y.) 424 (undertaking insufficient in amount); *Wells v. McCrady*, 24 Okla. 295, 103 Pac. 605 (bond did not provide indemnity for payment of attorney's fees as statute required); *McCord, etc. Mercantile Co. v. Glenn*, 6 Utah 139, 21 Pac. 500 (failure of principal to sign undertaking). See also *Langstaff v. Miles*, 5 Mont. 554, 6 Pac. 356, and *Singer Mfg. Co. v. Mason*, 5 Dill. 488, 22 Fed. Cas. No. 12,903, so holding with respect to amendments. In *Pierse v. Miles*, supra, in holding that a statute of the character referred to was applicable to an attachment bond, the court said: "The fourteenth section of the code provides that the court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by correcting a mistake in any respect. The purpose of requiring an undertaking in attachment is security to the defendant whose property has been seized by process of law. And it is not very material to the defendant when the undertaking is filed, provided this purpose is accomplished. Before the writ can issue, the clerk must require a written undertaking on the part of the plaintiff. But the clerk is not a judicial officer, and suppose he accepts an undertaking that is defective in form or otherwise insufficient. Are the rights of the plaintiff thereby concluded? Does he forfeit the fruits of his vigilance by reason of a clerical or other mistake? We think not. The one hundred and fourteenth section of the code is peculiarly applicable to cases of this kind. If the affidavit in attachment is found to be defective, it may be amended and the rights of the party saved. And for a like reason, if the undertaking is deficient, a new one may be given. The defendant ought not to object to the filing of a new undertaking for his benefit." In that case also it seemed to be the view of the court that under the authority of the statute allowing amendments in proceedings and pleadings generally, void bonds as well as defective bonds were amendable. The court said: "Where the right to amend is given, it makes no difference whether the undertaking be void or only defective. In either case, it is the duty of the court to permit the plaintiff to substitute a sufficient undertaking. . . . The law requires an undertaking or bond on appeal, but an appeal will not be dismissed because of a defect in or insufficiency of the bond or undertaking before giving the appellant an opportunity to file a new or sufficient one. And so we hold generally that it is within the spirit and meaning of the code to permit a plaintiff to give a new under-

taking in attachment when he finds, by a decision of the court, or otherwise, that the first undertaking is defective or in any manner insufficient."

In *Minnesota* an insufficient bond has been held to be amendable under authority of statute providing that "whenever any proceeding taken by a party fails to conform in any respect to the provisions of the statute, the court may permit an amendment of such proceeding so as to make it conformable thereto." *Blake v. Sherman*, 12 Minn. 420 (instrument not in form of bond required as it contained neither penalty nor condition).

In *Alaska*, since the statute does not "expressly require a sufficient surety before giving the right to the writ" attachment bonds have been held to be amendable subsequent to the issuance of the writ and it has been said that to allow an amendment under such circumstances is only the equivalent of the right the plaintiff has to file his original bond at that time. *Miller v. Alaska-Canadian Oil, etc. Co.* 4 Alaska 439 (surety failed to make affidavit to being worth twice amount of penalty). See also *Seattle First Nat. Bank v. Fish*, 2 Alaska 344 (failure of plaintiff to sign undertaking).

Similarly the court in the reported case, while holding that the undertaking with respect to which the question therein arose was valid, says that if such were not the case it was permissible for the court to allow the filing of a new bond correcting the alleged errors, since in that jurisdiction the original undertaking might be permitted to be filed after the return of the writ.

Amendment Not Allowed.

In many jurisdictions in which the filing of a proper bond is made a prerequisite to the issuance of the attachment writ the courts have refused in the absence of express statutory authority to permit amendments to be made to defective attachment bonds after the issuance of the writ, the view being taken that the requirement must be strictly and rigidly enforced since the remedy of attachment is an unusual and extraordinary one. *Roulhac v. Rigby*, 7 Fla. 336 (one security lacking); *Work v. Titus*, 12 Fla. 628 (not appearing in bond that plaintiffs, their agent or attorney, executed same); *Graham v. Burckhalter*, 2 La. Ann. 415 (insufficient security); *Elliott v. Plunkart*, 6 Pa. Co. Ct. 151 (bond not approved by court or by prothonotary); *Spettigue v. Hutton*, 9 Pa. Co. Ct. 156 (bond had but one surety); *Wagener v. Booker*, 31 S. C. 375, 9 S. E. 1055 (failure of plaintiff to sign bond); *Whitley v. Jackson*, 1 White & W. Civ. Cas. Ct. App. § 574 (bond not conditioned for payment of "costs"); *Winn v.*

Sloan, 1 White & W. Civ. Cas. Ct. App. 1103 (bond not conditioned for payment of costs); East, etc. Texas Lumber Co. v. Warren, 78 Tex. 318, 14 S. W. 783 (bond not in double sum sworn to be due); Caldwell v. Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316 (sureties nonresidents, instead of residents). See also Tanner, etc. Engine Co. v. Hall, 22 Fla. 391; Planters' Bank v. Byrne, 3 La. Ann. 687 (insufficient security); Price v. Motter, 2 Pearson (Pa.) 221; Booker v. Smith, 38 S. C. 228, 16 S. E. 774 (failure of plaintiff to sign bond). Compare Addison v. Sujette, 50 S. C. 192, 27 S. E. 631; Sloo v. Powell, Dallam Dig. (Tex.) 467. And compare, with the Louisiana decisions, the case of Bumberger v. Gerson, 24 Fed. 257, discussing the rule in that jurisdiction. See also in this connection the decisions of Tibbet v. Sue, 122 Cal. 206, 54 Pac. 741; Houston v. Belcher, 12 Smedes & M. (Miss.) 514; and Tevis v. Hughes, 10 Mo. 380, showing the foregoing view to have been taken in certain jurisdictions previous to the enactment of statutes expressly authorizing amendments.

In Spettigue v. Hutton, 9 Pa. Co. Ct. 156, the court said: "The proceeding of the justice in this case is erroneous and must be reversed. The justice has no jurisdiction to issue the attachment, as the bond of the plaintiff was defective, having but one surety. The 27th section expressly provides that, before such attachment shall issue, the plaintiff, or some one in his behalf, shall execute a bond, with good and sufficient sureties. Proceedings under the Act of 1842 are in derogation of the common law and are to be strictly pursued. . . . Nor did the subsequent amendment allowed by the justice, by adding two sureties, cure the original defect in issuing the attachment. In the case of Price v. Motter, decided by Judge Pearson, in 1875, 2 Pearson (Pa.) 221, where the bond in a similar proceeding was defective, he held that the defect could not be remedied after the writ issued. 'The bond should have been taken according to law, before the attachment was issued; could not be patched up afterwards.'"

Regardless of what might be permissible in the lower court, it was held in Durham v. Lisso, 32 La. Ann. 415, wherein a bond being insufficient with respect to the security given therein was sought to be amended, that no right of amendment existed on appeal.

In Bradley v. Kroft, 19 Fed. 295, in construing the Wisconsin statute providing for the issuance of a writ of attachment on a demand not yet due provided the undertaking is conditioned in three times the amount demanded, the court held that an undertaking for an amount less than that specified could not be amended so as to make it meet the requirements of the statute.

MANKIN ET AL.

v.

DICKINSON ET AL.

West Virginia Supreme Court of Appeals—
April 6, 1915.

76 W. Va. 128; 85 S. E. 74.

Judges — Special Judge — Selection by Agreement. — Necessary Parties.

An agreement made pursuant to section 11, chapter 112, serial section 4558, Code 1913, selecting a special judge to try a cause, purporting to be signed by counsel for all the parties, is not void because not signed by a guardian ad litem for infant defendants.

Equity — Pleading — Disregarding Erroneous Designation.

Though a bill be styled a cross-bill, it will be treated for what it really is, and if it contains proper matter calling for the relief prayed for it will be treated as an original bill.

Mortgages — Absolute Deed as Mortgage.

The general rule is that though land be conveyed by debtor to creditor by deed absolute, to secure the repayment of a loan, but with a collateral contract for the repurchase and reconveyance of the property, the deed and contract will be treated as a mortgage and not an absolute conveyance. But the deed and contract involved in this case, considered in connection with the objects and purposes of the parties, as disclosed by the record, and their subsequent transactions and dealings relating to the property, did not constitute a mortgage.

Foreclosure — Grounds for Injunction — Existence of Conflicting Claims.

Where there is no real impediment in the way of the trustee in the execution of a deed of trust, and the amount of the debt secured is certain, there is no necessity for the trustee to resort to a suit to remove impediments, or to have the debt adjudicated. To such cases the rules applicable to creditors' suits and the like have no application. Nor will a sale by the trustee in such case be enjoined at the suit of the debtor to await the litigation of unrelated controversies between some of the parties.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Circuit Court, Fayette county.

Action by Cal Mankin et al., plaintiffs, against R. H. Dickinson, administrator, et al., defendants. Judgment for plaintiffs. Defendants Bessie Woods et al. appeal. The facts are stated in the opinion. **AFFIRMED.**

Miller & Bobbitt and D. W. Taylor for appellants.

R. T. Hubbard for appellees.

[129] MILLER, J.—The bill, styled a cross-bill, was filed by Bessie Woods, a defendant in the original suit, after final decree therein fulfilling all the purposes of the original bill, but which decree provided that nothing therein should “in any way prejudice the defendants, Lutie O. Woods, Bessie Woods and Sam C. Woods, or either of them as to any rights they or either of them may have to recover against the defendant, Cal. Mankin, with reference to any controversy that may exist between said last mentioned parties in this cause.”

The joint answer of these and other defendants to the original bill alleged a series of transactions between the plaintiff Mankin and themselves and others, out of which it was conceived certain rights and equities between them remained to be adjusted, but they were not pertinent to the issues presented by the original bill, as the court evidently concluded, and there was no prayer for relief against Mankin based thereon. Wherefore the saving in their favor in said decree.

From the decree dismissing the so called cross-bill, and denying plaintiff any relief thereon, she has appealed.

The first point made is that there was error in the selection of a special judge to try the case. The selection was by [130] agreement purporting to be signed by counsel for all the parties pursuant to section 11, chapter 112, serial section 4558, Code 1913. Appellant does not claim that the agreement was not properly signed on her behalf, but contends that it is void because it does not appear to be signed by the guardian ad litem for some of the infant defendants, heirs of J. D. Woods, plaintiff's father. While it is true, as held in *Myers v. Myers*, 6 W. Va. 369, that an infant defendant can only appear and defend by guardian ad litem, we do not think that rule should be carried to the extent of denying counsel to a guardian ad litem. The contract is signed by counsel, not only for the adult heirs of J. D. Woods, including plaintiff, but also for all the other heirs of said Woods. The guardian ad litem did appear and defend by answer in proper person, and the requirements of the case referred to were thereby fully met. It is not pretended that any interests of the infants were affected by the supposed error, and appellant and her counsel were responsible for the signing of the contract on behalf of the infants. We do not think this point has any substantial merit, and it must be overruled. That a guardian ad litem may have counsel seems well settled. 22 Cyc. 665; *Owens v. Gunther*, 75 Ark. 37, 86 S. W. 851, 5 Ann. Cas. 130 and note.

In support of the decree it is interposed by counsel for Mankin that a cross-bill cannot be filed after final decree and the end of the

term, and considerable argument was submitted orally and in the briefs of counsel on this point. We deem the point inconsequential. As many times decided, no matter what the pleading may call itself it will be treated in equity for what it really is, and if the court may rightfully do so it will be treated as an original bill. *Martin v. Smith*, 25 W. Va. 579; *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199; *Silman v. Stump*, 47 W. Va. 641, 35 S. E. 833; *Jones v. Crim*, 66 W. Va. 301, 303, 66 S. E. 367; *McLanahan v. Mills*, 73 W. Va. 246, 80 S. E. 351.

The first ground alleged for relief against Mankin is, that the deed made by plaintiff and J. D. Woods and Lutie O. Woods, her father and mother, to Mankin, March 25, 1907, whereby, in consideration of one dollar cash in hand paid, the grantors conveyed to Mankin a certain house and lot in the town of Oak Hill, Fayette County, and the contract executed [131] between Mankin and wife and Bessie Woods contemporaneously with the making and delivery of said deed, and whereby Mankin and wife, in consideration of one dollar in hand paid, thereby gave and granted to Bessie Woods the exclusive right to repurchase said property, in consideration of fourteen hundred dollars, and the actual costs of any additional improvements, said amount to be paid cash in hand, the contract to be void after twelve months from date, and whereby on so electing and complying with the terms of the contract, Mankin and wife covenanted and agreed to make and deliver to her a deed of general warranty for said lot, constituted together a mortgage by Bessie Woods and others to Mankin, and not an absolute deed of conveyance, for the purpose of securing repayment to him of certain debts and liens existing against the property, estimated at nine hundred dollars, and five hundred dollars represented by the note of Mankin to Bessie Woods executed on the same day.

The general proposition contended for by counsel is supported by the numerous decisions cited, that where land is conveyed by debtor to creditor, to secure the repayment of a loan of money, and the borrower makes a deed absolute to the lender, but with a collateral contract or agreement for the repurchase of the property, the transaction constitutes a mortgage, and not an absolute sale. *Davis v. Demming*, 12 W. Va. 246; *Thacker v. Morris*, 52 W. Va. 221, 43 S. E. 141, 94 Am. St. Rep. 928; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Lawrence v. Du Bois*, 16 W. Va. 443; *Hoffman v. Ryan*, 21 W. Va. 416; *Kyger v. Depue*, 6 W. Va. 288; *Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Hursey v. Hursey*, 56 W. Va. 148, 49 S. E. 367; *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515.

But do the pleadings and proofs bring this case within the rule of those decisions? According to pleadings and proofs, the agreement, not evidenced by any writing between the parties, was that Bessie Woods, in whom the legal title was invested, should sell and convey the property to Mankin, and assign to him a certain collateral contract relating to one of the liens thereon, and that in consideration thereof Mankin should assume and pay the debts and liens against the property, estimated by both parties, after examining the records, to be about nine hundred dollars, and in addition pay the five hundred dollars; and should also execute an option contract [132] to reconvey the property to Bessie Woods within twelve months in consideration of fourteen hundred dollars to be paid him in cash. The contract so executed between the parties was not one for a loan of money. The proposition to Mankin was to sell him the property outright, not to borrow money. Evidently he was attracted to the proposition because of the opportunity presented to make a profit. The collateral contract assigned Mankin was one between J. D. Woods and certain of the other heirs of S. B. Woods, his father, whereby the latter in consideration of the agreement of the former to keep his mother, agreed to release to him their interest in a deed of trust debt on the property in favor of their father, the late Samuel B. Woods, and to procure all the other heirs to also release their interests, and thereby relieve the property of that lien, which at the time Mankin purchased it, still existed, and was one of the debts and liens which with the aid of said collateral contract Mankin was to pay off and release.

That these papers were not intended by the parties to constitute a mortgage is established beyond controversy by the subsequent transactions between them. It is alleged and proven that within four months after the date thereof Bessie Woods elected to repurchase the property, and did so, and that in compliance with the terms of the option contract, Mankin and wife, as directed by her, executed and delivered to Sam C. Woods, her brother, a deed of general warranty for the property, in consideration of fourteen hundred dollars, cash in hand paid, by surrender, through the bank where the deed was deposited by Mankin, of Mankin's note for five hundred dollars and payment to him of nine hundred dollars in money. Mankin's deed exhibited with the bill bears date July 16, 1907.

Moreover, it is further shown that at the time of the transactions just referred to, and as a means of raising the money to purchase the property from Mankin, Bessie Woods and her brother and mother borrowed from one Blake the nine hundred dollars to make the cash payment to Mankin, and se-

cured Blake by a deed of trust on the same property. With this transaction Mankin had nothing to do. By the making and delivery of his deed to Sam C. Woods, as stated, and [133] accepting the cash payment and surrender of his note, Mankin became wholly disconnected from the property, except that it appears he had not fully performed his contract to pay off and procure a release of the old trust debt in favor of the heirs of Samuel B. Woods, and of which we will speak later.

But as the bill alleges and the proof shows, when the money borrowed from Blake fell due and was not paid and he was about to sell the property under his deed of trust, these same people, the Woods heirs, applied to the Merchants & Miners Bank, of Oak Hill, for another loan of nine hundred dollars, which was declined, and then it was that they procured Mankin for their accommodation to endorse a note for that amount, and gave a new trust deed to secure him as endorser, both note and deed of trust then being accepted by the bank as security for the new loan. With the money thus raised these people paid off the Blake debt, and it is alleged and proven that Mankin's connection with this transaction was that of an accommodation endorser only. The oral agreement at the time of the loan was that payments were to be made on the note at the rate of twenty-five dollars per month, or seventy-five dollars per quarter, but only the first quarterly payment was made, when the note was reduced and renewed at ninety days for eight hundred and twenty-five dollars, endorsed by Mankin, and thereafter nothing more was paid by the makers, and the note was protested.

Mankin then being called upon by the bank to take up the note, in July, 1909, together with the bank and Lee, trustee, presented their original bill to which the present so called cross-bill was filed, alleging many of the facts above recited, the main object of which bill being to enjoin the sale of the property by A. H. Huddleston, trustee, in the deed of trust of January 22, 1894, securing the payment to the late S. B. Woods, of the sum of four hundred and seventy-six dollars, and to obtain a settlement of the balance due thereon, and to enforce specific performance of the collateral contract, assigned to Mankin, and with which bill Mankin tendered payment to the amount that might be found due therein to the S. B. Woods heirs, who had not executed said contract, and to obtain a decree for the same amount against those who had signed it.

[134] That bill was answered by some of the defendants, including Bessie Woods, and on final hearing, on pleadings and proofs, it was adjudged that the estate of J. D.

Woods, then deceased, was indebted to the administrator of the estate of Samuel B. Woods, in the sum of one hundred and ninety three dollars, which the decree recites was paid by Mankin to Dickinson, administrator for Samuel B. Woods, and Mankin was thereby given a decree over against those heirs who had signed said contract for the same amount, and the preliminary injunction against Huddleston, trustee, was thereby perpetuated, and the administrator of the estate of Samuel B. Woods was required to and did execute a release of said deed of trust on the property covered thereby.

So it appears that it was not until this suit was thus begun and concluded that Mankin had fully complied with his oral agreement with Bessie Woods and others, to pay off and discharge the debts and liens against said property, although prior to that time he had executed said option contract with Bessie Woods, by reconveying the property to her brother, and had accepted from her full payment therefor. In his testimony he gives as his reason for not having paid and settled this lien sooner that he had thought for a while that he could get along without a lawsuit with the Samuel B. Woods heirs, and without litigation obtain specific execution of their contract to release and obtain release of said deed of trust; and that he had allowed the matter to linger along in that way hoping to get the matter settled without suit.

As a result of this suit plaintiffs succeeded in clearing away all prior liens on the property, leaving the deed of trust to Lee, trustee, in favor of Mankin, endorser, as the first and only lien thereon; and then it was that on the demand of the creditors, Mankin and the bank, that Lee, trustee, advertised the property for sale to satisfy the note endorsed by Mankin, and appointed the 22nd day of July, 1911, as the day of sale.

On July 20th, two days before the day appointed for this sale, the appellant, Bessie Woods, instituted the present suit upon her so called cross-bill, making the process to answer returnable on the first Monday in August following, and although this bill was apparently sworn to on July 18, 1911, [135] the record shows that it was not filed until August rules following, and it is claimed that the defendants Lee, trustee, and Mankin, had no notice of the objects and purposes of said bill.

This so called cross-bill alleges many of the facts and exhibits most of the deeds and contracts already referred to; sets forth plaintiff's theory of the purposes and proper construction thereof. She alleges among other things that the deed made to her, and by her, or at her direction by Mankin and wife to her brother Sam C. Woods, were without con-

sideration passing from either of them, and were held by them respectively in trust for the widow and heirs of her father J. D. Woods, and the relief prayed for was that the said Sam C. Woods might be decreed to be holding the title thereto in trust as aforesaid, that the money received by the said Mankin be declared a trust fund in his hands for the same persons, and that Mankin and Lee, trustee, be enjoined and restrained from selling the property under the trust deed from Sam C. Woods to Lee, trustee, that said deed be declared null and void, and that Mankin be required to account for all moneys received by him, and for a reference of the cause to a commissioner for that purpose, and that any balance that might be found due from Mankin might be credited on the note executed by her brother Sam C. Woods to Mankin, and endorsed by him for their accommodation to the bank, and for general relief.

As already intimated, we hold, as the court below held, that the transactions with Mankin did not constitute a mortgage or render him trustee for widow and heirs of J. D. Woods, and that appellant was not entitled to the relief prayed for on those theories of her bill. Every fact in the record evidenced by deed or contract in writing, and the conduct of the parties, repel all these theories of the transactions between the parties. That the original contract with Mankin may have been a good one for him, and a bad one for the other parties thereto finds some color in the facts proven, but that the contract was as Mankin contends we can have no doubt from the record. It is quite evident that both parties to the contract estimated the debts which he would have to pay at about nine hundred dollars, and if he had had to pay the full amount [136] estimated the transactions would have offered him no profit. But as he was assigned the collateral contract with some of the heirs of Samuel B. Woods, and if without too much expense incurred in enforcing that contract he should succeed in doing so, a profit of two or three hundred dollars seemed in sight for him. It is now questionable, however, whether from all the transactions he will not sustain an actual loss. But this is neither here nor there, except as pertaining to the morals of the transactions, which are not controlling, at least in this particular case.

But one other point remains deserving consideration, that is, that the court erred, not shown by the pleadings, but on the facts appearing in the evidence, in not setting aside the sale of the property by Lee, trustee, on July 22, 1911, after the institution of plaintiff's suit. As already stated, process issued on the bill July 20, 1911; the sale, as previously advertised, took place on July 22, 1911, but the bill was not filed until the

August rules, 1911. And it is claimed that neither Mankin nor the trustee knew of the objects and purposes of the bill until long after the day of sale. Mankin is shown by the evidence to have been the purchaser of the property at the price of nine hundred and fifty dollars; that he took up and paid off the note, paid the expenses of sale, and that the total cost of the property to him was about ten hundred and sixty-seven dollars. Though as stated the prayer of the bill was for an injunction restraining the trustee from selling, and though plaintiff knew that the sale was to take place on the day named, no injunction was ever applied for, and the trustee proceeded with and completed the sale and executed a deed to Mankin for the property.

On this showing appellant invokes the rules applicable to suits by lien creditors, and when the title to the property is outstanding in trustees; and to suits by trustees in deeds of trust rendered necessary by existing impediments in the way of a proper execution of the trust by them, for the purpose of removing such impediments; and to cases where there is uncertainty in the amount of the debt, or there is usury entering into the debt secured, or clouds upon the title and the like. Of such are our cases of *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810; *Parsons v. Snider*, 42 W. Va. 520, 26 S. E. 285; *Martin v. Kester*, [137] 49 W. Va. 647, 39 S. E. 599, and *Stafford v. Jones*, 65 W. Va. 567, 64 S. E. 723, and other cases unnecessary to cite.

This suit by appellant is not a creditors' suit, nor is it alleged that there is any prior lien or impediment in the way of the proper execution of the trust by Lee, trustee. The only allegation in the bill relied on in support of this contention is that the money originally received by Mankin was trust money, and that Mankin, being endorser on the note secured in the deed of trust to Lee, should be compelled to pay any balance that might be found due from him on the alleged trust account, to the reduction of said note. But we have concluded there was no foundation in fact for any such relief. The bill makes no offer to pay the note due the bank and which constituted a lien upon the property. And the bank could not be held up by the plaintiff to enable her to litigate her alleged rights as against Mankin. And in so far as there existed at any time any impediment in the execution of the deed of trust to Lee, trustee, that impediment had been wholly removed by the final decree pronounced on the original bill of Mankin and Lee, trustee, and the bank, and the trustee had thereby discharged any duty devolving upon him, and there is no allegation in the bill that there ever existed at any time there-

after any lien, encumbrance or cloud on the property to interfere with the proper execution of the deed of trust by Lee, trustee. So we think that under our decisions there is no case presented calling for the interposition of a court of equity, or justifying the court in interfering with the trustee, and that unrelated matters may be litigated between the parties thereto.

The case of *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775, in some of its features, is much like the case presented here. In that case there was a bill of injunction to restrain a trustee from selling trust property, real estate, which was heard, the injunction dissolved and the bill dismissed. The property was then sold by the trustee and a deed made to the purchaser, after which the decree dismissing the bill was set aside and the purchaser at the trust sale and others were brought in as defendants. The amended bill filed sought to set aside the sale made by the trustee on the ground that the same was improperly made by the reason of the facts disclosed in the bill, [138] and that the reversal of the order dismissing the suit vacated the sale, and upon other grounds pertaining to specific facts which the plaintiff failed to show. The court below dismissed the bill, and this court on appeal decided that there was no error. In *George v. Zinn*, 57 W. Va. 15, 24, 49 S. E. 904, 110 Am. St. Rep. 721, opinion by Judge Poffenbarger, it was held, declining to carry the doctrine of *Keck v. Allender*, 37 W. Va. 201, 16 S. E. 520, and *Hartman v. Evans*, supra, to the extent of requiring a trustee, where there is really no impediment in the way of the proper execution of the trust, to resort to equity to remove supposed impediments, point 2 of the syllabus, that: "A trustee in a deed of trust cannot, as a matter of course, resort to a court of equity to have sale made under its decree, instead of selling under the power vested in him by the deed of trust, and, unless he shows such impediment to the exercise of his powers as renders it inequitable for him to proceed without the aid of the court, he will not be entertained." It does not appear from anything alleged or proven in this case that the sale of the property or the price obtained was in any way affected by the suit of the appellant. There is no evidence that a greater price could have been obtained at a public sale of the property. As was said in *Lallance v. Fisher*, supra, point 5 of the syllabus: "Such sale will not be set aside for inadequacy of price alone, unless the inadequacy is so gross as to justify the presumption of fraud. A sale for one half the estimated value is not such inadequacy." We are, therefore, unable to see error in the decree calling for reversal.

It is greatly to be regretted if plaintiff and her co-heirs have lost their home. But the record discloses the fact that they have made little progress to save it, during the twenty years or more covered by the transactions referred to in the record. Their efforts have been mainly directed to putting off the day of payment. We would be glad to see a way out for them, but limited as we are by legal rules and principles governing us and controlling the affairs of men, we do not see how we can properly disturb the decree.

We are, therefore, of opinion to affirm the decree below, with costs to the appellees incurred here and in the court below on appellant's bill.

Affirmed.

NOTE.

Right to Enjoin Sale under Mortgage or Trust Deed on Ground of Conflicting Liens or Rights or Because of Disputed Title.

Introductory, 125

Conflicting Liens or Rights:

Generally, 125

At Instance of Junior Lien Holder, 128
Disputed Title, 128

Introductory.

While ordinarily, no right exists, in the absence of fraud, to restrain a foreclosure and sale under a mortgage or the sale under a power given in a mortgage or deed of trust, many exceptions exist to this general rule. The right to enjoin a foreclosure sale on the ground of alleged error in the amount of the mortgage debt is treated in the note to Ekeberg v. Mackay, Ann. Cas. 1912C 568; and the right to enjoin a sale under a mortgage or trust deed on the ground that the action on the debt secured is barred by the statute of limitations is considered in the note to House v. Carr, 7 Ann. Cas. 185. This note deals with the right to enjoin a foreclosure or sale under a mortgage or deed of trust where there are conflicting liens or rights or where the title to the property is in dispute.

Conflicting Liens or Rights.

GENERALLY.

Where it appears that the property conveyed by a mortgage or deed of trust is subject to conflicting liens or rights the priority or validity of which is undetermined, equity has jurisdiction to restrain a foreclosure or sale of the property until the character and validity of the claims or incumbrances can

be ascertained. Draper v. Lewis, 104 U. S. 347, 26 U. S. (L. ed.) 783; Milliken v. Barrow, 55 Fed. 148; Struve v. Childs, 63 Ala. 473; Farmers' Sav. etc. Bldg. Assoc. v. Kent, 131 Ala. 246, 30 So. 874, affirming on rehearing 117 Ala. 624, 23 So. 757; Stoeckle v. Rosenheim (Del.) 87 Atl. 1006; Mercantile Trust Co. v. Hensey, 21 App. Cas. (D. C.) 38; Colesbury v. Dart, 59 Ga. 839; Merchants, etc. Bank v. Tillman, 106 Ga. 55, 31 S. E. 794; Gato v. Christian, 112 Me. 427, Ann. Cas. 1917A 592, 92 Atl. 489; Wingert v. Brewer, 116 Md. 518, 82 Atl. 157; Holden v. Hoyt, 134 Mass. 181; Ready v. Hamm, 46 Miss. 422; Ramoneda v. Loggins (Miss.) 39 So. 1007; Martin v. Jones, 72 Mo. 23; Wyckoff v. Noyes, 36 N. J. Eq. 227; Harrison v. Bray, 92 N. C. 488; Hemmings v. Doss, 125 N. C. 400, 34 S. E. 511; Fisher v. Hartman, 165 Pa. St. 16, 30 Atl. 513; Blackmar v. Sharp (R. I.) 47 Atl. 598; Martin v. Martin, 24 S. C. 446; Hart v. Larkin, 66 W. Va. 227, 66 S. E. 331, 135 Am. St. Rep. 1029. And see the reported case wherein it is held that conflicting claims, to constitute such an impediment to a sale under a deed of trust as will justify an injunction restraining the sale, must be more than mere unrelated controversies between the parties.

The court, in Draper v. Lewis, 104 U. S. 347, 26 U. S. (L. ed.) 783, granting an injunction restraining the sale of property under a power given in a trust deed, stated the rule as follows: "Although a deed of trust to secure a debt usually authorizes the trustee to sell on default of payment, yet where a trustee attempts, as Hyde did in this case, to sell property subject to conflicting liens, some of which it is at least questionable whether his deed covers, it is the right of the other parties interested to bring the matter before a court of equity for the purpose of deciding the mutual rights of the parties, and administering the fund accordingly." And in Hart v. Larkin, 66 W. Va. 227, 66 S. E. 331, 135 Am. St. Rep. 1029, the court enjoining a sale under a deed of trust until prior liens were ascertained, said: "That there were impediments in the way of a fair execution of the trust, when the injunction was awarded, is clear. The attachment liens were plainly uncertain as to amount. They were dependent in this particular upon actions at law, for unliquidated damages, yet to be tried. No one could bid on the property with a certainty as to what he would have to pay on account of these liens. A purchase would be subject to them. An intending purchaser could not calculate what he could afford to pay for the property. The unascertained amount of the liens would prevent bidding. Thus the value of the property at trustee's sale would be depreciated. Under such circumstances equity lends aid

to the trustee, or to the debtor if the trustee fails to seek it."

So where it appeared that mechanics' liens had been filed against the property and petitions presented for the ascertainment of the liens with their priorities, it was held that a mortgagee holding a mortgage prior to the mechanics' liens would be restrained from foreclosing his mortgage until all lien priorities and the rights of the various parties could be ascertained. *Blackmar v. Sharp* (R. I.) 47 Atl. 598. Similarly, where a creditor's suit was brought on behalf of the holder of a note secured by deed of trust and all other lien creditors under the West Virginia statute providing for such suits (Code 1906, § 4147) an independent sale of the property under the deed of trust was enjoined to await the determination of the liens and their priorities in the pending suit. *Stafford v. Jones*, 65 W. Va. 567, 64 S. E. 723. In that case it was said: "One of the chief purposes of such a suit is to determine priorities of liens; and any lienor has the undoubted right to dispute the priority of any other creditor's lien. Consequently, Jones' admission of the priority of Hawley's trust lien is not conclusive on the other lienors; and, until this asserted priority is determined either by their answer admitting it, or by the finding of a commissioner, it could not be certainly said that Hawley's trust lien is prior to the liens of some other creditors. The dates of some of the judgments do not appear from the pleadings. It might bring about great confusion, if the court should direct a sale of the land before the priorities of the liens are determined in a manner binding on all of the parties. The creditors who might want to bid for the land at a sale would be uncertain as to their rights, and would not know how to bid on the property. Such a condition would tend to becloud the title and to materially depreciate the value of the property."

Where a person advanced money to pay off an incumbrance on property with the understanding that papers should be executed giving him a first lien on the property, but through error the new security taken was defective, the holder of a junior mortgage, the existence of which was unknown to the person advancing the money, was enjoined from foreclosing that mortgage, until the respective rights of the parties could be determined. *Merchants', etc. Bank v. Tillman*, 106 Ga. 55, 31 S. E. 794, wherein it was said: "It is urged by the plaintiff in error that this remedy, the writ of injunction, is a harsh one and should be granted only where absolutely demanded. But what other recourse is open to Tillman? The bank refuses to recognize that he is entitled to a lien superior to its mortgage, which it is

proceeding to foreclose. If a sale of the property takes place thereunder, he will not be in a position to file a claim in a court of law to the proceeds realized from the sale, and the bank will thus be enabled to gain an undue advantage over him. The reply is made to this, that he does not affirmatively show that he will suffer irreparable loss, as he holds other security for his claim of a character apparently as good or better than the land itself. This argument, however, fails to fully meet the issue. Tillman undertakes to show that, as between himself and the bank, he is entitled to first be paid out of the land in question, and if so, the mere fact that he holds other security will not defeat this right, or furnish any excuse for the bank to disregard the same. On the contrary, the bank may, and should, be restrained from seeking to gain an inequitable advantage over Tillman by an attempt to enforce its lien as the apparently senior, though in point of fact the junior, encumbrance upon the property." In *Farmers' Sav. Bldg. etc. Assoc. v. Kent*, 131 Ala. 246, 30 So. 874, affirming on rehearing 117 Ala. 624, 23 So. 757, wherein it appeared that a mortgagor, after executing the mortgage, deeded the property by general warranty deeds in separate parcels to different people, it was held that the court would interfere by injunction because of the excess of the value of the property over the amount of the mortgage debt; the great number of the several parcels and owners of the encumbered property, the ability and desire of many to purchase one of the separate parcels, but not all, and the confusion and complications of the rights of the various parties inter se and the obstructions to their individual rights of redemption, which a sale in the aggregate, under the power, would entail.

In *Gato v. Christian*, 112 Me. 427, Ann. Cas. 1917A 592, 92 Atl. 489, it appeared that after a divorce a mortgage was given by the wife, in which her husband did not join, the proceeds of which were used to pay off a prior mortgage in which the husband had joined. Subsequently the divorce decree was set aside. The court granted an injunction against the foreclosure of the mortgage until the rights of the various parties could be determined.

Where one tenant in common purchased a mortgage on the common property and attempted to foreclose it he was enjoined until the respective interests of the parties could be determined. *Fisher v. Hartmen*, 165 Pa. St. 16, 30 Atl. 513.

In *Taylor v. Norfolk, etc. R. Co.* 162 Fed. 452, 89 C. C. A. 338, it appeared that a railroad and right of way were sold under foreclosure proceedings in the federal court, the

purchaser acquiring the benefit of certain condemnation proceedings which had been instituted to acquire any outstanding interest in the right of way, represented by a second mortgage. Pending the conclusion of the condemnation proceedings the mortgagee in the second mortgage instituted foreclosure proceedings in the state court. Declaring its right to enjoin such foreclosure proceedings the court said: "It would seem that every equitable consideration supports the right of the court to protect its purchaser by enjoining the foreclosure and sale of this right of way and strip of land until the condemnation proceedings are concluded. While the property was in the actual custody of the court, no foreclosure by the appellant could take place without its consent. The court directed its receivers to clear the title by condemnation proceedings but before those proceedings were concluded it sold the property; but by its conveyance it reserved to the purchaser the benefit of the condemnation proceeding, the object of which was to condemn the very mortgage interest which the appellant proposes now to enforce. It seems to us clear that it was within the jurisdiction of the court below to make its decree effective by the injunction which it granted, and that the injunction was necessary in order to protect the rights for which the purchaser, under the court's sale, paid his money."

Where it is claimed that an incumbrance has been signed by a married woman as surety for her husband, it has been held that a sale of the property will be restrained until her power to execute the incumbrance and the rights arising therefrom can be determined. *Sellers v. Page*, 127 Ga. 633, 58 S. E. 1011; *Harrington v. Rawls*, 131 N. C. 39, 42 S. E. 461; *Strom v. American Freehold Land Mortg. Co.* 42 S. C. 97, 20 S. E. 16. In the case last cited, the court, granting an injunction restraining the enforcement of a power of sale in a mortgage on the ground that it was claimed to have been executed by a married woman as security for her husband's debts and therefore to be void under the then existing law, said: "It is very obvious that, if the sale is allowed to proceed, . . . the plaintiff will be deprived of her legal right to have the question of her power to make the mortgage determined by the proper tribunal constituted for that purpose. Whether the plaintiff will be able to establish her claim of want of power to execute the mortgage, is a question entirely foreign to the present inquiry; and we do not desire to be regarded as expressing, or even intimating, any opinion as to that question. The only inquiry here is whether she shall be denied the opportunity of making that question, and of having it

determined by the tribunal constituted for the trial of such a question." But in *Hoss v. McWilliams*, 26 La. Ann. 643, wherein it appeared that the wife of the mortgagor sought to enjoin the foreclosure of the mortgage on the ground that she had an interest and ownership in the lots ordered to be sold superior to the mortgagee, and that she had a claim against the succession of her husband for rents and revenues which were under his control and which were received and converted by him to his own use, the court refusing to enjoin the foreclosure, said: "The grounds urged by the plaintiff in injunction do not authorize the injunction. The district court had jurisdiction to issue the executory process, and the rights asserted by the wife are not such as to enjoin the sale of her husband's property or property of the community. If she had real rights upon such property, they can be enforced upon the proceeds. If her rights are merely usufructuary, they will not be affected by the sale enjoined, as it is only the naked ownership of the property that is sought to be sold."

However, equity will not restrain the foreclosure of a mortgage at the instance of a judgment creditor, merely because he alleges that the sale will impair his lien on personal property situated on the mortgaged property, and in the absence of a sufficient showing to entitle him to an accounting. *Clark v. Vilas Nat. Bank*, 22 App. Div. 605, 48 N. Y. S. 192. Likewise, in a case wherein it was in dispute whether two persons giving a joint mortgage executed it as cosureties or principals, the court refused to restrain the sale until the relationship of the parties was determined, saying: "The mortgagee or the assignee of the bond cannot be required to defer the collection of his money and the enforcement of his security till the debtors thus adjust their liabilities between themselves."

And see the reported case wherein it is held that a sale will not be enjoined to await the settlement of unrelated controversies between the parties.

It has been held that a purchaser at a judicial sale under a mortgage could not restrain the foreclosure by an assignee of a purchase money mortgage given at the same time on the ground that it was agreed orally between the parties at the time of the execution of the two mortgages, that the purchase money mortgage should be the secondary mortgage. *Foxwell v. Slaughter*, 5 Del. Ch. 396. And where a mortgagor sought to enjoin the foreclosure of the mortgage on the ground that he held other mortgages on the same property, he was refused relief, the court holding that the mortgage given was clearly superior to any other mortgages which he might hold. *Perdue v. United*

States Fidelity, etc. Co. 39 Okla. 168, 134 Pac. 438. In *Robinson v. Mays*, 76 Va. 708, wherein it appeared that a deed of trust was given to secure various creditors, and provided that it should be a release of all debts of the creditors, it was held that the failure to execute a formal release was no ground for enjoining a sale under the deed of trust, as the deed itself operated as a release with respect to those receiving the benefit thereof.

In Tennessee it has been held that equity will not enjoin the enforcement of a lien by a mortgagee because of the existence of other liens either prior or subsequent. *Hill v. Hillsman*, 7 Lea (Tenn.) 196, wherein it was said: "The burden of the argument in support of the application is that there is a claim in suit, which may or may not be a prior claim. But the settled law of this state is that a mortgagee or lien creditor may enforce his lien without reference to other liens either prior or subsequent. The debtor may always prevent a sale by the payment of the lien debt. If he is unable to do so, that is his misfortune, for which the creator ought not to suffer."

AT INSTANCE OF JUNIOR LIEN HOLDER.

It is generally held that the holder of a subsequent mortgage cannot enjoin the sale of the property under a prior mortgage merely because of the fact that he holds a subsequent mortgage. *Bloomington v. Barnard*, 7 Hun (N. Y.) 459; *Fulghum v. Cotton*, 3 Tenn. Ch. 296. The reason for the rule was stated in the case last cited as follows: "A second mortgagee, or a creditor whose rights are subordinate to those of a prior mortgagee, is entitled to stand in the shoes of the mortgagor, and nothing more. Neither has any right either to interfere with or hasten the sale of the prior mortgagee; nor, of course, to bring him into litigation, unless it be to ascertain his debt, after a demand and refusal to disclose it. Each may, under the circumstances and in a proper case, redeem by paying the debt of the prior mortgagee, and this right to redeem is all either can acquire by a suit against such mortgagee. . . . And each may subject the mortgagor's interest in the property by sale, without making the first mortgagee a party, and may impound the rents by the appointment of a receiver until he chooses to assert his prior rights, and acquire a superior lien on such rents. . . . Neither, I am inclined to think, has any equity to interfere with the first mortgagee upon the ground . . . that the property may be sacrificed by reason of a cloud upon the title, unless he can go further, and show that there is a fraudulent combination between the mortgagor and such mortgagee to give the latter

an advantage, by reason of such cloud, at the expense of other creditors. The reason is, that the subsequent mortgagee or creditor can always prevent any sacrifice by paying the prior mortgage, if redeemable, or selling the equity of redemption of the debtor and buying it himself."

In *Davidson v. John Good Cordage, etc. Co.* 63 App. Div. 366, 71 N. Y. S. 565, the court, reversing an order granting an injunction restraining the foreclosure of a mortgage issued at the instance of a second mortgagee whose mortgage had been declared to be void, said: "It surely cannot be regarded as just and equitable that the holder of a valid and prior lien of doubtful value should be deprived, without security, of the right to pursue lawful remedies designed for his protection, at the instance of a subsequent lienor whose claim has been judicially determined to be void, in the mere hope that a higher court, to which no appeal has been taken, may validate the subsequent lien in an action with which the party restrained has no connection and in which he has no interest." But in *Davis v. Briggs*, 3 How. Pr. (N. Y.) 65, wherein it appeared that a prior mortgagee was made a party to a suit to foreclose a second mortgage it was held that an injunction would issue to restrain him from selling under his prior mortgage until the termination of the suit by the second mortgagee.

Disputed Title.

A vendee in possession of land, under a conveyance with general warranty, may enjoin the sale under a deed of trust given to secure the purchase price, on the ground of defeat of title, if the title is questioned by a suit either prosecuted, or threatened, or if the purchaser can show clearly that the title is defective. *State v. Judge*, 40 La. Ann. 206, 3 So. 561; *State v. Hingle*, 104 La. 775, 29 So. 349; *Gay v. Hancock*, 1 Rand. (Va.) 72; *Lane v. Tidball*, Gilmer (Va.) 130; *Miller v. Argyle*, 5 Leigh (Va.) 460; *Faulkner v. Davis*, 18 Grat. (Va.) 651, 98 Am. Dec. 698; *Morgan v. Glendy*, 92 Va. 86, 22 S. E. 854. See also *Thrift v. Bannon*, 111 Md. 303, 73 Atl. 680; *Thompson v. Edwards*, 3 W. Va. 659.

But if there is no ingredient of fraud, and the purchaser is not evicted or subject to a threatened eviction, the insufficiency of title is no ground for relief against a security given for the purchase money. *Harding v. Commercial Loan Co.* 84 Ill. 251; *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519; *Hill v. Butler*, 6 Ohio St. 207; *Dealey v. Lake* (Tex.) 131 S. W. 441. In *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, it was said of a bill to enjoin the enforcement of a purchase money

mortgage on the ground of defect of title: "This case comes within the general doctrine . . . that a purchaser of land who is in possession, cannot have relief here against his contract to pay, on the mere ground of defect of title, without a previous eviction. . . . If there be no fraud in the case, the purchaser must resort to his covenants, if he apprehends a failure or defect of title, and wishes relief before eviction. This is not the appropriate tribunal for the trial of titles to land. It would lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts, or takes any measures to assert, a hostile claim can be permitted, on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money, and of all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim, in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will, to assert or renounce a title which he never asserted, and, perhaps, never thought of? I apprehend there is no such practice or doctrine in this court; and that a previous eviction or trial at law is, as a general rule, indispensable. Perhaps an outstanding incumbrance, either admitted by the party, or shown by the record, may form an exception, in cases of covenant against incumbrances."

In *Harding v. Commercial Loan Co.* 84 Ill. 251, an injunction was refused where it appeared that the vendor's title was voidable as to a part of the land conveyed, having been purchased from a minor, the court holding that a person giving a deed of trust for the purchase price of land could not enjoin its enforcement on the ground of the vendor's voidable title where no threat had been made or suit brought to avoid the title.

It has been held that before a mortgagor can have relief in equity against the foreclosure of the mortgage on the ground of a defect in the title, he must have commenced suit to perfect the title. *Marr v. Howland*, 20 Wis. 282.

It has been held that the existence of a small paving tax was not a cloud on the title sufficient to warrant enjoining the sale of land under a deed of trust. *Patch v. Morriett* (Va.) 22 S. E. 173, wherein it was said: "We do not think that the paving tax due to the city of Manchester constitutes any cloud upon the title. There is no reason to suppose that if it was an existing incumbrance upon the property, for which the appellees were liable, the trustees would not

have made a proper application of the purchase money. They could, without doubt, have been compelled to do so, and it is scarcely possible that so small a charge could seriously have affected the sale of the property." And in *Sidney Land, etc. Co. v. Milner, etc. Lumber Co.* 138 Ala. 185, 35 So. 48, wherein a bill was filed to abate the purchase price of a tract of land consisting of twenty thousand acres, and to enjoin the foreclosure of a mortgage given to secure the purchase price, it was held that as the title was shown to be good as to the large majority of the land, being defective as to five acres only, the foreclosure would not be enjoined, but the court would order the purchase price to be abated as to the five acres.

In *Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238, in answer to the contention of the grantor in a deed of trust that he had no title when he executed the deed and that therefore a sale under it should be enjoined, the court said: "As to the question of title, plaintiff is estopped by his deed. He cannot disparage his own title to prevent a sale under such deed of trust, but the same conveyed all his right, title, and interest, both legal and equitable, in and to said property, and this the trust creditor would have the right to have sold."

In some jurisdictions it has been held that a foreclosure or sale under a mortgage or deed of trust will not be enjoined on the ground that the mortgagee or vendor was without title at the time of the conveyance. *Crocker v. Robertson*, 8 Ia. 404; *North Carolina Gold Amalgamating Co. v. North Carolina Ore Dressing Co.* 73 N. C. 468. In *Crocker v. Robertson*, *supra*, it was said: "There is no such showing in the bill, of either fraud or mistake, and no such showing that the plaintiffs would sustain an irreparable injury by being turned over to their legal remedy, upon the covenants claimed to be broken, as to justify the interference of a court of equity by injunction. Second. It is fully shown that Crocker was well aware of the actual condition of the title of which he now complains, at the time he took the deed, and that there has been no change of parties or facts since that time. Third. Granting the alleged defects to exist, plaintiffs are in no position to complain. At most defendant is only proceeding, according to plaintiff's own showing, to sell property to which they have no title. Under such circumstances, it does not readily appear how they could be prejudiced, and, least of all, sustain such irreparable injury as would entitle them to an injunction."

**GULF REFINING COMPANY OF
LOUISIANA.**

v.

HAYNE ET AL.

Louisiana Supreme Court—November 29,
1915.

138 La. 555; 70 So. 509.

**Oil and Gas — Nature of Leases — Ap-
plicability of General Statutes.**

Gas and oil leases and contracts are apart by themselves. They partake of the nature of both "sale" and "lease;" and they have features which may not be applied to either. The law referring to sales and leases found in the code cannot be unreservedly applied to them.

Same.

But the law in the code will be applied to them by the courts in cases where it can be applied.

**Partition — Mining Property — Power
to Partition in Kind.**

A lessee under a mineral contract may not contest the title of his lessor as an owner in indivision with others, and compel him and his co-owners to make a judicial partition in kind of the property leased.

[See note at end of this case.]

Same.

Known oil lands, like mines, cannot be judicially partitioned in kind, at the suit of one of the co-owners; or by a creditor of a co-owner.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Eleventh Judicial District Court, Parish of Red River: CUNNINGHAM, Judge.

Action by Gulf Refining Company of Louisiana, plaintiff, against W. P. Hayne et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

D. Edicard Greer, Thomas W. Nettles, Thigpen & Herold and F. C. Proctor for appellant.

Alexander & Wilkinson for appellees.

[556] SOMMERVILLE, J.—Plaintiff and defendant W. P. Hayne entered into a contract of lease, or mineral contract, the terms of which plaintiff alleges were not complied with by defendant. That defendant represented himself and his mother, Mrs. Aurora Hayne, to be the owners of the property leased, when, in fact he was the owner of only one-third in indivision with other per-

sons here made codefendants, and Mrs. Hayne was not the owner of any portion of the property.

That a partition in kind of the property is necessary and is demanded of Hayne and his co-owners, so that the lease held by plaintiff may bear upon the one-third of the land falling to the lot of W. P. Hayne; and a money judgment is asked for in the alternative against Hayne.

W. P. Hayne and Mrs. Aurora Hayne excepted to the jurisdiction of the court, alleging themselves to be residents of Rapides parish, and the exception was sustained in so far as the demand was for damages.

Certain co-owners answered to the merits, while others filed an exception of no cause of action to the petition.

The exception was sustained, and plaintiff has appealed.

The only question in the case is whether a tenant under an oil lease, or mineral contract, may sue his lessor and the co-owners with the lessor for a partition in kind of the oil land leased, and have the lease declared to cover the lot or portion of ground falling to the lessor.

Article 1310 of the Civil Code provides that a tenant cannot bring a partition suit. It says:

[557] "But the possession, necessary to support this action, must be in the names of the persons enjoying it, and for themselves; it cannot be instituted by those who possess in the name of another, as tenants and depositaries."

But plaintiff argues that it is not the tenant referred to in the article quoted. It claims that an oil lease, or mineral contract, is different from the ordinary lease, and that the court has so decided. It cites the cases of *Cooke v. Gulf Refining Co.* 127 La. 592, 53 So. 874; *Rives v. Gulf Refining Co.* 133 La. 178, 62 So. 623; *Cooke v. Gulf Refining Co.* 135 La. 609, 65 So. 758; *Natalie Oil Co. v. Louisiana R. etc. Co.* 137 La. 706, 69 So. 146; *Spence v. Lucas*, 138 La. 763, 70 So. 796—in which the court has so held. It also refers to act 232 of 1910, p. 393, which provides that mining contracts may be mortgaged.

In the *Rives Case*, supra, it is said:

"In determining the scope and legal effect of an instrument giving rights and privileges to mine or take minerals, oil, or gas, it is immaterial by what name it is called, whether a lease, license, sale, contract, grant, deed of conveyance, a real right, an incorporeal hereditament, a chattel interest, a chattel real, a right in land, or other name; the court will look to the language used in the instrument, aside from these terms so used, and determine its legal effect."

In that case, the lease was termed a "real right," a right to part ownership in the oil and gas when it would have been taken from the ground, and confined in pipes and reservoirs.

Plaintiff is the holder of the ordinary gas lease; and it argues that, as the holder of a real right in and upon the undivided one-third interest of W. P. Hayne in the oil land leased to it, it is a creditor of Hayne, and that it may exercise, in the place of Hayne, its debtor, the real right of partition against Hayne and his co-owners.

The right of plaintiff is clearly not that of owner, and only an owner can sue his co-owner for a partition. Plaintiff is the owner of the right to explore and extract oil [558] from an undivided one-third interest in the property, but it is not the owner of any portion of the landed estate.

In the decided cases just referred to by plaintiff, the court also said that it would apply the law on letting and hiring to oil leases, as it was set forth in the Code and statutes, where it was possible to apply it. And article 1310 says that partition suits may not be brought by tenants and depositaries.

Plaintiff is a tenant of Hayne under the oil lease executed by them, although by its terms he may have acquired greater rights than an ordinary tenant on a predial estate would have acquired. It has a particular estate in and to the oil and gas when these minerals will have come into its possession. It has the right to go upon the land and explore for oil and gas. Nevertheless, the contract is one of lease, or letting or hiring, in which Hayne is the lessor and plaintiff is the lessee or tenant. It is a valid, existing contract between them, under which both have rights. Plaintiff may have thought that it had leased the whole tract of land, when in truth the lease only extended to the undivided one-third interest in the land owned by Hayne, its lessor. It cannot be put into possession as lessee or tenant of the undivided one-third interest owned by Hayne (*Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 903, 38 So. 612); and, as tenant of Hayne, it cannot ask for a partition in kind of the property owned by Hayne and his co-owners so that its lease may cover the land falling to the lot of Hayne.

The court might recognize the rights of plaintiff under the lease, but it cannot put it in the actual corporeal possession of an undivided interest in the land leased. Such right is a mere abstract right; while, if plaintiff's lease bore upon specific property it might be put into possession of it.

Again, a lessee in possession cannot contest [559] or force a change in the ownership of his lessor of the thing leased. C. C.

art. 3441; *Hanson v. Allen*, 37 La. Ann. 732. Plaintiff cannot contest in any manner the ownership of Hayne to an undivided interest in an oil field, and compel him to accept ownership of a defined area thereof which might not contain any oil whatever. Nor can it or Mr. Hayne compel the co-owners of Hayne to accept such an unequal division. Partition implies equality; and, where equality cannot be had by a partition in kind, the partition must be by licitation.

Many courts have held that mines could not be partitioned in kind.

Thornton on Oil and Gas says, in section 276:

"In a case of an attempted partition of a mine, Justice Brewer used the following language: 'The mere fact of joint ownership in a mine does not give an equitable right to a partition. Seldom can a division of a mine be made. Generally partition must result in a sale. To such property there is an unknown value; and a chancellor may well require full information as to all the relations of the parties to the property before decreeing any partition which will practically result in dispossessing one of the parties entirely.' And in a dictum in an Illinois case it was said: 'The mines, when opened, in their nature were indivisible. Neither partition could be made at law, nor dower assigned by metes and bounds.'"

In section 277, after discussing the question of the right to partition of supposable oil or gas land, Mr. Thornton further says:

"But after gas or oil has been discovered on the land, an entirely different question is presented. If the entire tract has been developed, and the wells are so distributed, and their production is well known so that their respective values can be determined, then a division might possibly be decreed; but it would be almost impossible to find an instance of this kind. And then, too, other powerful wells, in spite of the supposition that the land had been fully developed, might be sunk upon one part of the divided tract and all attempts to find other productive wells on the other tract might be failures. In such an event the partition proceedings would result in an unequal division in value, a thing studiously avoided in partition proceedings. . . . Especially can there be no partition of the right to take oil or gas from beneath a tract of land, the surface being owned by a third person; and an attempt of the court to make partition of such a right is void."

[560] In line with Mr. Thornton the law is thus stated in 21 Am. & Eng. Enc. of Law (2d ed.) 1161:

"A partition of oil and gas owned by co-owners separate from the surface cannot be decreed except by sale and division of the

proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void."

In the case of *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791, 49 L.R.A. 464, the court holds:

"Partition of oil and gas owned by co-owners separate from the surface cannot be decreed, except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void."

In the case of *Dangerfield v. Caldwell*, 1 Fed. 554, 81 C. C. A. 400, the Circuit Court of Appeals say in the syllabus:

"A tract of land known to have oil or gas or both under its surface is not properly susceptible of partition in kind."

There are other decisions to the same effect.

And the law set forth in the Civil Code is the same. Article 1303 is as follows:

"There can be no partition, when the use of the thing held in common is indispensable to the coheirs, to enable them to enjoy, or to derive an advantage from the portion of the effects of the succession falling to them, such as an entry which serves as a passage to several houses, or a way common to several estates, and other things of the same kind."

And articles 1336, 1339, and 1340, which follow, forbid the partition in kind of property where it cannot be conveniently made.

"Art. 1336. The judge who decides on a suit for a partition and on the mode of effecting it, has a right to regulate this mode as may appear to him most convenient and most advantageous for the general interest of the coheirs, in conformity, nevertheless, with the following provisions."

"Art. 1339. When the property is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of any one of the heirs, on proof of either of these facts, that it be sold at public auction, after the time of notice and advertisements prescribed by law, and in the manner hereinafter prescribed."

[561] "Art. 1340. It is said that a thing cannot be conveniently divided, when a diminution of its value, or loss or inconvenience of one of the owners, would be the consequence of dividing it."

It might be a most serious loss to one or more of the co-owners to divide a piece of oil land into three parts, and award one part to each owner. A lot without oil under the surface falling to one co-owner would work incalculable damage to him to whom it was awarded, due entirely to the consequence of dividing the land. The courts cannot compel such a division or partition.

In case of known oil land or a mine the suit must be for a partition by licitation.

The law of France is similar to our law. It says in the Napoleon Code:

"Art. 827. If the immovables cannot be commodiously divided, a sale by auction must be proceeded in before the court. Nevertheless the parties, if all of age, may consent that the auction should be made before a notary, on the choice of whom they can agree."

"Art. 832. In the formation and arrangements of the lots, parties must avoid as much as possible disjoining estates and dividing works; and it is expedient, if it can be, to dispose in each lot the same quantity of movables and immovables, of rights or credits of the same nature and value."

"Art. 1686. If one thing common to several persons cannot be commodiously divided and without loss; or if in a partition made with mutual consent of common property, there be found some goods which none of the coparceners can or will take, the sale thereof is made by auction, and the price thereof is distributed between the joint proprietors."

But plaintiff does not seek a partition by licitation. Under such sale his lease would not follow the land, or the proceeds of the sale thereof. C. C. art. 1338; *Spence v. Lucas*, 138 La. 763, 70 So. 796. It asks for a judicial partition in kind.

The petition does not disclose a cause of action.

Judgment affirmed.

(70 So. 512.)

[512] O'NIELL, J. (*dissenting*).—This is not a suit for a division or partition of a mine or of an oil or gas well, nor for a division or partition of the right to take oil or gas from beneath the surface of the land. It is an ordinary suit for a partition or division of a tract of land on which no oil, gas, or other mineral has ever been discovered, nor mining operations or explorations ever made, as far as the record discloses. Therefore the doctrine quoted from Mr. Thornton's work on Oil and Gas, and from other authorities, has no application whatever, viz., that a mine is not susceptible of division in kind; that, after gas or oil has been discovered on a tract of land, it is not probable that the wells would be so equally distributed and their production be so nearly equal that a fair division in kind might be made; that the right to extract oil or gas from the land cannot be divided in kind; and that a tract of land known to have oil or gas under its surface is not susceptible of partition in kind.

The plaintiff has alleged that the land of which he desires a partition can be divided in kind without diminution of its value. If

the land is not susceptible of division in kind, because it is supposed to have oil or gas beneath its surface or for any other reason, that is a matter of defense on the merits of the case. On this appeal from the judgment dismissing the suit on an exception of no cause or right of action, we must assume that the allegations of the petition are true.

The plaintiff's grantor, W. P. Hayne, could have maintained this action of partition under the allegations of the plaintiff's petition. The right of an owner of an undivided interest in real estate to maintain an action of partition against the co-owners is absolute. R. C. C. 1289. The other co-owners cannot be injured by, and have not a substantial interest in complaining of, the suit being brought by W. P. Hayne's grantee, instead of by him; and he did not file an exception of no cause or right of action.

As a general rule, a creditor or obligee may maintain any action of which his creditor or obligor has a right, except those which are purely personal to the creditor or obligor. See *Spencer v. Goodman*, 33 La. Ann. 906; *Forstall v. Planters' Consol. Assoc.* 34 La. Ann. 773; *Jack v. Harrison*, 34 La. Ann. 736; *Klotz v. Macready*, 44 La. Ann. 169, 10 So. 706; *Belcher v. Johnson*, 114 La. 443, 38 So. 481; *New Orleans v. United States*, 131 U. S. 191, 9 S. Ct. 745, 33 U. S. (L. ed.) 99; and *New Orleans v. Gaines*, 138 U. S. 595, 11 S. Ct. 428, 34 U. S. (L. ed.) 1104. The right of an owner of an undivided interest in a tract of land to sue the co-owners for a partition is not more personal to him than was any one of the rights of action which the creditors were permitted to maintain in the decisions cited above. In one of them, *New Orleans v. United States*, 131 U. S. 191, 9 S. Ct. 745, 33 U. S. (L. ed.) 99, it was said:

"The right thus claimed for the creditor (the word 'creditor' being used in its large sense, as in the civil law) may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States; and all existing rights in any state of the Union ought to be suable in some form in those courts."

The word "creditor" was used in its broad sense of obligor, in the foregoing opinion, as defined in the Civil Code, article 3556, paragraphs 20 and 21.

The obligation of W. P. Hayne to put his grantee, the plaintiff, into possession of whatever share of the property the grantor owned is expressed in article 1903 of the Civil Code, viz.:

"The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom,

is considered as incidental to the particular contract or necessary to carry it into effect."

By the express terms of the grant to the plaintiff, he was given the exclusive right to drill into this land for oil and gas and all other rights that might be reasonably necessary to carry on the mining operations. Possession of the land, or of the share belonging to the grantor, was indeed necessary for the grantee to drill for oil or gas and to carry out the mining operations. The grantor, W. P. Hayne, knew, or is presumed to have known, that he could not deliver possession of his share in the land to his grantee if the co-owners of the land objected, except by a partition of the land. In the case of *Martel v. Jennings-Heywood Oil Syndicate*, decided more than 10 years ago, reported in 114 La. 903, 38 So. 612, it was said that a judgment recognizing a joint owner's undivided interest in a tract of land could not be enforced by a writ of possession, and that all the court could do was to recognize the right of the plaintiff as a coproprietor and let him make it good by the remedies which the law gave him. The remedies thus referred to were to provoke a partition, and be put into possession of a proportionate share of the land, if it could be divided in kind without loss to its owners, or [513] the proportionate share of the proceeds of a partition sale, if it could not be divided in kind without loss to its owners. Hence the right to provoke a partition of this land was one of the incidents of the grant made by W. P. Hayne to the plaintiff. R. C. C. 1903. Even if this grant be regarded as an ordinary contract of lease, in the precise language of our Civil Code (article 2692), "the lessor is bound from the very nature of the contract, and without any clause to that effect, to deliver the thing leased to the lessee."

I concur, however, in the view expressed in the recent case of *Rives v. Gulf Refining Co.* 133 La. 178, 62 So. 623, that there is scarcely any comparison between a mineral lease and the ordinary lease of a house or farm. I also concur in the opinion there expressed, that the framers of our Civil Code had no thought of mineral leases, granting the right to drill for and extract oil or gas or other minerals from the leased premises, when these compilers of the Code adopted the articles referring to the ordinary lease of a house or farm. The rule of interpretation of an oil and gas lease was expressed, at page 182 of the opinion referred to, thus:

"In determining the scope and legal effect of an instrument giving rights and privileges to mine or take minerals, oil or gas, it is immaterial by what name it is called; whether a lease, license, sale, contract, grant, deed of conveyance, a real right, an incorporeal

hereditament, a chattel interest, a chattel real, a right in land, or other name; the court will look to the language used in the instrument, aside from these terms so used, and determine its legal effect."

In the decision last quoted, it was said, quoting *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490, that a mineral lease, like the one before us, is to be regarded not as a grant of the land nor as a lease, properly so called, but as a grant of a right in the nature of an incorporeal hereditament, and that is the common-law definition of what is called a real right in our Civil Code. Attention was called, in the case last cited, to the fact that our Civil Code does not expressly define nor refer to a mineral lease. This was repeated in *Cooke v. Gulf Refining Co.* 135 La. 609, 65 So. 758, where it said that the Legislature also had been silent on the subject of mineral rights and contracts. And, in the case of the *Natalie Oil Co. v. Louisiana R. etc. Co.* 137 La. 706, 69 So. 146, it was said that our Code of Practice was also framed and adopted at a time when there was no thought that oil existed under our soil, and that the laws were not framed to meet such conditions. In the session of 1910, however, the Legislature adopted Act No. 232, authorizing the owner of an oil or gas lease or other mineral lease to mortgage such real right, because, as said in the preamble of the statute, such mineral leases had become so numerous in this state that the mining industry ought to be encouraged and promoted by facilitating the securing of the capital required.

The principles underlying the provisions in our Civil Code on the real right called servitudes are, in my opinion, applicable to such a mineral lease as we have now to deal with, which is in the nature of a servitude. It is not a real or predial servitude, imposed upon one estate for the benefit of another, but is like a personal servitude in favor of the grantee (R. C. C. art. 646), in the nature of a usufruct, which is defined as the right to enjoy the property of another and draw therefrom the profit, utility, and advantages thereof (R. C. C. art. 533), which right may be conferred in a divided or limited portion (R. C. C. art. 539), and may be limited as to the time of its beginning and end (R. C. C. art. 608). It is, of course, not a perfect usufruct, because it confers upon the grantee "the right of accession," which the grantor had, to "construct below the soil all manner of works, digging as deep as he deems convenient, and draw from them all the benefits which may accrue." R. C. C. art. 505. In other words, the grant confers upon the grantee the mineral rights which the law does not, itself, confer upon an ordinary usufructuary. R. C. C. art. 553.

There is no reason why the principles of the following articles of the Civil Code should not be applied to the case before us, viz.:

"Article 739. The coproprietor who has consented to the establishment of a servitude on property held in common, cannot prevent the exercise of the servitude by objecting that the consent of his coproprietor has not been given.

"If he becomes the owner of the whole estate, he is bound to permit the exercise of the servitude to which he has before consented."

"Article 740. If the coproprietor has established the servitude for his part of the estate only, the consent of the other owners is not necessary, but the exercise of the servitude must be suspended, until his part be ascertained by a partition. In this case, he to whom the servitude has been granted may compel the coproprietor from whom he received it, to sue for a partition, or may sue for it himself."

There was no express provision in the French Code, that he to whom a servitude was granted on an undivided interest in a tract of land could sue for a partition so that the servitude might be exercised on the part allowed to the grantor, or on the whole property if the grantor of the servitude acquired the whole estate at the partition sale, as provided in articles 739 and 740 of our Code. The jurisprudence of France, however, recognizes this right of the grantee of a servitude from the owner of an undivided interest in a tract of land to sue for a partition of the land, under the general provision of article 1166 of the Code Napoleon, giving a creditor or obligee all of the rights of action possessed by his debtor or obligor, except strictly personal rights. See *Carpentier & Du Saint*, vol. 34, vo. "Servitude," No. 766.

Article 1309 of our Civil Code expressly provides that it is not indispensable to be an owner in common of the land itself to be entitled to an action of partition; that a coproprietor of a real right and especially of [514] a usufruct may maintain an action of partition; and a usufruct is a servitude on land in favor of a person. R. C. C. art. 646.

There are several reasons why article 1310 of the Civil Code, denying one who possesses as a tenant the right of action for a partition, has no application to this case. In the first place, an ordinary tenant or lessee in possession has no reason to institute an action of partition. In the second place, it is settled by the decisions of this court, cited above, that the word "tenant," meaning an ordinary lessee of a house or farm, as used in the Code, has no reference to a grantee under a so-called mineral lease. In the French text of article 1233 of the Civil Code

of 1825, the English text of which is reproduced verbatim as article 1310 in the Revision of 1870, the French word translated as "tenant" is "fermier," indicating that it referred to a tenant under a predial lease or lease of a farm. And, for the precise meaning of the words which were translated from the French into our present Code, as was said in the cases of *Breedlove v. Turner*, 9 Mart. O. S. (La.) 353, and *Lafourche v. Terrebonne*, 34 La. Ann. 1230, reference should be had to the French text. But beyond these reasons, if the ordinary tenant in possession were not expressly denied the right of action for a partition, he would have no right to institute it or any other real action. Code of Practice, arts. 26, 28, 29, 43, 48. The right of the grantee under such a mineral lease as we have before us, on the contrary, is a real right, *jus in re*, as is settled by the decisions quoted above. And our Code of Practice, in articles 5, 6, and 7, provides that a real action, such as a petitory or possessory action, may be maintained not only by the owner of an estate, but by any one "who has a right upon or growing out of it." It cannot be doubted that a grantee in possession of a tract of land under a mineral lease could maintain a possessory action, or that such grantee out of possession could maintain a petitory action.

Article 1310 of the Civil Code does not, nor does any other article, expressly deny a lessee out of possession the right of action for a petition, as the obligee or creditor of the coproprietor, if such action be necessary for the exercise of his right of possession of the share in the property belonging to his landlord. Article 1310 merely provides that the action of partition shall not be brought by a tenant in possession; and the reason is that such action in his part would be an unnecessary interference with the title of his landlord. To apply this article of the Code to a grantee of a real right, out of possession, compels not only the overlooking of all reason for the law, but also the inversion of its very terms.

It is not and cannot be disputed that the plaintiff has a real right in this land. Hence he must have a remedy, though it be not expressly provided in our Code of Practice or Civil Code. *Fortier v. Slidell*, 7 Rob. (La.) 398; *Morris v. Cain*, 35 La. Ann. 759; and *Citizens' Bank v. Marr*, 111 La. 602, 35 So. 780. And, in the absence of any express law, either granting or denying a remedy, where there is a legal right, we are bound to proceed and decide according to equity, by applying natural law and reason. R. C. C. art. 21.

The plaintiff does not allege that he made a formal demand upon his grantor to file

the partition suit before filing it himself. It was not necessary to allege a formal putting in default, in view of the allegation that the grantor actively violated his obligation to deliver possession, by repudiating the contract and forcibly preventing the plaintiff from taking possession. See *New Orleans, etc. R. Co. v. Ganah*, 18 La. 510; *Hivert v. Lacaze*, 3 Rob. (La.) 357; *Abels v. Glover*, 15 La. Ann. 247; *Beck v. Fleitas*, 37 La. Ann. 492; *Dwyer v. Tulane Educational Fund*, 47 La. Ann. 1232, 17 So. 796; *Southern Sawmill Co. v. Ducote*, 120 La. 1052, 46 So. 20; and *Johnson v. Levy*, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978.

Being of the opinion that the plaintiff is entitled to the remedy invoked and that his petition discloses a cause of action, I respectfully dissent from the opinion and decree to the contrary rendered in this case.

Rehearing denied January 10, 1916.

NOTE.

Partition of Mining Interests and Mining Rights.

Introductory, 135.

Compulsory Partition in General, 135.

Partition by Sale, 136.

Persons Entitled to Sue, 136.

Introductory.

It is the purpose of the present note to review the more recent decisions passing on the partition of mining interests or mining rights. The earlier cases are discussed in the notes to *Robertson Consol. Land Co. v. Paull*, 15 Ann. Cas. 778; and *Cedar Canyon Consol. Min. Co. v. Yarwood*, 91 Am. St. Rep. 841, 884.

Compulsory Partition in General.

The general rule is that all mining property capable of being held in cotenancy is subject to partition by judicial proceedings. *Sheffield Coal, etc. Co. v. Alabama Fuel, etc. Co.* 185 Ala. 51, 64 So. 67; *Barnes v. Broglio*, 17 West. L. Rep. (Yukon Ter.) 294. In *Richardson v. Monson*, 23 Conn. 94, the court said with respect to the constitutionality of a statute authorizing a partition by sale of ore beds and a distribution of the proceeds thereof among tenants in common: "The statute in question does not profess to deprive any one of any interest in his property, but only to afford a reasonable remedy for its enjoyment, by partition. The right of partition is incident to all real estate holden in common, whether corporeal or in-

corporeal, and especially whenever it cannot be otherwise enjoyed. The right of beneficial enjoyment of property is as essential as the right of ownership. And, indeed, by the principles of the common law, recognized by Stat. 31 and 32, Hen. VIII, this right of partition enters into the very nature of the title of estates holden in common, and is inseparable from them. The only question is, how can it best be made? The statute giving the power of sale introduces, as we think, no new principle; it provides only for an emergency, when a division cannot be well made, in any other way."

Partition by Sale.

If, as is frequently the case, a physical partition of mining property will be prejudicial to the owners, it will be sold and the proceeds divided. *Sheffield Coal, etc. Co. v. Alabama Fuel, etc. Co.* 185 Ala. 51, 64 So. 67; *Richardson v. Monson*, 23 Conn. 94; *Ball v. Clark*, 150 Ky. 383, 150 S. W. 359; *Scott v. Pond Creek Coal Co.* 152 Ky. 67, 153 S. W. 23; *Spence v. Lucas*, 138 La. 763, 70 So. 796; *Smith v. Frenche*, 28 N. J. Eq. 115; *Barnes v. Brogglio*, 17 West. L. Rep. (Yukon Ter.) 294. Thus where it appeared that the value of land for its ore deposits exceeded its value for agricultural purposes and because the mineral deposits were located under a small part of the land, a partition in kind would be inequitable, the court in supporting the chancellor's conclusion that the property should be sold said: "It would seem that the interest of all joint owners of such a tract would more certainly secure the best value for their unseparated holdings by a sale, whereat the optimism and expert foresight of prospective buyers might invite an appreciation of the value of that which in part is, the evidence shows, of uncertain value." *Sheffield Coal, etc. Co. v. Alabama Fuel, etc. Co.* 185 Ala. 51, 64 So. 67. And in *Smith v. Frenche*, 28 N. J. Eq. 115, wherein it appeared that some parts of a large tract of land sought to be partitioned contained mineral deposits, the report of the master that it could not be partitioned in kind, without prejudice to the interests of the owners, was upheld and a sale was ordered.

In a partition suit between parties who were interested only in the oils and minerals on and under the land, but neither of whom had any interest in the surface or soil of the property, it was held that the interests of the parties could be partitioned only by a sale. *Robertson Consol. Land Co. v. Paull*, 63 W. Va. 249, 15 Ann. Cas. 775, 59 S. E. 1085. *Compare Heaton v. Dearden*, 16 Beav. (Eng.) 147.

In *Barnes v. Brogglio*, 17 West L. Rep. (Yukon Ter.) 294, it was held that a tenant

in common had a right to insist on a partition by sale notwithstanding the opposition of the other cotenant on the ground that the prospective purchasers might be adversely disposed towards him, the court saying: "We are bound, of course, by the English Partition Act of 1863, and that act has been interpreted by the judgment in the case of *Pemberton v. Barnes* [L. R. 13 Eq. (Eng.) 349], 40 L. J. Ch. 675, where the Lord Chancellor lays down very clearly that the owner of any moiety in a property may insist on a sale, subject always to certain provisions in the act to prevent a vindictive sale. There is no evidence of anything of that nature here, and the plaintiffs, being the owners of much the larger proportion of the property, would seem to have a better right than the defendant to insist on their views being carried out. However that may be, it seems to me that I have no option in the matter, and must direct a sale. The question of dividing a placer mining claim has come up in this court before, and the evident impossibility of dividing a claim of this nature with exact fairness has been shown. No one can tell what the ground contains in gold values below the surface, and certainly the dividing of a claim in the proportions held here would not work out equitably at all. As I said before, I am bound by the English act and by the interpretation put upon it by the Lord Chancellor in the case cited; and, apart from that case, and apart from the Partition Act altogether, I see no possibility of preserving the conveniences which the defendant seeks to have preserved for himself in operating adjoining properties. This court, in this action, and in the present position of the action, certainly could not enforce any such claims."

Persons Entitled to Sue.

An action for the partition of mining property and mining interests may be maintained only by one occupying the legal status of a coparcener, a joint tenant, or a tenant in common. *Richardson v. Monson*, 23 Conn. 94; *Zeigler v. Brenneman*, 237 Ill. 15, 86 N. E. 597; *Ball v. Clark*, 150 Ky. 383, 150 S. W. 359; *Scott v. Pond Creek Coal Co.* 152 Ky. 67, 153 S. W. 23; *Canfield v. Ford*, 28 Barb. (N. Y.) 336, 16 How. Pr. 473; *Barnes v. Brogglio*, 17 West L. Rep. (Yukon Ter.) 294.

A lease given for the sole purpose of mining and operating for oil and gas does not convey an interest in the land, but is merely a license; and a suit in partition by the lessee cannot be maintained. *Beardsley v. Kansas Natural Gas Co.* 78 Kan. 571, 96 Pac. 859; *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880. And see the reported case. See also *Gillespie v. Fulton Oil, etc. Co.* 239 Ill.

326, 88 N. E. 192; *Kansas Natural Gas Co. v. Neosho County*, 75 Kan. 339, 89 Pac. 750; *Phillips v. Springfield Crude Oil Co.* 76 Kan. 783, 92 Pac. 1119.

Where a conveyance was made by a cotenant of the minerals in a tract of land to a stranger, reserving however in the grantor his interest in the land itself, the court held that as between grantor and grantee the conveyance was entirely valid, but was ineffective as against the other cotenant, against whom the grantee could not maintain an action in partition. The reason given for the rule was that if this were permitted, a joint tenant might convey ore deposits to different persons and thereby create as many different tenancies in common on each of which a sale might be enforced against the original cotenant. *Ball v. Clark*, 150 Ky. 383, 150 S. W. 359.

In *Canfield v. Ford*, 28 Barb. (N. Y.) 336, 16 How. Pr. 473, it was held that a grant to a person, and his heirs and assigns forever, of all the ores and minerals lying or being on certain lands, and all the estate, right, title and interest, etc., to the said mines and minerals, was such an interest in the grantee that he could maintain an action for partition against his grantor's cotenant.

It has been held that a lease of mining interests is subject to the contingency of being defeated, in the event that the mining land is judicially partitioned by sale. *Spence v. Lucas*, 138 La. 763, 70 So. 796.

In *Heaton v. Dearden*, 16 Beav. (Eng.) 147, where one tenant in common agreed to lease his undivided interest in certain mines and minerals, it was held that such lessee was entitled to specific performance and for a partition in kind, as to the portion of the property specified in the demise.

In a suit for the partition of mining premises the complainant must show that he is the owner of an undivided interest therein, as a joint tenant or tenant in common with the parties against whom the suit is brought. *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *Zeigler v. Brenneman*, 237 Ill. 15, 86 N. E. 597; *Kansas Natural Gas Co. v. Neosho County*, 75 Kan. 339, 89 Pac. 750; *Beardsley v. Kansas Natural Gas Co.* 78 Kan. 571, 96 Pac. 859; *Ball v. Clark*, 150 Ky. 383, 150 S. W. 359; *Scott v. Pond Creek Coal Co.* 152 Ky. 67, 153 S. W. 23. And see the reported case. In a conveyance of an undivided interest in mining ground, containing an express stipulation that it conveyed only a mining right on the premises, the court held that it did not constitute the grantee a joint tenant or tenant in common with the grantor, and that therefore he could not maintain a suit for partition. *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880. *Compare*

Canfield v. Ford, 28 Barb. (N. Y.) 336, 16 How. Pr. 473.

In *Zeigler v. Brenneman*, 237 Ill. 15, 86 N. E. 597, it was held that where a tenant in common executes a lease of his mining interests without the knowledge of his cotenants, the lessee cannot seek partition against the cotenants, but the lessor may do so and may give to his lessee the sole right to operate in that part of the land which the court may apportion to him. See also *Stevenson v. Yoho*, 63 W. Va. 144, 59 S. E. 954.

STATE

v.

LIPKIN.

North Carolina Supreme Court—February 24, 1915.

169 N. Car. 265; 84 S. E. 340.

Statutes — Construction of Police Regulations — Effectuating Purpose of Act.

Laws and regulations necessary for the protection of the health, morals, and safety of society are within the police power, and should be given such a construction as will suppress the mischief aimed at.

Gaming — What Constitutes Lottery — Sale with Possible Abatement of Price.

Revisal 1905, § 3726, declares that any person who shall promote a lottery, or by such means sell or dispose of any property, evidences of debt, etc., shall be guilty of an offense. Defendant took orders for furniture, under contracts providing for weekly installments until the entire purchase price should be paid, but holding out the prospect that the purchaser might for advertising purposes be given the article before the payments had been completed. The contracts further provided that a lapse in payment should work forfeiture. It is held that as the purchasers had no control over the way in which the prizes were to be distributed, and as the prizes were ordinarily given before any advertising was done, the transaction was a "lottery," which term in common parlance means a scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value, obtains a token, which entitles him to receive a larger or smaller value, as some formula of chance may determine; the fact that the purchasers could at all events keep up their payments, and ultimately receive the furniture, not changing the nature of the transaction.

[See note at end of this case.]

Appeal from Superior Court, Edgecombe county: **FERGUSON**, Judge.

Criminal action. Charles G. Lipkin convicted of conducting lottery, and appeals. **AFFIRMED.**

[266] The prisoner was indicted in the court below for conducting a lottery in violation of Revisal, sec. 3726, which provides that it shall be unlawful to open, set up, promote, or carry on a lottery, publicly or privately, by any name or style, or by such ways and means expose to sale any real or personal property therein described, or goods or chattels, or anything of value whatsoever, and imposing a fine or imprisonment as the punishment for the offense as a misdemeanor. It also provides that any person who engages in disposing of any species of property whatsoever, money or evidences of debt, or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose shall be subject to prosecution under that section. The following is a copy of the contract referred to in the testimony of Mrs. Emma Jacobs, who first got a wardrobe under a similar contract, and afterwards contracted for a sewing machine by this instrument:

MUTUAL SUPPLY COMPANY,
Incorporated.
Authorized Capital, \$25,000.
Furniture, Rugs, Jewelry, Etc.
Complete House Furnishers. Direct from
Factory to Home.
\$17.50 Furniture Society.
Corner Ninth & Broad Streets, Richmond, Va.
Entrance 214 N. Ninth Street.
When Calling on Us, Bring This Contract
with You.
Mutual Supply Company, Inc.
Contract No. 4473.

We hereby agree to sell to the holder of this contract, Mrs. Emma Jacobs, and said party agrees to purchase a sewing machine or any one of the articles enumerated on the next page for the sum of \$17.50, on the following terms and conditions: Each customer agrees to pay 25 cents per week until the sum of \$17.50 has been paid, or until their name is selected by the company as an advertising medium. In order to advertise our business on a broader principle, we will distribute among our patrons each week several pieces of furniture. Patrons who are selected to receive the furniture will not be required to make any further payments, and will then be entitled to receive their furniture at once, providing their payments have been made regularly.

[267] No method of any kind dependent upon or connected with chance in any form

whatsoever enters into this contract. We do not authorize agents to make statements or arrangements, verbal or otherwise, to add, change, or erase the terms of this contract.

No money can be lost by lapsing, as the amount paid in can be applied at any time to the purchase of any \$17.50 article. The furniture which is distributed each week is given solely for advertising purposes, and the Mutual Supply Company, Inc., reserves the right to make the selection in such a manner as it considers best for the benefit of the business. The consideration of 25 cents paid on receipt of this contract shall constitute a full acceptance of the terms and conditions mentioned herein.

Each contract will entitle the holder to a separate article unless by special agreement in office. No money refunded if discontinued.

Partly filled contract bought or loaned from others cannot be used for redemption of articles enumerated herein.

I have read this contract before signing same and am acquainted with its contents, and as evidence that I understand and fully agree to the printed terms of this contract, I make my first payment.

(Signature) Emma Jacobs.

Address: Tarboro, N. C.

Attached to the contract was a card, so arranged with blank spaces as to enter therein the payments made in each week to the number of seventy, which would be \$17.50 by addition of the weekly payments. There is also shown on the back of this paper a list of articles of furniture (value \$17.50 each) to be selected from the ticket holders, and a copy of the contract or substantial portions thereof, for the company, with a similar card for entering payments on the back. On each contract are these entries at the bottom: "When calling on us, bring this contract with you. Pay to agent only first payment. Our authorized collector will call weekly," and the title of the concern, as follows: "Mutual Supply Company, Incorporated. Authorized capital, \$25,000. Furniture, Rugs, Jewelry, etc. Complete house furnishers. Direct from Factory to Home. The \$17.50 Furniture Society, Corner Ninth and Broad Streets, Richmond, Va. Entrance 214 N. Ninth Street. No other but the stipulated terms in this contract will be recognized."

Mrs. Emma Jacobs, a witness for the State, testified: "I live in Tarboro. Mr. Lipkin, the defendant, came to see me last March. Said he was from Richmond. That he wanted to get up a club, to establish his furniture. I signed contract for wardrobe. (Admitted to be identical with 4473, taken also by this witness.) Defendant collected 25 cents each week, and I was to get wardrobe. I was going away, and paid \$2.25 in advance, and he said this would be all right.

He, defendant, never said anything; just said he didn't know when my name would be called [268] out. I did not get away, and I received card saying my wardrobe was here. I think wardrobe was worth \$25. I paid \$3.75 in installments. I took out other contracts to get sewing machine and sideboard. I paid installments to Mr. Lipkin. I can't say how many came to see my sideboard, so many did. I was in my room. Mr. Lipkin came in and asked me if I did not want to join the club, and told me how it worked; that he did not know when my name would be called, and I would pay 25 cents a week until it was called, and when I thought I was going away I paid in advance. He said I would have to pay until my name was called out. It might be a long time or a short time. I expected to have to fill my card clean out, that is, pay \$17.50. I received notice from Richmond that my name had been called out, and then received wardrobe and paid in \$3.75. Mr. Lipkin came to my house every Monday to collect. I don't remember any conversation except he would just come and say for me to pay. I was perfectly satisfied with furniture I got. A good many people came there to see my furniture. I understood if I got others to join, I would get piece of furniture. They told me if I got piece, others would join. Others came and saw my piece and said they were going to join. I stopped paying after Mr. Lipkin was indicted, because I thought I was going away. I was perfectly satisfied and have heard no one complain."

Oscar Lloyd, witness for the State, testified: "I am a barber, single man, and live in Tarboro. I signed that contract of Mutual Supply Company, No. 4492, for the purchase of a brass bed at \$17.50. (It is admitted this contract is identical with No. 4473 of Emma Jacobs.) Mr. Lipkin did not get me to sign, but he came round to collect. Mr. Lipkin, when I asked him, said I would have to pay until I got something. If I got out, I would lose what I had paid in. I paid in 75 cents, three installments. I have never gotten anything. I stopped paying because I thought I was not going to get anything. No one told me to stop. I expected to get something if I stayed in. I stopped because I got tired of paying in and not getting anything."

R. B. Hyatt, witness for the State, testified: "I am sheriff of Edgecombe and I know the defendant. He told me that he was representing a furniture house in Richmond. I told him a drawing like that was a violation of law. He said he was going to try it, and that it was an advertising scheme. He went on for some time before I arrested him. He said some of the members were to be drawn out each week. He was arrested

11 June. At the trial before the recorder, when he was convicted, it was understood there would be no new contracts, but collections would be made on the contracts existing and everybody was to act in good faith pending the appeal in this case. I can't be positive he said selection or drawing. Selection might have been his word; I don't recall. [269] I know one was to come off every week, but I don't recall if it was a drawing or selection."

The State rested its case.

The defendant moved to dismiss the action or for judgment of nonsuit, under chapter 73, Laws 1913. Motion denied. Defendant excepted.

Mr. Abrams, only witness of defendant, testified: "I live in Richmond, Va. I am office manager of the Mutual Supply Company. I have been with them one year. I am familiar with their manner of doing business. Many thousands of dollars worth of stock is kept on hand. When an agent sells a contract, it is executed in duplicate. One copy is left with purchaser and the original is filed. I have charge of them. In selections of furniture to be given members, there is no drawing of any kind. The selection is made in the following way: Many pieces of furniture are given away. For instance, if Mrs. Jacobs benefits the company, she receives her piece of furniture. We receive information from our agents if customers are benefiting business. The agent soliciting the trade keeps a record, which is filed with company, showing what benefit customer is to business, and when furniture is given we expect her to recommend her friends. Emma Jacobs gave us several names and her friends bought furniture. That is the advertising feature spoken of in contract, and she was selected for reason of advertisement. The article furnished Emma Jacobs was worth \$17.50. Mr. Lipkin, the defendant, is our local collector. He got those contracts. I did not say Emma Jacobs got a \$25 wardrobe for \$3.75. I said it was worth \$17.50. Mrs. Gray Andrews, of this place, was of great benefit to company. I have no stock in Mutual Supply Company. The principal office is at 214 N. Ninth Street, Richmond, Va. Our chief warehouse is at 30 N. Seventh Street. It is a three-story building. We have all kinds of furniture direct from factory to home. We do not store much furniture. We have a great deal on hand. Mrs. Andrews paid 25 cents. She was of much benefit. Somebody got a brass bed. We may give away our furniture if we wish. We have many thousands of members. We have not been run out of Rocky Mount, but are doing business there today. We number the contracts because we have many alike, and every contract is numbered and filed according to

number. The numbers have nothing to do with selections. At present we give away things to advertise. I do not know of any concern like ours in Richmond. The numbers are put on contracts for the purpose of book-keeping. Our agent is collecting in Rocky Mount this week. The only trouble we have had is in Wilmington, and it was agreed here we were to take no new contracts pending this appeal. Complaint was made by a dissatisfied customer in District of Columbia, and the district attorney investigated and refused to prosecute."

[270] The State and defendant closed the case. Defendant renewed his motion to nonsuit or dismiss under chapter 73, Laws 1913. Motion refused. Defendant excepted. In apt time the defendant requested the court to give the following instructions to the jury:

1. If the jury find the evidence offered by the State to be true, then they will return a verdict of "Not guilty."

2. If the jury find the undisputed evidence offered in this case to be true, then they will return a verdict of "Not guilty."

3. The jury are instructed that if they find the evidence offered by the State to be true, they will return a verdict of "Not guilty," for that if section 3726 of the Revisal of 1905, under which this prosecution is had, undertakes to prohibit the carrying on of the business of the Mutual Supply Company, Incorporated, for which defendant is salesman or agent, as is shown here by the evidence and contract, it would be void as contravening the Constitution of the United States, for the following reasons: (1) Because said section to that extent would be in violation of first section of Article XIV of the said Constitution of the United States, because it would deprive the defendant of his liberty and property without due process of law; and (2) because it would deprive the defendant under the first section, Article XIV of the Constitution of the United States of the equal protection of the laws, in this: that the furniture allotted to certain customers for advertising purposes under the terms of the contract offered in evidence does not come within the prohibition of said section 3726 of Revisal 1905.

The court refused to give any of these instructions, and defendant excepted. The court instructed the jury, if they believed the evidence, to return a verdict of "Guilty." Defendant excepted. Verdict of guilty and judgment thereon. Defendant appealed.

Melville Flegenheimer and *J. M. Norfleet* for appellant.

Attorney-General Bickett and *Assistant Attorney-General Calvert* for appellee.

WALKER, J. (*after stating the facts*).—It is well settled that laws and regulations

necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power, and in the interpretation of such remedial statutes the office of the judges, it has been said, is to make such a construction as will suppress the mischief and advance the remedy, and to defeat all evasions for the continuance of the mischief. *Magdalen College Case*, 11 Coke (Eng.) 71 b. The word "lottery" is not a term of the common law, and to dispose of real or personal property by lot is not an offense which has a recognized and established legal definition, and, therefore, in construing the statute we must be guided chiefly by the meaning of the term as it is ordinarily [271] used in a popular sense, and by reference to the mischief intended to be redressed. *State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723. A lottery, for all practical purposes, may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. This definition has generally been approved by the authorities. *State v. Perry*, 154 N. C. 616, 70 S. E. 387, and cases cited; *Long v. State*, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L.R.A. 426. In the case last cited, as showing the strong trend of judicial thought in this country against lottery enterprises, the Court said that it will appear, from the many cases decided upon the subject, to be difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been adjudged as in violation of the lottery or gambling laws of the various States, which are mostly alike. And we say that no sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited, or if it has the element of chance. It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credu-

lous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

In *Thomas v. People*, 59 Ill. 160, it was urged, in defense of a similar scheme, that no plan of distribution had been decided upon; that the purchasers were to receive certain articles in a just and legal manner, and that a plan might be devised, at the proper time, which would neither violate the law nor be in contravention of good morals. The Court replied that if the prizes were distributed "in a just and legal manner" it should be done in an honest, upright, and equitable one, and there should be perfect fairness and equality. The plan would be utterly violated if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a "just and legal manner" unless the number of purchasers was the same as the number of prizes, and the prize received proportional, as nearly as possible, to the amount of [272] money paid. It is barely possible, but most improbable, that the purchasers would be the same in number as the presents. We could not indulge in so unreasonable a presumption, even in a criminal proceeding. In ordinary affairs we must reason upon probabilities, deduce conclusions from facts, and not indulge in mere conjectures. We have no right to harbor wild imaginings to change a reasonable and probable result. The Court then says: "Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain which gather around the gaming table? Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. This influence may be as direct and the immediate consequences as disastrous as in some kinds of gambling which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die. The temptations, however, are thrown in the way of a larger number and a better class. The evil may spread more widely and infect more deeply. It is said that the plan was undetermined, and that the wisdom of the 'advisory committee would have devised one, just and equal.' So chance is always undetermined. It neither forms nor designs. Intention is never attributed to it; its events are uncertain. The promise of the handbill, that the distribution shall be in a just and legal manner, is evasive. We are not bound to determine the intention from the language alone, but from all the facts, and the reasonable deductions from facts."

That case is a fair comment and a just criticism upon the facts of this one, showing

the clear illegality of the transaction. It is not pretended here that the projector of this enterprise, either in the matter of volition, as to the giving of presents, or of approbation, as to the recipients of them, founds its action on any settled rule of conduct, or judges by any standard of comparison or selection which would appear reasonable to itself or to others. *State v. Shorts*, 32 N. J. L. 398, 90 Am. Dec. 668; *Com. v. Wright*, 137 Mass. 250, 50 Am. Dec. 306. So far as appears, the choice among those who are to receive its favors is based upon nothing more than its arbitrary will, exercised for its own benefit, in advancing its scheme by advertising, it may be admitted, but this does not alter the case, as all such concerns are organized and set up for just this purpose. Nor does it matter that the person who buys a chance for a trivial sum, in the expectation of winning something of much larger value, can go on with his contributions, and, after paying the full amount of \$17.50, get the piece of furniture he may want. This has been held not to divest it of its gambling quality. *State v. Perry*, *supra*; *DeFlorin v. State*, 121 Ga. 593, 49 S. E. 699, 104 Am. St. Rep. 177; *State v. Moren*, 48 Minn. 555, 51 N. W. 618. In the case last cited it is said that such a feature would [273] probably operate as an additional incentive to purchase a chance in the lottery scheme, and does not take it out of the statute, as the vicious element still inheres in it. The sale of the ticket gave the purchaser the chance to obtain something more than he paid for it, and the other fact became an extra inducement for the purchase, making the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game, and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing, and in order to protect the unwary against the insidious wiles of the fakir or the deceitful practices of the nimble trickster. Call the business what you may, a "gift sale," "advertising scheme," or what not, but it is none the less a lottery, and we cannot permit the promoter to evade the penalties of the law by so transparent a device as a mere change in style from those which have been judicially condemned, if the gambling element is there, however deep it may be covered with fair words or deceitful promises. If it differs from ordinary lotteries, it is chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thor-

oughly dishonest and injurious to society. So far as those who manage schemes of this character can be supposed to give the credulous persons who deal with them any chance whatever of a return in greater value for their investment, the chance lies in the purchase of the right to participate in the favor offered or held out to tempt the gambling instinct and thereby to prosper the business of the unlawful concern. *Dunn v. People*, 40 Ill. 465. All pay them money, at least in part for the chance of winning a prize of greater or less value in proportion to what they hazard, however it may be glossed with some apparent safeguard against loss. Many will take the chance of the play, not expecting to continue the payments if they should lose at the first, second, or third attempt, or at some later period. According to every correct idea of legal definition or conception, this must be gaming within the meaning of the law, whether we construe it in letter or in spirit. All new artifices designed to evade and cheat the law, and entrap the unwary or ignorant, are but aggravations of the offense, and the more ingenious and deep-laid they are, the greater the wrong. *Bell v. State*, 5 Sneed (Tenn.) 507.

In the DeFlorin case, supra, referring to the contention of the defendant that the purchaser of a ticket could continue to pay and get the goods, the Court said: "The fact that a member who was unlucky in the drawing of prizes might, by continuing to pay a dollar a week for thirty [274] weeks, receive a suit of clothes, regardless of the result of the drawings, does not make the transaction any the less a lottery; for the lucky members of the club won prizes varying in value from \$1 to \$29." And the Court quoted from *Shumate's Case*, 15 Grat. (Va.) 653, the following passage as a full answer to the position: "It is true that a bet does imply risk, but it does not necessarily imply a risk in both parties. There must be between them a chance of gain and a chance of loss, but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain, but cannot lose, and the other may lose, but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss." See, also, an elaborate and exhaustive discussion of the question by Justice Cobb, in *Myer v. State*, 112 Ga. 20, 37 S. E. 98, 81 Am. St. Rep. 17, 51 L.R.A. 496.

The ingredient of chance is, obviously, the evil principle which the law denounces and will eradicate, however it may be clothed, or however it may conceal itself in a fair exterior. It is by this means that cupiditas

solicited or an appeal is made to avarice, for if fortune be propitious, or chance should favor him, either in his selection as the winner of its favor or in the mere turn of a wheel, or the throw of the dice, or the fall of the coin, a return of value is expected for the small consideration or trivial price paid for the privilege of being thus favored. *State v. Shorts*, 32 N. J. L. 398, 90 Am. Dec. 668.

The case of *State v. Clarke*, 33 N. H. 329 66 Am. Dec. 723, appears to be very much in point. The Court said of a similar enterprise: "The jury were well warranted in finding that according to some scheme upon which the defendants professed to act there was a correspondence between the number placed on the books purchased and the different articles proposed as gifts or prizes, by which when the book was purchased the defendants ascertained what gift or prize the purchaser was entitled to have according to their scheme. The defendants, on the evidence, appear to have held out that notion to the public, and the jury were at liberty to find that, so far at least, the business was fairly conducted. The purchaser did not know when he bought his book and paid his money what prize or gift the number on it would entitle him to receive, and it was with him as much a matter of lot and chance as if he had drawn the number from a hat. He paid more than the book was worth, and the excess must be understood to have been paid for this chance. As to the real nature of the contrivance, it stands as if the excess had been paid for the chance without any sale of a book to color the transaction."

The same contention was made there as in this case, that the choice of persons to receive the furniture was not by lot or chance, but by the [275] judgment of the company which proposed to sell but the Court rejected it, and thus showed its fallacy: "With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and, as we think, within the general meaning of the word 'lottery,' and clearly within the mischief against which the statute is aimed." *Randle v. State*, 42 Tex. 580.

Defendant's counsel, in their able and learned argument, have cited us to *People v. Elliott*, 74 Mich. 264, 41 N. W. 916, 16 Am. St. Rep. 640, 3 L. R. 403; but upon examining the case we find this stated: "It is not the drawing of the lots, but the disposing and selling of the chances, that brings the case within the statute. It is promoting the lottery for money by paying the money for the chances of receiving more. It is of

little consequence where the drawing takes place. These views to some extent will be found supported in the following authorities: (citing many cases). It is thought by counsel for defendant that this case is ruled by *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47. That case, however is different. There the contingency was one upon which the parties interested could exercise their reason and judgment under an agreement upon which the money was paid, and was in its nature executory. In this case the money was paid when the chance was obtained, and there was no opportunity for exercising the reason or judgment or any other faculty of the mind; and hence the lottery."

We think this substantially supports our view of the question. So far as we can see from the evidence, the managers of the "Mutual Supply Company" exercised no more than an arbitrary choice of its customers as recipients of its graft; but however that may be in fact, the vice of the whole scheme lies farther back than that, and is found in the "chance" which the customer takes when he pays his money, under the terms of the contract, and the temptation held out to arouse the gambling spirit, which is just as evil and debasing as if there were any other kind of chance taken; and, besides, if he fails once or twice or more times to win the prize, and discontinues paying, he loses all that he has paid. So that if tempted by this cunning device, which so insidiously appeals to this gambling instinct, his money is risked in the hope of drawing a piece of furniture of much larger value, the person so investing it may lose or win, and in either event may retire, forfeiting what he had paid in the one case, and retaining what he has drawn in the other as the profit of his venture.

The only difference between this case and that of *State v. Perry*, 154 N. C. 616, 70 S. E. 387, is that there the suit of clothing was drawn by lot; but there [276] is the same element of chance here, even if in a less degree, as there is no rule or standard for the investor to determine what his luck will be, nor can the managers of the scheme forecast at the time of hazard what the result will be. Mrs. Jacobs, as the evidence shows, performed no services, if any at all, until after she had received the wardrobe, which she exhibited and extolled to her friends, who doubtless considered it a good return for so small an outlay in money, and concluded to take the same risk, hoping to be favored with the same kind of good fortune. The temptation was increased by holding out that they might not lose if they continued in the game to the end. *State v. Perry*, supra, where we held, citing 25 Cyc. 1639: "Suit clubs, the members of which pay weekly dues and have weekly drawings for suits, the unsuccessful

members being entitled to receive a suit eventually, after the payment of a stipulated amount, or to withdraw and take out in trade the installments which they have paid, are lottery schemes." We further said in that case: "It will be seen by examination of the authorities that chance is an essential element of a lottery, whether that chance be as to any return or merely as to the amount or value of the return; and as thus considered, where there is a hazard in which sums are ventured upon the chance of obtaining a greater value, the scheme partakes of the nature of a lottery—that is, something gained or won by lot. 5 Words and Phrases, pp. 4245 and 4246, where many cases are collected. The definition of the term 'lottery' given above has been approved by this Court. *State v. Lumsden*, 89 N. C. 572."

In the view we take of the case, it comes within that principle, and the courts will not be deceived or misled by attractive names or professions of honest intentions. As said by the Court in *State v. Morris*, 77 N. C. 516, referring to the language of Justice Grier in *Phalen v. Virginia*, 8 How. 168, 12 U. S. (L. ed.) 1030: "The 'North Carolina Beneficial Association' is an imposing title, but the law has pronounced it in its lottery features to be a cheat and a nuisance to be suppressed like other public pestilences. Of all the forms of gambling, it is the most widespread and disastrous, entering almost every dwelling, reaching every class, preying upon the hard earnings of the poor, and plundering the ignorant and simple."

Having decided this question against defendant, it follows that, if we are right, there is nothing in the case involving the violation of defendant's rights under the fourteenth amendment to the Federal Constitution. The State has the right to enforce all needful police laws and regulations for the preservation of the health, morals, and safety of the people, and especially for the suppression of lotteries. *Boyd v. Alabama*, 94 U. S. 645, 24 U. S. (L. ed.) 302; *Stone v. Mississippi*, 101 U. S. 814, 25 U. S. (L. ed.) 1079; *Douglas v. Kentucky*, 168 U. S. 488, 18 S. Ct. 199, 42 U. S. (L. ed.) 553. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose [277] unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of its police powers is not final or conclusive, but is subject to the supervision of the courts. This must needs be so, and it was so definitely held in *Lawston v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 386, but no violation of private right is presented in this case.

We are also inclined to the opinion that the Legislature intended by the last words of section 3726, being the amendment made by

Laws 1874-5, ch. 96, to enlarge the scope of the previous enactment so as to include enterprises of this kind; but it is unnecessary to decide this question, as it is sufficient to hold that the scheme is a lottery within the intent and meaning of the statute.

No error.

NOTE.

The reported case holds to be a lottery an advertising device whereby furniture was sold on small weekly payments, and from time to time one of the purchasers was given the article purchased and further payment on the contract was waived. It appeared that the persons receiving the articles contracted for at less than the contract price were selected not by lot but arbitrarily by the seller at his discretion. The court holds that the element of chance necessary to constitute a lottery need not consist in a selection of the beneficiary by lot, but that it is sufficient if at the time of the purchase of the ticket or contract there is a chance that the purchaser will receive more or less according to some event then undetermined and not subject to be foreseen or controlled by the purchaser. The general question what constitutes a lottery is discussed in the notes to *State v. Nebraska Home Co.* 1 Ann. Cas. 88, and *Yellow-Stone Kit v. State*, 16 Am. St. Rep. 38. Chance as an essential element of a lottery is considered in the notes to *People v. Lavin*, 1 Ann. Cas. 165, and *Russell v. Equitable Loan, etc. Co.* 12 Ann. Cas. 129. The cases dealing with the so-called tailor's "suit clubs" which are closely analogous to the scheme considered in the reported case, are reviewed in the notes to *People v. McPhee*, 5 Ann. Cas. 835, and *Grant v. State*, 16 Ann. Cas. 844.

McCRACKEN

v.

CITY OF JOLIET ET AL.

McCRACKEN

v.

COWING ET AL.

Illinois Supreme Court—December 22, 1915.

271 Ill. 270; 111 N. E. 131.

Streets and Highways — Establishment by User — Width of Street — Extension of Original Lines.

Where the stakes of an original survey of a street line could not be located, but the

public had used sidewalks to a line even with the front of buildings along the street for twenty years, past the plaintiff's vacant lot, in front of which was a sidewalk extending to the line, the plaintiff is barred from asserting ownership beyond the line, although the line, as used, made the street seventy-two feet wide where on the original plat it was only sixty-six feet wide.

[See 2 Ann. Cas. 973.]

Attorneys — Retaining Lien — On Appeal Record.

Where the court reporter refused to surrender the certificate of evidence in an action until payment of his fees, but loaned it to plaintiff's attorneys to prepare their abstracts and briefs for appeal, they are entitled to a lien on the certificate for their compensation; the character of their possession not being adverse to their lien.

[See note at end of this case.]

Appeal and Error — Question Reviewed — Evidence Not in Record.

Where on appeal from a judgment sustaining a lien of attorneys for fees against papers in their possession the certificate of evidence as to their lien was not in the record, the judgment cannot be reviewed on the question of the character of their possession of the papers.

Jury — Right to Jury Trial — Attorney's Lien.

In an action involving the right of attorneys to a lien a jury trial cannot be demanded as of right on the issue of the attorneys' fees.

Error to Circuit Court, Will county: HOOPER and DIBELL, Judges.

Actions by William S. McCracken, plaintiff, against City of Joliet et al., and Arthur B. Cowing et al., defendants respectively. Actions consolidated. Judgments for defendants. Plaintiff brings error. The facts are stated in the opinion. **AFFIRMED.**

Jones, Addington, Ames & Seibold, Keene H. Addington and Walter Hamilton for plaintiff in error.

Cowing & King for defendants in error.

[270] CARTER, J.—A bill was filed in the circuit court of Will county by plaintiff in error, William S. McCracken, against the city of Joliet and James R. Lamb, an adjoining property owner, to enjoin said city and said Lamb from interfering with the construction of a brick building by McCracken on the land which he claimed as part of his lot but which the city [271] authorities claimed to be an encroachment of about three and one-half feet on what always had been and should be reserved for sidewalk purposes as part of the street. After the pleadings were settled a hearing was had before the chancellor, which resulted in a decree being entered June 28, 1912, dismissing the bill

for want of equity. From that decree an appeal was prayed to this court, but as the certificate of evidence, though presented to the trial judge within the time allowed, could not, for reasons hereinafter stated, be signed and filed in time, the case was brought here on a short record. On October 1, 1912, on motion of the then appellant, the appeal was dismissed in this court, and the case was thereafter redocketed in the circuit court of Will county February 11, 1915. Plaintiff in error on October 22, 1914, filed a separate suit in said circuit court, alleging in his petition the refusal of his former solicitors in the main suit to deliver the original certificate of evidence in that case and praying the court to require them to do so, in order that the suit might be brought to this court on a writ of error. The respondents in the second suit, plaintiff in error's former attorneys, Arthur B. Cowing and Samuel W. King, filed their joint answer, alleging that by agreement with plaintiff in error they were to take the original case to the Supreme Court and were to be paid nothing if they lost the suit and \$150 if they won, and further alleging their wrongful discharge, and that they had a statutory and common-law lien on such certificate of evidence for their fees, to be determined upon a basis of *quantum meruit*. February 11, 1915, this second suit was consolidated with the first, and thereafter the chancellor entered a decree or order allowing respondents a lien on said certificate of evidence and finding their reasonable fees to be \$100. Several months after the final order was entered in this matter plaintiff in error asked to have the order modified by granting permission to present for signature and to file a certificate of evidence as to the testimony heard on the [272] question of attorneys' fees. This last motion was denied and there is no certificate of evidence here as to the said testimony. By virtue of subsequent orders and the payment of the \$100 to the attorneys the certificate of evidence in the original suit was filed as of September 24, 1912. This writ of error has been sued out to review the entire record as to the consolidated cause.

We will first take up and consider the question in the main suit as to the bill for an injunction to restrain the city and Lamb from interfering with the construction of the brick building by plaintiff in error. The lot in question, forty-four feet wide, upon which said building was to be erected, is situated on the south side of Cass street, in the city of Joliet. Cass street runs east and west, and said lot is the third one west of the intersection of Cass street and Eastern avenue. Defendant in error Lamb owns a lot improved with a brick building immediately west of said lot. Adjoining plaintiff in error's lot

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on the east is one owned by Augustine, which is improved by a frame building. Next east of Augustine's property is a brick building owned and occupied by plaintiff in error. Plaintiff in error's lot in question has been vacant for many years. It was owned by Mary Dames from 1880 until purchased by plaintiff in error in November, 1909. For many years a bill board had stood across the front of this lot. In July, 1910, plaintiff in error, with helpers, knocked the bill board down and put up a fence where he claims his north line is, and started to build a brick wall which would be several feet north of the front of the buildings on that street in that locality. The city authorities, we understand from the record, moved this fence back and caused the arrest of the plaintiff in error. He later made another attempt to build on what he claimed to be his line, which the city prevented. The original bill herein was thereafter filed.

The principal question in this case is the proper location of the south line of Cass street. Plaintiff in error claims [273] that this line is about three and one-half feet north of the buildings on either side of him. Defendants in error contend that the line of the adjoining buildings, marks the approximate location of the said street line. They further contend that even though the north line of said buildings is not the exact location of said street line as originally laid out, said original location cannot now be determined, as the evidence shows the original survey stakes cannot be found, and that on this record plaintiff in error is estopped by the public use of this disputed ground as far back as the line connecting the front of the adjoining buildings, from claiming any land north of said line. The trial court found substantially as claimed by the defendants in error, finding the south line of Cass street in front of plaintiff in error's lot to conform to the north line of the Lamb building extended east. This line would intersect the projected west line of the Augustine building two inches north of the northwestern corner of said building.

During the time that Mary Dames owned this lot there was never any contention with reference to the north line of said lot. She built a sidewalk in front of her lot and replaced it twice. Under this sidewalk, for its support, she caused to be built two walls, about eighteen inches thick and several feet apart. These walls are still under the sidewalk. From the evidence we should judge they were never intended to be at either extreme edge of the walk. They are about six feet high, bringing the sidewalk to grade, the lot being somewhat low at this point. The bill board was built on a line running from the northwest corner of the Augustine build-

ing to about a foot from the northeast corner of the Lamb building. Several witnesses testified that they crawled through between the Lamb building and the billboard to get down onto this lot. Plaintiff in error contends that they were able to do this because the west end of the billboard was a sufficient distance north of the northeast corner of the Lamb building to allow a person to get [274] through, while defendants in error claim that the billboard, if extended, would have touched the northeast corner of the Lamb building but that it did not extend quite that far. The evidence is not entirely clear on this point. Fastened to the supports of the bill board was a horizontal strip about even with the sidewalk. From this ran several two-by-fours toward the street. On the top of these three planks were placed, running in the same direction as the street line, thus extending the sidewalk to the billboard.

Plaintiff in error introduced as one of his witnesses William H. Zarley, county surveyor of Will county, who testified that the northeast corner of the lot at the corner of Cass street and Eastern avenue was shown by a cross cut in the stone sidewalk; that this cross had been placed there a number of years before by another surveyor, Comstock, now deceased. Zarley testified that there was an overplus of about three feet in this part of the city in addition to what was shown on the plat; that there used to be two crosses on that corner, about a foot apart. Manifestly, from this witness' testimony the actual location of the south side of Cass street as indicated on the original plat cannot be stated with certainty, as the stakes of the original survey, placed when it was platted, cannot be found. No evidence was offered why, when or how Comstock located such crossmark or how he had figured with reference to the overplus. C. D. O'Callahan, connected with the engineering department of the city for about eighteen years, testified at length with reference to street lines, curbs, buildings, sidewalks, etc., in this vicinity. From his testimony, which is not in serious conflict with any other in the record, it appears that all buildings in that vicinity for a distance of two blocks west of Eastern avenue and running some distance east of this lot were situated as far or farther south than the north line of the Lamb building. If these buildings are on the original street line Cass street would be about seventy-two feet wide at this point. On the original plat it was sixty-six [275] feet. Defendant in error Lamb testified that he had built on his lot, immediately west of the lot here in question, a three-story brick building in 1891; that before building he requested city surveyor Comstock to locate the line of the street and built on the line thus located. This is the

same surveyor who made the cross on the stone on the corner of Eastern avenue.

From the evidence in the record it appears that the billboard was built along the front part of the property between eighteen and twenty years before this trial, and that during all that time the planks were placed on the scantlings next to said billboard, parallel with the street, these planks being used by all people who wished to walk on them, as part of the sidewalk. The testimony shows that Cass street at this point was formerly largely used for residence purposes but that recently it had changed to a business street. There is considerable testimony by neighbors as to the location of former sidewalks and the billboard, but, as usual in matters of this kind, it is not very definite and somewhat conflicting, as none of them had ever measured or made a record as to the actual measurements or conditions of former sidewalks, billboard, etc. The weight of the evidence, in our judgment, sustains the decree of the trial court that all the space north of the north line of the Lamb building, extended across this lot, had been for twenty years or more planked and used for a sidewalk; that the city had accepted such space as part of the sidewalk and kept it in repair, the same as it kept in repair other sidewalks.

When none of the stakes in an original survey can be located or their precise location ascertained, the conduct of lot owners in building and maintaining their improvements within a certain line, and that of the city in maintaining its sidewalk for many years with reference to the same line, must be given great weight in determining the location of the street line. (Mt. Carmel v. McClintock, 155 Ill. 608, 40 N. E. 829; Decatur v. Niedermeyer, 168 Ill. 68, 48 N. E. 72.) [276] None of the buildings on the south side of Cass street, in this vicinity, extended further north than the Lamb building, and the sidewalk, as we understand from the evidence, extended as far south on the other lots as the north line of the Lamb building. On this record we think the proof shows that plaintiff in error is barred from asserting any rights to said disputed strip as against the right of the public to use the same for sidewalk purposes.

This leaves for consideration the question of the correctness of the trial court's order as to the lien of attorneys Cowing and King upon the certificate of evidence. This certificate of evidence had been loaned to the attorneys by the court reporter to enable them to present it to the trial judge and to prepare their abstract and briefs, but the reporter refused to surrender the certificate for filing until McCracken had paid him for preparing the same in accordance with his agreement. McCracken subsequently finished his payments to the reporter and the

latter informed the attorneys that the certificate of evidence was released from his claim, but the attorneys were prevented from prosecuting a writ of error because McCracken failed to advance the fees necessary to obtain the record from the clerk of the court. Plaintiff in error decided not to continue said attorneys' services and employed other attorneys. Cowing and King claimed they were wrongfully discharged and were entitled to compensation on a *quantum meruit* basis and to a lien for such fees on these papers in their hands. The trial court, as already stated, ruled in their favor and allowed them as reasonable attorney's fees \$100, ordering that this be paid before they be required to deliver over said papers. It appears by a plea of release of errors filed by Cowing and King in this court that such money was paid and the certificate of evidence delivered as required by said order, and by a *nunc pro tunc* order, as before stated, was filed and became for the first time a part of the records of the court. The question of attorneys' liens was discussed [277] at length by this court in *Sanders v. Seelye*, 128 Ill. 631. It was there said that attorneys' liens are classed as general or retaining liens and charging or special liens; that the first attach to all the papers, documents, etc., which the attorney receives professionally, and the second only upon those which are recovered through his professional services. Under the reasoning of that case we think these papers could clearly be held under a retaining lien and that the trial court ruled correctly on this question. The weight of authority in other jurisdictions also strongly supports this conclusion. *Weeks on Attorneys at Law*, 778: 2 *Thornton on Attorneys at Law*, secs. 573, 577, inclusive; 3 *Am. & Eng. Enc. of Law* (2d ed.) 454, and cases cited; 4 *Cyc.* 1015, and cited cases.

Counsel for plaintiff in error concede that attorneys have a possessory lien on the papers of their clients ordinarily placed in their hands, but argue that this certificate of evidence and copy were placed in the hands of respondents for the special purpose of making up the record and perfecting an appeal to this court, and that under these circumstances they were not entitled to such a lien. As the certificate of evidence on the question of attorney's fees is not in this record we cannot say that the plaintiff in error's claim as to why or how these papers were placed in Cowing and King's hands is the correct one. From what does appear, and from the statements of counsel, we gather that plaintiff in error employed other attorneys because he thought Cowing and King were not proceeding fast enough with his case and were giving him dilatory answers when he protested against delay. The

attorneys claim they were not proceeding with the case because plaintiff in error delayed in advancing the necessary circuit clerk's and stenographers' fees in order to get the record in shape. Even according to plaintiff in error's own argument these papers were in counsel's hands for the purpose of perfecting an appeal or taking out a writ of error. There is nothing we can find in this [278] record that indicates that the purpose for which they had possession of these papers was inconsistent with or adverse to their right to assert such a lien. (2 *Thornton on Attorneys at Law*, secs. 638, 639, and authorities cited.) From this record we cannot say that there is any error with reference to the trial court's rulings with reference to this matter. His former attorneys being entitled to this lien, plaintiff in error was not entitled, under the constitution, to a jury trial as to these attorneys' fees. *Standidge v. Chicago Rys. Co.* 254 Ill. 524, *Ann. Cas.* 1913C 65, 98 N. E. 963, 40 L.R.A. (N.S.) 529.

In view of the conclusions we have already reached it is unnecessary for us to consider or decide the other questions raised as to the plea of release of errors.

The decrees of the circuit court in both matters, as consolidated here, will be affirmed.

Decrees affirmed.

Rehearing denied February 2, 1916.

NOTE.

Lien of Attorney on Papers in His Possession Connected with Litigation.

General Rule, 147.

Application of Rule, 149.

Qualification of Rule, 150.

General Rule.

The right of an attorney to retain as security for the payment of his fees the papers and documents of his client connected with the litigation, generally known as a retaining lien, was derived from the common law and has never been seriously disputed. The lien extends to all papers, books, documents, etc., in the possession of the attorney in connection with the litigation of his client.

England.—Ex p. Bush, 7 *Viner's Abr.* 74; In re Faithfull, L. R. 6 Eq. 325; *Rollins v. Goldingham*, L. R. 13 Eq. 440; In re Morris [1908] 1 K. B. 473; Ex p. Yalden, 4 Ch. D. 129; *Batten v. Wedgwood Coal, etc. Co.* 28 Ch. D. 317; *Boden v. Hensby* [1892] 1 Ch. 101; In re Jones [1905] 2 Ch. 219 [1905] W. N. 57; In re Rapid Road Transit Co.

[1909] 1 Ch. 96 [1908] W. N. 222. See also *Simmonds v. Great Eastern R. Co.* 3 Ch. 797; *In re Moss*, L. R. 2 Eq. 345; *In re Boughton*, 23 Ch. D. 169; *In re Ward* [1896] 2 Ch. 31; *In re Hawkes* [1898] 2 Ch. 1. *Compare* *Belaney v. Ffrench*, L. R. 8 Ch. 918.

Canada.—See *Reesor v. Ella*, 7 Pr. R. 371; *Executors, etc. Trust Co. v. Seaborn*, 9 Sask. L. Rep. 232, 34 West L. Rep. 112, 27 Dominion L. Rep. 427.

United States.—*Leszynsky v. Merritt*, 9 Fed. 688; *In re Wilson*, 12 Fed. 235, 26 Alb. Law J. 271; *Davis v. Davis*, 90 Fed. 791; *Everett v. Alpha Portland Cement Co.* 225 Fed. 931, 141 C. C. A. 55. See also *In re Paschal*, 10 Wall. 483, 19 U. S. (L. ed.) 992; *In re Baxter*, 154 Fed. 22, 83 C. C. A. 106; *Cain v. Hockensmith Wheel, etc. Co.* 157 Fed. 992.

Alabama.—See *Mosely v. Norman*, 74 Ala. 422.

Arkansas.—See *Compton v. State*, 38 Ark. 601.

Georgia.—See *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473.

Idaho.—*Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134.

Illinois.—*Scott v. Morris*, 131 Ill. App. 605. See also *Nichols v. Pool*, 89 Ill. 491; *Dinsmoor v. Bressler*, 56 Ill. App. 207. And see the reported case.

Michigan.—*Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222.

Minnesota.—*Le Sueur First State Bank v. Sibley County Bank*, 96 Minn. 456, 105 N. W. 485, 489; *Habegger v. Kipp*, 96 Minn. 456, 105 N. W. 489. See also *Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402.

Mississippi.—See *Pope v. Armstrong*, 3 Smedes & M. 214; *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

Montana.—*Walsh v. Hoskins*, 46 Mont. 356, 128 Pac. 589.

Nebraska.—See *Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85.

New Hampshire.—*Dennett v. Cutts*, 11 N. H. 163, *Wright v. Cobleigh*, 21 N. H. 339.

New Mexico.—See *Pritchard v. Fulmer*, 159 Pac. 39.

New Jersey.—See *Delaney v. Husband*, 64 N. J. L. 275, 45 Atl. 265.

New York.—*St. John v. Diefendorf*, 12 Wend. 261; *Matter of Russell*, 1 How. Pr. 149; *Ulster County v. Brodhead*, 44 How. Pr. 411; *Hinman v. Devlin*, 40 App. Div. 234, 57 N. Y. S. 1037; *Matter of McGuire*, 106 App. Div. 131, 94 N. Y. S. 97; *Anglo-Continental Chemical Works v. Dillon*, 111 App. Div. 418, 97 N. Y. S. 1081; *Matter of Edward Ney Co.* 114 App. Div. 467, 99 N. Y. S. 982; *Harding v. Conlon*, 146 App. Div. 842, 131 N. Y. S. 903; *In re Hollins*, 197 N. Y. 361, 90 N. E. 997. See also *In re Dunn*, 205 N. Y. 398, Ann. Cas. 1913E 536, 98 N. E. 914;

DeLamater v. McCaskie, 4 Dem. 549; *Schwartz v. Jenney*, 21 Hun 33; *In re Rieser*, 137 App. Div. 177, 121 N. Y. S. 1070. *Oregon*.—See *State v. Lucaa*, 24 Ore. 168, 33 Pac. 538.

Pennsylvania.—*Eddinger v. Adams*, 4 Kulp. (Pa.) 401; *Dubois' Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478; *McKelvy's Appeal*, 108 Pa. St. 615. See also *Quakertown, etc. R. Co. v. Guarantors' Liability Indemnity Co.* 206 Pa. St. 350, 55 Atl. 1033. *Compare* *Walton v. Dickerson*, 7 Pa. St. 376.

Texas.—*Thomson v. Findlater Hardware Co.* 156 S. W. 301.

Vermont.—See *Hutchinson v. Howard*, 15 Vt. 544; *Hurlbert v. Bingham*, 56 Vt. 373; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

West Virginia.—See *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609.

Thus in *Ex p. Bush*, 7 Viner's Abr. (Eng.) 74, Lord Chancellor Talbot said: "The attorney hath a lien upon the papers in the same manner against assignees as against the bankrupt, and though it doth not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law." So in the case of *In re Wilson*, 12 Fed. 235, it was held that an attorney's lien was a general one resting wholly on possession, and was a mere right to retain, until his whole bill was paid, all papers, deeds, vouchers, etc., in his possession on which, or in connection with which, he had expended money or given his professional services. The court said: "This 'retaining lien' is a general one for whatever may be due to him; and, though a client may change his attorney at will, if the latter be without fault and willing to proceed in pending causes, none of the papers or vouchers can ordinarily be withdrawn from him except upon payment of his entire bill for professional services. . . . This lien, like other mere possessory liens, is, however, purely passive, being a bare right to hold possession till payment." Likewise in *Scott v. Morris*, 131 Ill. App. 605, it was said: "An attorney has a lien upon all papers of the client in his hands as such for the payment of his lawful charges, regardless of the particular purpose for which they were intrusted to the attorney's keeping." And in *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707, the court said: "To assist an attorney in recovering his cost, he has a lien for the amount of his bill, upon the deeds, papers, and writings of his client, which come to his hands in the course of his professional employment." So in the case of *In re Morris* [1908] 1 K. B. (Eng.) 473, Lord Chief Justice Alverstone said: "Prima facie a solicitor has a lien for his charges upon the papers of his client."

Application of Rule.

Account: The lien of an attorney extends to an account in his possession in connection with the litigation of his client. *Ex p. Yalden*, 4 Ch. D. (Eng.) 129; *Hargett v. McCadden*, 107 Ga. 773, 33 S. E. 666.

Bank or Check Book: The lien of an attorney extends to a bank or check book in his possession in connection with the litigation of his client. *Matter of Edward Ney Co.* 114 App. Div. 467, 99 N. Y. S. 982; *Matter of Stenton*, 53 Misc. 515, 105 N. Y. S. 295.

Bond or Other Security: The lien of an attorney extends to a bond or other security connected with the litigation. *In re Morris* [1908] 1 K. B. (Eng.) 473; *McPherson v. Cox*, 96 U. S. 404, 24 U. S. (L. ed.) 746; *Coe v. East*, etc. R. Co. 65 Fed. 16; *Gist v. Hanly*, 33 Ark. 233; *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601, *affirming* 27 Ill. App. 288; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Bickford v. Ellis*, 50 Me. 121; *Shackleton v. Hart*, 20 How. Pr. (N. Y.) 39, 12 Abb. Pr. 325, note; *Fairbanks v. Sargent*, 39 Hun (N. Y.) 588; *Arkenburgh v. Arkenburgh*, 27 Misc. 760, 59 N. Y. S. 612, *affirmed* 49 App. Div. 636, 64 N. Y. S. 742, 176 N. Y. 551, 68 N. E. 1114; *Heyward v. Maynard*, 119 App. Div. 66, 103 N. Y. S. 1028. See also *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473; *McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515, 23 Ky. L. Rep. 74; *Henry v. Fowler*, 3 Daly (N. Y.) 199; *Winans v. Grable*, 18 S. D. 182, 99 N. W. 1110.

Book: *In Friswell v. King*, 15 Sim. (Eng.) 191, it was held that a solicitor's retaining lien extended to a valuable book which was intrusted to him for the purpose of being exhibited to witnesses.

Contract: The lien of an attorney extends to a contract in his possession which is connected with the litigation in which he is employed. *Mathot v. Triebel*, 98 App. Div. 328, 90 N. Y. S. 903.

Deed: The lien of an attorney covers a deed which has come into his possession in the course of the litigation. *Ex p. Yalden*, 4 Ch. D. (Eng.) 129; *Ex p. Cobeldick*, 12 Q. B. D. (Eng.) 149, 49 L. T. N. S. 741, 32 W. R. 239; *Pennsylvania Finance Co. v. Charleston*, etc. R. Co. 46 Fed. 426; *Matter of McGuire*, 106 App. Div. 131, 94 N. Y. S. 97. See also *In re Moss*, 2 L. R. Eq. (Eng.) 345; *In re Sproule*, 1 Ont. Pr. 396; *In re Wilson*, 12 Fed. 235, 26 Alb. L. J. 271; *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707; *De-laney v. Husband*, 64 N. J. L. 275, 45 Atl. 265.

Execution: The attorney's retaining lien "extends to the execution and copy of the judgment if they are in the attorney's hands." *Wright v. Cobleigh*, 21 N. H. 339.

Insurance Policy: The lien of an attorney extends to an insurance policy in his pos-

session in connection with the litigation of his client. *Matter of Sweeney*, 86 App. Div. 547, 83 N. Y. S. 680. See also *Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134; *Matter of Attorney*, 63 How. Pr. 152, 87 N. Y. 521.

Lease: An attorney has a lien on a lease in his possession in connection with the litigation of his client. *Jackson v. Erkins*, 131 App. Div. 801, 116 N. Y. S. 385.

Letter or Writing: The lien of an attorney extends to a letter or writing of a client which is in his possession in connection with the litigation of his client. *Ex p. Yalden*, 4 Ch. D. (Eng.) 129. See also *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

Mortgage: The lien of an attorney extends to a mortgage or mortgage bond in his possession in connection with the litigation. *Worrall v. Johnson*, 2 Jac. & W. (Eng.) 214; *LeSueur First State Bank v. Sibley County Bank*, 96 Minn. 456, 105 N. W. 485, 489; *Habegger v. Kipp*, 96 Minn. 456, 105 N. W. 489; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *Rubel v. Burr*, 132 App. Div. 910, 117 N. Y. S. 63. Thus in the case last cited it was held that an attorney had a lien on a bond and mortgage, which had been delivered to him by his client, for services rendered, of which he could not be deprived by a summary order. The court said: "He had commenced an action against his client to recover for his services, when this application was made to compel the surrender. He offered to hand over all the papers in his possession upon the appointment of a referee to pass upon the value of his services and upon the giving of security, which the client refused. If the client stood upon his legal rights to defend the action brought for services rendered and to demand a jury trial, then the attorney was entitled to stand upon his legal lien upon the papers."

Note: An attorney has a retaining lien on a note in his possession which is connected with the litigation of his client. *Scott v. Morris*, 131 Ill. App. 605; *Needham v. Voliva*, 191 Ill. App. 256; *Foss v. Cobler*, 105 Ia. 728, 75 N. W. 516; *Dennett v. Cutts*, 11 N. H. 163; *Hazeltine v. Keenan*, 54 W. Va. 607, 46 S. E. 609, 102 Am. St. Rep. 953; *Re Attorney*, 7 Ont. Pr. 311. See also *English v. Clark*, 12 C. P. (Eng.) 451; *In re Paschal*, 10 Wall. 483, 19 U. S. (L. ed.) 992; *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473; *White v. Harlow*, 5 Gray (Mass.) 463; *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707; *Dickinson v. Ritchie*, 50 Wis. 365, 7 N. W. 305.

Record: The lien of an attorney extends to copies of the printed record on appeal in his possession in connection with the litigation of his client. *In re Hollins*, 107 N. Y. 361, 90 N. E. 997. And see the reported

case. *Compare* Matter of Bergstrom, 131 App. Div. 791, 116 N. Y. S. 245. In the case of *In re Hollins*, supra, it was held that an attorney had a lien on the printed cases on appeal to the court of appeals. The court said: "The memorandum filed by the learned judge who made the order at special term indicates that he acted upon the assumption that the cases on appeal were held by the attorney under a special agreement which freed them from the usual attorney's lien. His citation of Matter of Bergstrom, 131 App. Div. 791, shows this. In that case the papers in controversy had been printed by the petitioners and paid for by them, and had been delivered to counsel for the express purpose of filing the same with the clerk of the court of appeals. It is well settled that where an attorney receives property for a specific purpose he must carry out that purpose irrespective of any lien which he might have otherwise. (*West v. Bacon*, 164 N. Y. 425.) In the *Swoboda* suit, however, nothing had occurred between Mr. Hickey, the attorney, and Mr. Hollins, his client, to differentiate the printed cases on appeal to the court of appeals from any other papers in that litigation so far as the attorney's lien was concerned. The mere fact that Mr. Hollins had sent Mr. Hickey \$50 to be applied to the expense of printing those cases did not have the effect of discharging them from such lien. It was simply a payment on account of disbursements in the action and the circumstance that Mr. Hickey applied that particular sum to the expense of printing the cases did not obligate him to turn the papers over to a new attorney unless his claim for services was paid or secured. He retained a lien upon these cases as well as upon all other papers in the suit belonging to his client." But in the Matter of Bergstrom, supra, it was held that an attorney could have no lien on copies of the printed records of a case on appeal to the court of appeals. The court said: "Whatever may be said as to the right of this attorney to retain possession of papers left with him by his client relating to the general litigation and professional relations between them, it is quite clear that it does not extend to records and papers which by the rules of the court have to be filed in court, and which have been delivered to the attorney and received by him for that purpose. This attorney, therefore, was bound by his professional duty to his client to see to it that these records were filed with the clerk of the court of appeals as required by its rules, and his refusal to either file them with the clerk or deliver them to the petitioners to be filed until his fees were paid was a breach of his professional obligation, and it was the duty of the court to enforce that obligation summarily."

Trust Deed: The lien of an attorney covers a trust deed which is in his possession in connection with the litigation of his client. *In re Dee Estate* [1911] 2 Ch. (Eng.) 85, [1911] W. N. 100; *Needham v. Voliva*, 191 Ill. App. 256.

Voucher: The lien of an attorney extends to a voucher which has come into his possession in the course of the litigation. *In re Wilson*, 12 Fed. 235, 26 Alb. L. J. 271.

Warrant or Town Order: The lien of an attorney extends to a warrant or town order which is in his possession and is connected with the litigation of his client. *Gordon v. Hennings*, 89 Neb. 252, 131 N. W. 228 (municipal warrant); *Howard v. Osceola*, 22 Wis. 453 (town order).

Qualification of Rule.

The retaining lien of an attorney extends only to papers which have come into his hands in the course of his professional employment. *Winans v. Grable*, 18 S. D. 182, 90 N. W. 1110. Thus he has no lien on papers of his client which were delivered to him as mortgagee. *Pelly v. Wathen*, 7 Hare (Eng.) 351. But it has been held that he may retain deeds which were entrusted to him for the purpose of raising money on them. *Ex p. Pemberton*, 18 Ves. Jr. (Eng.) 282; *Ex p. Sterling*, 16 Ves. Jr. 258. An attorney has no lien for his individual fees on papers which have been delivered to the firm of which he is a member. *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489.

Papers cannot be held under an attorney's lien unless they came rightfully into his possession. *DeLamater v. McCaskie*, 4 Dem. (N. Y.) 549, wherein it was said: "If the property were wrongfully obtained, he is not entitled to the possession as against the executrix, and there can be no lien based upon a tortious possession. The property he holds consists of railroad bonds and stocks, promissory notes, bank stocks, coupons, etc. It is difficult to understand how the possession of such property, by an attorney, should be acquired or needed for the simple purpose of obtaining the probate of an uncontested will, any more than the possession of gold and silver plate, bank bills, a herd of cows, or a carriage and horses could be acquired and needed for such purpose."

It has been said that an attorney's retaining lien extends to papers of his client regardless of the purpose for which they were delivered to him. *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601; *Scott v. Morris*, 131 Ill. App. 605. But that statement is subject to the qualification that the purpose must be consistent with the retention of the papers. Thus if papers are delivered to the

attorney as a trustee or bailee for a specific purpose he cannot divert them from that purpose by holding them under a lien. *State v. Lucas*, 24 Ore. 168, 33 Pac. 538; *Anderson v. Bosworth*, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 90; *Goodrich v. Mott*, 9 Vt. 395. And see the reported case. Thus in *Henry v. Fowler*, 3 Daly (N. Y.) 199, it was said: "An attorney has no lien except upon such papers of his client as have come into his hands for the purpose of business, in the ordinary course of his professional employment (*Stevenson v. Blakelock*, 1 M. & S. [Eng.] 535), which was not the case here, as the bond came into the defendant's hands upon his own statement as a trustee, and he could, consequently, have no lien upon it in his professional character as an attorney." So in *Lindsley v. Caldwell*, 234 Mo. 498, 137 S. W. 983, 37 L.R.A. (N.S.) 161, the court said: "But it is unnecessary to decide whether defendant had a legal claim against *Stevenson* for services, because even if he had such claim he had no right to hold this stock for the sole purpose of forcing a settlement with *Stevenson*. It was placed in his name as the confidential adviser of *Stevenson*, under an express agreement that he would immediately indorse and deliver it to *Stevenson*. Such action on his part is to be condemned, if for no other reason than that it is violative of the confidential relation which existed between him and his client."

In *Watts v. Newberry*, 107 Va. 233, 57 S. E. 657, it was said: "In the view we take of this assignment of error, it is unnecessary to consider the question whether or not the drafts came into the hands of the attorneys in the course of their professional employment, for, if it were conceded that the drafts were deposited with the attorneys in the course of professional employment, it is clear, we think, that they were placed in their hands for a special purpose, inconsistent with the claim of a lien. The object of placing the drafts in the hands of the attorneys, as stated by them in their original and amended answers, was to enable the client at any time to realize the money on the drafts and apply it to the payment of such debts as he thought best. The action of the client in depositing the drafts with his attorneys, as they had advised, for that express purpose, is inconsistent with the claim of lien now asserted by his attorneys. Their debt might not be, and most probably was not, one of the debts which he intended to pay out of the money deposited in bank. If it had been he would very likely have given his attorneys a check in payment of their debt and obtained drafts for the residue only. If their debt was not one of the debts which he, in his then financial condition, thought it 'best' to pay out of the proceeds of the

drafts, he would be compelled to submit to the demand of his attorneys or have the whole purpose for which he deposited the drafts in accordance with their advice thwarted."

In *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601, the purpose for which the papers were delivered was held not to be inconsistent with their retention under a lien, the court saying: "The authorities seem to be uniform in holding that this retaining lien exists on all papers or documents of the client placed in the attorney's hands in his professional character or in the course of his professional employment (*Stokes on Liens of Attorneys*, p. 67; *Weeks on Attorneys*, sec. 372, p. 614; *Wharton on Agency*, sec. 625; *Story on Agency*, sec. 383); and it makes no difference what the purpose may have been in placing them in the attorney's hands. *Weeks on Attorneys*, sec. 372, *supra*; *Wharton on Agency*, sec. 625, note 1. Did the bonds in question come into the possession of appellees within the meaning of these rules? It is insisted that they were left with *Seelye* merely for safe keeping, subject to appellant's orders, and that their deposit with him had no connection with either his or *Quick & Miller's* professional employment in the *Peck* case. This position is wholly inconsistent with the remedy appellant is now seeking to enforce. If *Seelye* was a mere custodian of these bonds for safe keeping, and held them only subject to appellant's order, by what authority can the circuit court of Cook county, in the *Peck* case, make an order requiring respondents to show cause why they do not surrender them? We think, however, that the evidence is clear, to the effect that they were placed in the hands of *Seelye* as the attorney of appellant in the *Peck* case, so that they might be used in securing to the client the benefits resulting to him from the successful litigation of that case in the Supreme Court; and whatever may have been appellant's understanding as to the amount of fees to be paid, it cannot be claimed that he did not fully understand that *Quick & Miller* and *Seelye* were acting together as his attorneys in that case. Therefore, whether the bonds were delivered to *Seelye* alone, or to him and *Quick & Miller* jointly, the lien would attach for the benefit of all. It is also clear, from the evidence, that appellant knew that these bonds had been deposited by *Seelye* in the safe of *Quick & Miller*, and that they claimed a lien upon them for their services; and with such knowledge he permitted them to remain in their possession, retaining them thereafter in the further management of said cause. We are of the opinion, therefore, that the circuit court was justified in holding that said bonds were subject to a lien in favor of appellees for any

balance due and unpaid them for their fees as the attorneys of appellant."

On the principle that a retaining lien does not extend to papers delivered to an attorney for a purpose inconsistent with their retention by him, a client's will cannot be held. *Georges v. Georges*, 18 Ves. Jr. 294, 34 Eng. Rep. (Reprint) 328; *Balch v. Symes*, T. & R. 87, 37 Eng. Rep. (Reprint) 1028; *Ex p. Law*, 2 Ad. & El. 45, 29 E. C. L. 26, 111 Eng. Rep. (Reprint) 18; *In re Bracher*, 60 N. J. Eq. 350, 51 Atl. 63; *Bracher v. Olds*, 60 N. J. Eq. 449, 46 Atl. 770. Thus in *Georges v. Georges*, 18 Ves. Jr. 294, 34 Eng. Rep. (Reprint) 328, Eldon, Lord Chancellor, said: "I never heard of a lien upon a will." And in *Bracher v. Olds*, 60 N. J. Eq. 449, 46 Atl. 770, it appeared that after a will had been executed the testator delivered it to Olds, the attorney who drew it up, with express instructions to have copies of it made and then to deposit it in a safe of which the testator had the use. Holding that Olds had no lien on the will the court said: "Upon delivery of the paper upon such instructions, the possession of Olds was not that of an attorney or confidential adviser, but only of an agent or messenger with prescribed duties inconsistent with the possession under the claim of lien. By such possession Olds acquired no more right to retain the document and withhold it from probate than he would have if he had surreptitiously abstracted it from his client's possession."

An attorney's retaining lien does not extend to public records. *Wright v. Cobleigh*, 21 N. H. 339. Neither does it permit an attorney to withdraw and retain papers which he has filed in court. *Dodson v. Riddle*, 1 Ohio Dec. (Reprint) 54, 1 West L. J. 393.

An attorney will not be permitted to hold under a retaining lien papers which are essential to the preservation of the rights of his client in future litigation and the attorney will be compelled to bring them into court for the benefit of his successor, the court making such order for the attorney's protection as may be proper. *Cane v. Martin*, 2 Beav. (Eng.) 584; *Wilson v. Emmett*, 19 Beav. (Eng.) 233; *Colegrave v. Manley*, 1 T. & R. (Eng.) 400; *Ross v. Laughton*, 1 Ves. & B. (Eng.) 349; *In re Galland*, 31 Ch. D. (Eng.) 296; *Pennsylvania Finance Co. v. Charleston, etc. R. Co.* 48 Fed. 45; *Trust v. Repoor*, 15 How. Pr. (N. Y.) 570. *Compare Redfern v. Sowerby*, 1 Swanst. (Eng.) 84. In *Healop v. Metcalfe*, 3 Myl. & C. (Eng.) 183, it was said: "It is admitted that, when the solicitor discharges himself, the client and his new solicitor shall, at all events, have free access to inspect and copy the papers at the office of the former solicitor. The mere giving of access, however, is, nine

times out of ten, of no practical value; for if the papers are to remain, notwithstanding, in the custody of the solicitor who has discharged himself, it is obvious that they cannot be made use of in the further progress of the suit. The result would be that the client is to be put to the expense of fresh copies; that fresh briefs must be prepared for counsel; in short, that all the costs arising from making copies of the papers and documents to be used in the cause must be incurred over again, and so the client is to be greatly damnified. That is entirely inconsistent with the dictum of Lord Eldon, that the suitor must have his business conducted with as much ease and celerity, and as little expense, as if the connection had not been dissolved. On the other hand, if all that expense be, in fact, incurred by the client, what is the use of the solicitor's lien? There may, indeed, be original papers; but supposing them, as here, to be papers in the cause, the effect of the rule would only be to impose a very great hardship on the client, without any benefit to the solicitor. But if the expense is to operate so as to compel him rather to pay the solicitor's bill than to go to the expense of fresh copies, the admission of access and inspection would be nugatory, and of no value."

An attorney may be compelled to produce in evidence at the instance of the party adverse to his client papers on which he claims a lien. *Brassington v. Brassington*, 1 Sim. & St. (Eng.) 455, wherein it was said: "It would be very extraordinary if a deed by which property is conveyed were to be of no effect, because the party who executed the deed did not choose to pay his solicitor's bill. It may be reasonable that the husband, if calling for the deed for his own purposes, should not have access to it until the solicitor's claim was satisfied; but to refuse to produce it as a witness for the other party cannot be justified. I shall order the deed to be produced, and the witness to pay all the costs occasioned by his refusal." But in *Davis v. Davis*, 90 Fed. 791, it was held that an attorney could not be compelled to produce such papers in evidence at the instance of his client, the court saying: "The witness refused to produce the papers called for, because he claimed a lien upon them, as having once been counsel for the plaintiff. The plaintiff, while admitting that an attorney has a lien for his services upon papers deposited with him by his client, yet contends that that lien will not justify the attorney's refusal to produce those papers if he be summoned as a witness in any suit. I have been referred to but few cases bearing upon the right of a lawyer claiming a lien to refuse to produce papers for inspection when he has been summoned as a witness;

but in *Hope v. Liddell*, 7 De Gex M. & G. 331, the lords justices held that a lawyer summoned by a subpoena duces tecum could not refuse to produce in court documents upon which he claimed a lien, if the party demanding their production was not the person against whom the lien was claimed. In his opinion Lord Justice Knight Bruce carefully refused, however, to express any opinion upon the case in which the debtor was the person seeking production, while Lord Justice Turner implied pretty strongly that in such case the right to have the documents produced did not exist. That the debtor cannot require his former counsel to produce papers upon which the latter claims a lien is also implied or asserted in the case of *In re Cameron's Coalbrook*, etc. R. Co. 25 Beav. 1, and in *Brassington v. Brassington*, 1 Sim. & St. 455, and the point was expressly ruled at nisi prius by Lord Chief Justice Denman in *Kemp v. King*, 2 M. & Rob. 437. The exception to the general rule of production seems to me a reasonable one. That an attorney's lien on his client's papers should not be permitted to embarrass a third person in no way liable for the debt is reasonable, but, if an attorney's lien upon his client's papers amounts to anything, I think he may assert it as against the client, even when summoned by him to produce the papers by a subpoena duces tecum. The value of the lien often lies almost altogether in the power to withhold papers from use as evidence, and that the debtor client should be allowed by a subpoena duces tecum to make practically worthless his creditor's lien seems to me unjust."

An attorney is not entitled to retain under a lien papers to which a third person has a pre-existing right. *Walker v. Sargeant*, 14 Vt. 247. So an attorney is not entitled to retain papers belonging to a decedent's estate under a lien for services rendered to the personal representative. *De Lamater v. McCaskie*, 4 Dem. (N. Y.) 549. And see *Newell v. West*, 149 Mass. 520, 21 N. E. 954.

FREY

v.

ETZEL ET AL.

Wisconsin Supreme Court—March 23, 1915.

160 Wis. 311; 151 N. W. 807.

Deeds — Construction — Meaning of "More or Less."

Where a farm is sold, described to contain 104 acres more or less, except 28.50 acres

more or less sold to a railroad, a shortage of about three acres in the property passing to the purchaser is covered by the words "more or less," as such words are intended to cover a reasonable excess or deficit.

[See note at end of this case.]

Appeal from Circuit Court, Milwaukee county: WILLIAMS, Judge.

Action by Henry Frey, plaintiff, against Mary Etzel et al., defendants. Judgment for plaintiff. Defendants appeal. REVERSED.

[311] This is an action to recover money paid by mistake. It [312] was tried by the court. The facts were as follows: The parties for many years owned and lived upon neighboring farms in the town of Granville, Milwaukee county, the defendants' farm containing somewhat more than 100 acres. In November, 1909, the defendants sold to a railway company a strip of land through their farm which was surveyed and staked out by the engineer of the company. The defendants met the representatives of the railway company November 9th to close the transaction, and the plaintiff, who desired to purchase the remainder of the farm, was also present. At that time there was produced a certificate by the surveyor to the effect that he had surveyed the strip sold to the railroad company and that it contained 28.80 acres *more or less*. This latter parcel was then conveyed by the defendants to the railway company. After this conveyance was made the plaintiff and defendants entered into a written contract for the purchase by the plaintiff of the remainder of the farm. In this contract the plaintiff agreed to purchase the farm at \$136 per acre, of which \$50 was paid down and the balance was to be paid March 1, 1910. The farm consisted of three contiguous parcels which were described separately in the contract. The first was described by courses and distances, followed by the words "containing 34.95 acres." The second was described as "the north 25 acres of said quarter-section described as follows;" then followed a description by courses and distances. The third was described as "the north 50 acres of the east half of said northwest quarter, section 31, except six acres heretofore sold to Nicholas Mullatore;" then followed the words "containing in the whole 104 acres *more or less*, together with all buildings and improvements of every kind thereon, excepting, however, 28½ acres *more or less* this day sold to the Milwaukee, Sparta, C. & N. W. Railway Company."

On the 1st of March, 1910, the parties met again and the plaintiff paid the consideration (which was figured on the basis of 75.70 acres at \$136 per acre, amounting in

all to [313] \$10,295.20). A warranty deed of the farm was executed and delivered and the plaintiff thereafter took possession of the farm. In the deed the first parcel of land was described by metes and bounds, "containing 34.95 acres *more or less*." The second and third parcels were described as in the contract, but the phrase "containing in the whole 104 acres more or less" at the end of the three descriptions was omitted and the exception at the end read "except six acres heretofore sold to Nicholas Mulla-tore and excepting 28.80 acres heretofore deeded to the M. S. and N. W. Ry. Com-pany."

A year after the execution of the deed the plaintiff had the farm accurately surveyed and it was found that the first parcel of land described in the contract as containing 34.95 acres only contained 33.75 acres, while the parcel deeded to the railway company contained 30.18 acres instead of 28.50 acres as described in the contract or 28.80 acres as described in the deed.

The court did not find that any fraud was committed, but that the parties mutually understood that there were 75.70 acres in the farm, whereas there were in fact but 72.57 acres; that the sale was a sale by the acre at \$136 per acre, and that on account of the mistake the plaintiff paid \$425.68 more than he should have paid.

Judgment for this sum with interest from the date of the commencement of the action was rendered for the plaintiff, and the de-fendants appeal.

Henry V. Kane and Joseph P. Callan for appellants.

Clarke & Donnelly for respondent.

[314] WINSLOW, C.J.—The farm which was sold was well known to both parties. They both supposed it to contain something more than seventy-five acres after the rail-road parcel was taken out. They agreed that the plaintiff should purchase it and should pay therefor at the rate of \$136 an acre, and their contract described it in effect as 104 acres "more or less," excepting 28.50 acres "more or less" that day sold to the railroad company. In fact the original farm contained but 102.75 acres and the piece conveyed for railroad purposes contained 30.18 acres, leaving but 72.57 acres covered by the contract, being about three acres less than the amount named in the contract.

The fundamental question in the case is whether this shortage is covered by the words "more or less." These words must be given some meaning; they cannot be supposed to have been inserted merely for their literary effect. Unquestionably they constitute a qualification of the previous statement of

acreage, and the well established principle is that they import that there may be a small deficiency or excess of acreage, the risk of which both parties assume, but that they do not cover a great difference or a considerable variation either way, *i. e.* a difference so great as to make it evident that either fraud or gross mistake entered into the contract.

As has been said, "the words 'more or less' are intended to cover a reasonable excess or deficit." *Belknap v. Sealey*, 14 N. Y. 143, 156, 67 Am. Dec. 120; *Hosleton v. Dickinson*, 51 Ia. 244, 1 N. W. 550; *Trinkle v. Jackson*, 86 Va. 238, 9 S. E. 986, 4 L.R.A. 525, see note p. 526; 2 *Warvelle, Vendors*, p. 838. [315] This is the basis of decision in the recent case of *Richards v. Millard*, 146 Wis. 552, 131 N. W. 365, where the contract de-scribed the land sold as about 160 acres more or less and there was in fact but 152.81 acres. In that case also the purchase price was computed by the acreage.

The difficulty doubtless is to determine when an excess or deficit ceases to be slight or reasonable and becomes great or consid-erable. In the New York case above cited the difference between eight acres and four was held not to be covered by the words, and in the Iowa case the difference between thirty acres and eighteen acres was held too great to be covered. In the Wisconsin case cited, however, the difference between 160 acres and 152.81 was deemed to be covered. Following that case, it would seem that the deficiency in the present case, being about three acres out of seventy-five, should be held to be covered. This seems the more reason-able in view of the fact that the plaintiff here had been well acquainted with the land and its boundaries for many years and was evidently buying by the tract, although the price was computed by the acreage named in the contract.

BY THE COURT.—Judgment reversed, and action remanded with directions to dismiss the complaint.

SIEBECKER, J. (*dissenting*).—The trial court found that the parties to the contract for the purchase and sale of the tract of land in question understood that the sale of the land was made by the acre and that it was not a sale of a lump quantity of land for a definite gross sum. It seems to me that this conclusion of the trial court is cor-rect under the contract and deed in the light of the facts and circumstances of the trans-action. I am of the opinion that the circuit court properly awarded recovery of the \$425.68, the amount of overpayment on the land at the agreed price of \$136 per acre, and that the judgment of the circuit court should be affirmed.

NOTE.

Construction of Term "More or Less" in Deed of Realty.

Introductory, 155.

Sale in Gross or by Description, 155.

Sale by Acre, 155.

Equitable Relief in Case of Mistake, Misrepresentation or Fraud, 156.

Introductory.

It is the purpose of the present note to discuss the recent cases passing on the meaning and effect of the words "more or less" as used in a deed of realty. The earlier cases passing on this subject are collected and considered at length in the notes to *Kitzman v. Carl*, 12 Ann. Cas. 296, and *Oakes v. DeLancey*, 28 Am. St. Rep. 628.

Sale in Gross or by Description.

It is generally held that where a deed describes the land conveyed by metes and bounds, or as containing a specific quantity, qualified by the words "more or less," the qualifying words will relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically stipulated in the deed. *Joliffe v. Baker*, 11 Q. B. D. (Eng.) 255; *Gingras v. Garipey*, 50 Quebec Super. Ct. 88; *Hunter v. Kerr*, 21 West L. Rep. (British Columbia) 823; *Cottingham v. Cottingham*, 11 Ont. App. 624; *Touart v. Jett Bros. Contracting Co.* 169 Ala. 638, 53 So. 751; *Walton v. Ramsey*, 50 Ga. 618; *Finney v. Morris*, 116 Ga. 758, 42 S. E. 1020; *Goette v. Sutton*, 128 Ga. 179, 57 S. E. 308; *Georgia, etc. Development Co. v. Buck*, 134 Ga. 674, 68 S. E. 514; Ga. Civ. Code, § 2642; *Adams v. Betz*, 167 Ind. 161, 78 N. E. 649; *Holden v. Crolly*, 153 App. Div. 254, 138 N. Y. S. 23; *Phillips v. Crist*, 33 Pa. Super. Ct. 445; *Yates v. Buttrell* (Tex.) 132 S. W. 831; *Richards v. Millard*, 146 Wis. 552, 131 N. W. 365. And see the reported case.

Thus in *Finney v. Morris*, supra, wherein it appeared that land was sold by the tract and described in the deed as so many acres "more or less," the court in denying relief to the vendee, with respect to a deficiency of thirty acres in a conveyance of 165 acres, said: "We know of no distinction between actual and intentional fraud. When the defendant disclaimed any purpose to charge the plaintiff with any actual fraud in the sale of the land, he admitted himself out of

court; for, as we understand the decisions of this court, it is only in cases of actual fraud that a purchaser of land, sold by the tract and described in the deed as so many acres 'more or less,' can have the price which he agreed to pay for the land apportioned because of a deficiency in the number of acres actually conveyed to him. . . . Unless the enumeration of the quantity of land sold is of the essence of the contract, and not matter of description merely, the covenant of warranty will not be broken by a deficiency in the quantity of land conveyed."

With respect to a deficiency of 156 acres in a deed conveying "1200 acres more or less" it was said, in *Walton v. Ramsey*, 50 Ga. 618, that when a tract of land is sold in a body as containing so many acres "more or less" and both parties have an equal opportunity to judge for themselves and both act in good faith, a deficiency in the quantity sold cannot be apportioned.

In *Phillips v. Crist*, 33 Pa. Super. Ct. 445, an excess of thirty acres in a conveyance of sixty acres "more or less" was held to be immaterial, the court saying that the description of land by quantity does not amount to a covenant that the land shall equal the quantity mentioned in the deed.

Where it appeared that a tract of land sold was described as containing "five acres more or less" which after survey by the vendee disclosed only a little over four acres, in an action by the vendee for damages the court said: "There seems to be a disposition on the part of some purchasers to hold that the phrase 'more or less' only applies in their case when it is *more*, and never when it is otherwise. . . . This one-sided interpretation cannot stand the test of judicial interpretation." *Hunter v. Kerr*, 21 West. L. Rep. (British Columbia) 823.

Sale by Acre.

Where a sale is by the acre and not as a specific tract, the words "more or less" in the deed do not qualify and restrict in the same sense as in a sale in gross. The differences presumed to have been contemplated by the parties are only such as are due to the errors incident to measurement by different surveyors, and in the variation in the instruments used, and the words "more or less" in the deed are treated as words of precaution merely and as intended to cover but slight and unimportant inaccuracies. *Boggs v. Bush*, 137 Ky. 95, 122 S. W. 220; *Koch v. Bird*, 174 Mich. 594, 140 N. W. 919; *Berry v. Fishburne*, 104 Va. 459, 51 S. E. 827; *Pack v. Whitaker*, 110 Va. 122, 65 S. E. 496. In *Boggs v. Bush*, supra, the court said: "The addition of the qualifying clause 'more or less' relieves only the necessity for

exactness. It indicates that the parties contemplated making some allowance for those inaccuracies that are usual in such measurements, and that they each took the chance of the fact being, if ascertained with accuracy, that the quantity was somewhat more or somewhat less than was represented. The difficulty arises, in administering relief upon complaint, in determining the limit. While the courts have not set a rule applicable to all cases, in Kentucky no case to which our attention has been called has granted the relief where the deficit was less than ten per cent, and none where it was refused where the deficit was as much or more than ten per cent. In the early history of the state, when lands were cheap, and in consequence surveying was frequently attended with inaccuracies because, perhaps, it did not pay to take the time and go to the labor and expense necessary to secure greater exactness, more latitude for discrepancy was allowed. As values have enhanced, and surveying has been more carefully done, there is less reason for, and would be more injustice in, applying the rule of ancient times."

On the question whether a sale is by the acre or in gross, the fact that both the contract and the conveyance describe the land as containing "50 acres more or less" indicates a sale by acre unless there is other language by which it plainly appears that a sale in gross is intended. *Pack v. Whitaker*, 110 Va. 122, 65 S. E. 496.

In *Pickens v. Pickens*, 72 W. Va. 50, 77 S. E. 365, it was held that the use of the term "more or less" in connection with other facts showing an intent to sell by the acre creates an ambiguity admitting parol evidence to show whether the sale was in gross or by the acre. See also *Scott v. Dunkle Box*, etc. Co. 106 Ark. 83, 152 S. W. 1025; *Adams v. Betz*, 167 Ind. 161, 78 N. E. 649.

Equitable Relief in Case of Mistake, Misrepresentation or Fraud.

The use of the words "more or less" in a deed does not prevent relief where the discrepancy between the actual quantity, and the quantity stated is very great or where the vendor acts in bad faith. *Seymore v. Rice*, 94 Ga. 183, 21 S. E. 293; *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556; *Collinsville Granite Co. v. Phillips*, 123 Ga. 842, 51 S. E. 666; *Boggs v. Bush*, 137 Ky. 95, 122 S. W. 220; *McGhee v. Bell*, 170 Mo. 121, 70 S. W. 493, 59 L.R.A. 761; *Straus v. Norris*, 78 N. J. Eq. 488, 79 Atl. 611.

In *Boggs v. Bush*, supra, it appeared that a tract described as containing 90 acres "more or less" actually consisted of 78 acres. In a suit in equity for relief against the deficiency on the ground of mistake or fraud,

it was said in granting the relief that the question whether the sale was by the acre or in gross was immaterial, since if the sale was by the acre the number of acres represented must be within the boundary, while if it was in gross and the deficiency was so great as not to be within the contemplation of the parties, the buyer was entitled to relief on the same basis of computation as if the sale had been by the acre.

In *Straus v. Norris*, 78 N. J. Eq. 488, 79 Atl. 611, it was said: "I take it that while some of the judges have stated that relief would be granted in case of mistake, and others have stated that it would be granted in case of gross mistake, there is substantially no difference between the two expressions. The mistake must be sufficient to induce the court to believe if the truth had been known at the time, the parties would not have contracted; in view of this idea, mistake and gross mistake are interchangeable."

In *Pickens v. Pickens*, 72 W. Va. 50, 77 S. E. 365, wherein it appeared that the parties entered into a preliminary contract for the sale and purchase of land by the acre, the acreage to be determined by a survey to be made, and the deed recited a certain number of acres "more or less," the court said: "The deed in consideration of twelve hundred and forty-five dollars paid and to be paid, purported to convey a tract by metes and bounds as 'containing 83 acres more or less,' the consideration being an exact multiple of the number of acres at the price per acre agreed upon. The fact that the deed employs the words 'more or less' after stating the quantity, does not affect the positive character and representation, and does not evince any intent to change the original contract from a sale by the acre to one in gross as contended by appellant."

In *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556, it appeared that a deed purported to convey "672 acres more or less," and the tract conveyed was subsequently ascertained to consist of only 465 acres. In an action for damages for the deficiency the court said that the words "more or less" would cover any deficiency not so gross as to justify the suspicion of wilful deception or mistake amounting to fraud, and that the question of fraud or what was tantamount to fraud was generally a question for the jury except in extraordinary cases where there could be no difference of opinion. See also *Seymore v. Rice*, 94 Ga. 183, 21 S. E. 293.

Where one executed a deed for eighty acres when in fact he had only sixty-one acres, it was held that the vendee in a suit for equitable relief, there being nothing to indicate that one part of the land was more valuable than

another, was entitled to elect to retain the land that the grantor could convey and to demand an abatement of the price for the deficiency in proportion to the price given for the whole tract as represented. *McGhee v. Bell*, 170 Mo. 121, 70 S. W. 493, 59 L.R.A. 761.

Alexander Rosenthal and George Gordon
Battle for appellant.

Lamar Hardy, Charles J. Nehrbaas and
Terence Farley for respondent.

**MATTER OF CITY OF NEW YORK
(COURT HOUSE).**

New York Court of Appeals—January 4,
1916.

216 N. Y. 489; 111 N. E. 65.

**Judgments — In What Proceedings
Entered — Special Proceeding.**

A special proceeding terminates in an order, instead of a judgment.

Eminent Domain — Proceedings — Appeal from Order of Confirmation — Finality of Order.

Where a landowner appealed from an order confirming the report of the commissioners of estimate and appraisal in a condemnation suit and the appellate division dismissed the appeal, the dismissal virtually made the order of confirmation absolute, and as the proceeding terminated in the final order, an appeal will lie to the court of appeals, as an intermediate court cannot deprive that court of jurisdiction by dismissing an appeal leaving a judgment or final order in full force.

Waiver of Right to Appeal — Acceptance of Amount Awarded.

Where, in a proceeding to condemn land, the landowner asserts that the award of the commissioners of estimate and appraisal is insufficient, he does not, by accepting the amount awarded, the report being confirmed, lose his right to appeal on the ground of deficiency, but such acceptance merely limits the grounds on which reversal may be sought.

[See note at end of this case.]

Matter of City of New York (Court House),
168 N. Y. App. Div. 58, reversed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Application by City of New York to acquire land as site for court house. Report of commissioners of appraisal confirmed by Special Term of Supreme Court. Appeal dismissed by Appellate Division of Supreme Court. Samuel Green appeals. The facts are stated in the opinion. **REVERSED.**

[491] WILLARD BARTLETT, Ch. J.—This is a condemnation proceeding to acquire lands as site for the proposed new courthouse in New York city. By an order of the Supreme Court confirming the report of the commissioners of estimate and appraisal the sum of \$135,000 was awarded to the appellant. He accepted payment of the award from the city but nevertheless appealed to the Appellate Division from the order of confirmation. That court has dismissed his appeal and he comes here.

The learned counsel for the respondent questions our jurisdiction to review the order of dismissal. I think we have jurisdiction. By refusing to hear his appeal the Appellate Division virtually made the order of confirmation absolute. The effect upon the rights of the appellant was the same as an affirmance on the merits would have been. If this had been an action instead of a special proceeding the proper practice would have been to enter a judgment of dismissal upon the order. (*Stevens v. Central Nat. Bank*, 162 N. Y. 253, 255, 56 N. E. 628.)

[492] A special proceeding, however, regularly terminates in a final order, and this order possesses all the elements of finality. The case cited is authority for the proposition that the courts below cannot deprive this court of jurisdiction by dismissing an appeal thus leaving a judgment or final order in full force against the party claiming to be aggrieved. "In many cases that would have the same effect upon the rights of the parties as an affirmance."

I proceed, therefore, to review the order of dismissal. The rule is well established that in ordinary cases a party who accepts the benefit of a judgment thereby waives his right to appeal therefrom. (*Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37.) The waiver results from the inconsistent attitude of a party who at the same time collects the amount of a judgment in his favor and appeals for the purpose of reversing that judgment. But in *Matter of New York, etc. R. Co.* 98 N. Y. 12, 18, Judge Earl, writing for the court, said that this rule was not applicable to appeals in condemnation proceedings where the claimant seeks to question simply the amount of the award. "That rule is enforced because it would be inequitable and unjust to permit a party to take and hold the benefit of a decision, and yet appeal from and seek to annul it, and the reason of the rule does not apply to such a case as this. Here the city did not seek to enforce the award; it took the money

awarded for the land of which it was deprived. It did not seek by the appeal to get the land back again, or to divest the title of the company, but sought only to get more adequate pay for the land." In the case cited the money, pursuant to the provisions of the Railroad Law, had been deposited with the chamberlain of the City of New York from whose custody the city did not withdraw it, so that it was a case of deposit for the benefit of the landowner instead of actual payment. In discussing the question upon principle, Judge Earl added: "If . . . the order shall be reversed, and a new appraisal ordered, the title and possession shall [493] remain in the company (the condemning party), and if, upon the new appraisal, the award be diminished, the landowner must refund the difference, and if it be increased, the company must pay the difference. But in any event, after the payment or deposit of the first award, the landowner has, during the corporate existence of the company, lost all right, estate and interest in the land, as well as the use thereof."

The precise point presented by this appeal, however, was necessarily passed upon in our decision in *Matter of White Plains*, 195 N. Y. 502, 505, 88 N. E. 1102. There an award had been made to property owners, who declined to take it and appeal. The appeal resulted in a new appraisal and an increased award. The property owners claimed interest on the entire amount from the time of the first award. It was held that as the property owners were entitled to take the award and still appeal, they were only entitled to interest upon the excess of the second award over the first from the time the condemning party entered into possession. It was there said: "He (the property owner) runs no risk in accepting the award. It does not operate as a waiver of his right to appeal (citing *Matter of New York*, etc. R. Co. *supra*). The case is not analogous to a judgment which may be reversed on appeal. A judgment reversed becomes a nullity. But though a new appraisal may be ordered in a condemnation proceeding, the effect of the confirmation of the original award is not destroyed. As pointed out, it still transfers title of the land to the condemning party, and the property owner still retains title to the award that has been paid him subject, only in case the new award should be less, to a judgment against him for the difference. On this difference he is not liable for any interest."

The same doctrine has received the approval of the courts of last resort in other states. In *St. Louis*, etc. R. Co. v. *Fowler*, 113 Mo. 458, 20 S. W. 1069, the question was whether the landowner was entitled to interest from

the time of [494] the original report, the same as in the *White Plains Case* (*supra*). If the landowner had the right to take the amount of the award pending subsequent proceedings, he was entitled to interest. The court said: "The company has the right to use the property by paying the amount of the first award; and the question is, whether the landowner has the corresponding right to withdraw and use the money pending further proceedings. We are of opinion he has such right. . . . He has the right to withdraw and use the money the same as the company has the right to use the property, he being bound to refund if the final award is less, and the company being bound to pay the excess if the final award is more than that first allowed." In *Low v. Concord R. Co.* 63 N. H. 557, 561, 3 Atl. 739, it was said: "The proprietors of a railroad cannot bar the landowner's right of appeal by a payment or tender of the damages awarded; nor is an acceptance of the sum tendered a waiver of an appeal previously taken. If accepted, the tender operates as a payment *pro tanto*, and if the amount tendered and accepted was sufficient, it bars any further claim of damages, interest and costs by the landowner, and subjects him to a judgment for costs; if insufficient he is entitled to judgment for the additional damages and costs awarded him upon appeal. The plaintiff did not waive the appeal by accepting the sum tendered."

In those jurisdictions in which it has been held that the acceptance of an award operates as a bar to the right of appeal, the distinction in favor of an appeal which seeks only to review the sufficiency of the award does not appear to have been considered. (See *Mississippi*, etc. R. Co. v. *Byington*, 14 Ia. 572; *Hartshorn v. Petroff*, 89 Ill. 509, and *Baltimore*, etc. R. Co. v. *Johnson*, 84 Ind. 420.)

While the acceptance of the award in condemnation proceedings does not deprive the landowner of his right to appeal it does limit the grounds upon which he can seek a reversal. He may not assail the order of confirmation [495] for irregularity or so far as it adjudges the right of the condemning party to acquire his land. He is confined to an attack upon the award for insufficiency. All that he can be heard to say is that he has not received as much for his property as it is worth. There is no inconsistency between the acceptance of the award and insisting that it ought to be larger, provided it is not accepted as payment in full.

Inasmuch, therefore, as the appellant had the right to review the sufficiency of the award by appeal to the Appellate Division, notwithstanding his acceptance thereof, it was error to dismiss his appeal.

The order of dismissal should be reversed, with costs to the appellant, and the case re-

mitted to the Appellate Division to pass upon the merits.

Hiscock, Chase, Collin, Cardozo, Seabury and Pound, JJ., concur.

Order reversed, etc.

NOTE.

The reported case holds, apparently against the weight of authority, that a landowner does not by accepting the amount awarded in condemnation proceedings preclude himself from appealing from the order confirming the award. It is held however that by such an acceptance the landowner is debarred from attacking the award on account of any irregularity, and can complain only of the sufficiency of the amount awarded. The earlier cases dealing with the estoppel of a landowner by acceptance of a condemnation award are reviewed in the note to *Chicago Great Western R. Co. v. Kemper*, Ann. Cas. 1915D 815.

MASON

v.

WESTERN UNION TELEGRAPH COMPANY.

North Carolina Supreme Court—May 25, 1915.

169 N. Car. 229; 85 S. E. 384.

Telegraphs and Telephones — Claim for Damages — Suit as Equivalent of Filing.

The stipulation of a telegraph blank requiring notice in writing within sixty days, of claim for damages, is satisfied by commencing an action, by service of summons, within sixty days after sending two messages, for failure to deliver the first and delay in delivering the second, though at the same time notice of claim on account of the second message only was given, the company not having thereby been misled to its damage, and though the complaint was not filed till after the sixty days.

[See note at end of this case.]

Appeal from Superior Court, Cherokee county: JUSTICE, Judge.

Action by J. B. Mason, plaintiff, against Western Union Telegraph Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[230] Civil action to recover damages for negligence on part of the defendant telegraph company.

There was evidence on part of plaintiff tending to show that, on 30 October, 1910, plaintiff, whose son was very ill at his home in said county, sent a telegraphic message from Nantahala, N. C., to Dr. Morrow, at Andrews, importing urgency, and same was not delivered, and by reason of such failure the doctor did not attend in response to said message. Later, on 4 November, plaintiff sent another message to the doctor, still more urgent, and it was claimed there was negligence in delivering this message, by reason of which the doctor's arrival was delayed from about 8 a. m. to 2 p. m. of same day, 4 November; that this boy was in a dying condition when the doctor arrived, and died the second day after the last message was sent.

There was a verdict for the plaintiff as to negligent failure to deliver the first message, 30 October, and for defendant as to second message, 4 November, and damages assessed at \$300.

Plaintiff introduced a written notice, of date 16 December, 1910, containing claim for damages in \$2,000, for negligent failure to deliver the message of 4 November, and further, the summons in the present action, issued 16 December, 1910, and complaint, regularly filed therein, at the next term of Superior Court, 4 April, 1911, claiming damages for negligence in case of both messages.

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Alf. S. Barnard and George H. Fearons for appellant.

Dillard & Hill for appellee.

HOKE, J. (after stating the facts).—Our cases on this subject are to the effect that the ordinary and usual stipulation, requiring that claims for damages, arising from the company's negligence in the transmission or delivery of a telegraphic message, shall be made in writing and within sixty days from the sending, is a reasonable one, except, perhaps, in certain instances, where there is an entire failure to deliver and they also hold that when an action for such negligence is instituted within the sixty days the giving of such notice is dispensed with, and a failure in this respect is not then available as a defense. This was fully recognized in *Sherrill v. Western Union Tel. Co.* 109 N. C. 527, 14 S. E. 94, and expressly decided in the subsequent case of *Bryan v. Western Union Tel. Co.* 133 N. C. 604, 45 S. E. 938.

In the present instance the message on which recovery has been had was received for transmission on 30 October, 1910. The action was instituted on 16 December following, and the case, therefore, comes directly within the principle of the decisions

referred to, and we see no reason why the judgment should not be affirmed.

[231] It is earnestly urged for defendant that not only was no written notice filed within the sixty days, but the claim that was filed made demand on an entirely different message, to wit, that of 4 November, and, to apply the principle of Bryan's Case would operate with great harshness on the company, as it has been positively misled. But, on the facts in evidence, we are not impressed with this view. Even if it was sufficiently presented, the position would not, in our opinion, justify a departure from a principle established and acted on as the law of the State for the past fifteen years and more; but, on the record, we think that no such claim can be sustained. These stipulations have been upheld because it is deemed fair and right that the company shall be notified before the witnesses may disappear and while the facts may be made available by proper inquiry. We know that Nantahala and Andrews, villages on the railroad, have no such great amount of business that the facts relevant to a message of this character are likely to escape observation, and a perusal of the testimony will show that the action was instituted six weeks after the message was sent; that a complaint, giving specific notice of the demand, was regularly filed at the first term of the Superior Court thereafter and five months from such date, and not only was the defendant not deprived of opportunity to inquire, in this instance, by lapse of time, but there is uncontradicted evidence of the doctor, the addressee of the message, to the effect that, soon after the action was instituted, the agent of defendant company presented a number of back receipts to witness, claiming that, in the pressure of business, he had failed to have them signed, and induced the doctor, by inadvertence, to sign for the message sued on, although the doctor told the witness that he would not sign a receipt for that date, as no such message had been received.

We find no reason for disturbing the results of the trial, and the judgment in plaintiff's favor must be affirmed.

No error.

WALKER, J. (*concurring*).—The defense set up is that "no written claim for damages was presented to the company within sixty days after filing the message for transmission, as required by the contract." We have held this stipulation to be a reasonable one: but it should be enforced reasonably, and not harshly to defeat a just claim. It does not apply if the suit for damages is commenced within the sixty days. Sherrill v. Western Union Tel. Co. 109 N. C. 527, 14 S. E. 94; Bryan v. Western Union Tel. Co.

133 N. C. 604, 45 S. E. 938. Whether those cases were properly decided is a question we need not discuss, as the condition now is that this case should be exempted from the operation of the rule established by those cases, by reason of its special facts. The object of this provision in the contract is to inform the company of its default, to the end that it may make seasonable investigation of the matter before the proof is lost by lapse of time.

[232] The ground alleged for exempting this case from the operation of the rule, as to the suit being itself equivalent to presenting a claim, is that there were two telegrams, and there was no written claim presented for failure to deliver the one filed with the company 30 October, 1910, while there was such a claim made as to the one filed 4 November, 1910. According to the above cited cases, the suit would be notice as to both, unless, as defendant now contends, the filing of a claim as to one should prevent it from being so. It is urged that this should be so, because the conduct of plaintiff was apt to mislead the defendant. If the fact that plaintiff was in fact misled, and not merely apt to be misled, should take the cases out of the rule, it was incumbent upon the defendant to plead and prove the fact. This must be so, as if a suit is a notice of the claim, it must continue to be so, unless some valid reason is shown in the regular course of procedure why it should not be. The burden was not on the plaintiff to show why that, which this Court has said is a sufficient compliance with this stipulation, is not so, but this burden rested on the defendant; and I take it that this burden would not be adequately discharged by simple proof that two telegrams were involved, instead of one, unless it was alleged and shown that the defendant was actually misled to its prejudice, and not merely that there was a chance of its being misled. There was no allegation in the answer as to this material matter, which it is contended avoided the effect of the suit as notice, the averment being that no written notice of claim was given, as required by the contract; nor was there any issue tendered or submitted that fairly embraced it, unless it was the fourth issue, and there was no request for instructions as to this issue, but only as to the issue concerning damages, which is the fifth, and the question of notice was not germane to that issue. But apart from all this, the proof tends to show, not that the defendant was misled by the claim as to one of the messages, but, on the contrary, that it well knew of the default as to the telegram of 30 October, as its agent at Andrews asked Dr. Morrow to "sign for the message" on the delivery sheets, "so that his books would

show up and make it all right for him," which the doctor agreed to do, upon the express promise of the agent that his acknowledgment of its receipt should not be dated as of 30 October, 1910, but should bear the true date, the doctor testifying that the message of 30 October was not delivered until some time after that date. Besides, the delivery sheet was still in the company's possession after the suit was brought, and itself showed the default, until the doctor "signed for the message." This proved full knowledge of the facts, on the part of the company, through the agent who handled the messages, and the possession of its own record of the facts, viz., the "delivery sheet" on which the default clearly appeared. If the Sherrill and Bryan decisions are not to be overruled—and I do [233] not think it necessary that they should be, in order to sustain the judgment—there is no reason for excepting this case from the operation of the rule they established.

I may add that in Sherrill's case, 532, it was held that when the message is not delivered, the claim for damages may be filed, or the suit brought, within sixty days after knowledge of that fact, and "if defendant wishes to insist that plaintiff did not give notice of his claim within sixty days after knowledge of the nondelivery, he must set this up by answer." This is a case of nondelivery, and it is not alleged or found as a fact when plaintiff had notice of nondelivery.

BROWN, J. (*dissenting*).—The issues and findings of the jury are as follows:

1. Was the defendant Western Union Telegraph Company negligent in the transmission and delivery of the telegram dated 30 October, 1910, as alleged in the complaint? Answer: "Yes."

2. If so, was the plaintiff injured thereby? Answer: "Yes."

3. Was the defendant Western Union Telegraph Company negligent in the transmission and delivery of the telegram dated 4 November, 1910, as alleged in the complaint? Answer: "No."

4. If so, was the plaintiff injured thereby? Answer: "No."

5. What damage, if any, is the plaintiff entitled to recover? Answer: "\$300."

It is thus seen that the jury passed on two causes of action, one based on the failure to deliver the telegram on 4 November, 1910, and the other on the failure to deliver the telegram of 30 October, 1910. It is admitted that the plaintiff filed with the defendant within the sixty days a notice in writing that he claimed damages for failure to deliver the telegram of 4 November. It is admitted that the plaintiff did not file any

written claim for damages based on the telegram of 30 October, 1910. I am of opinion that this omission is fatal to a recovery on that cause of action.

It is well settled in this state that the stipulation that the company will not be liable unless the claim is presented in writing and within sixty days is not a stipulation restricting the liability of the telegraph company for negligence, but is a stipulation rather against the neglect of the plaintiff in *not making known his cause of complaint* within a reasonable time. This is held to be a most reasonable requirement, and, unless it is complied with, bars a recovery. *Sherill v. Western Union Tel. Co.* 109 N. C. 527, 14 S. E. 94; *Lytle v. Western Union Tel. Co.* 165 N. C. 505, 81 S. E. 759; *Jones on Telegraph and Telephone Companies*, sec. 393.

It is clear from these authorities that this court recognized the justness of this stipulation in order that the company may have notice while the transaction is fresh that there has been a default, and that such [234] default has resulted in damages, so that it can make an intelligent investigation to ascertain if the claim is just, and, if not just, prepare its defense. It is contended that the fact that this action was commenced within the sixty days is a full compliance with the stipulation.

It is held in *Bryan v. Western Union Tel. Co.* 133 N. C. 604, 45 S. E. 938, that a summons served on a telegraph company within the time stipulated in the telegraph blanks for making claim for damages is equivalent to the presentation of the claim within that time.

It is not necessary that I should controvert what is there held, for in my opinion there is quite a distinction between that case and this. If the plaintiff had only one cause of action, based on a failure to send one telegram, or for negligence in delivering that telegram, the principle laid down in *Bryan's* case might apply. In this case the plaintiff presented to the defendant company a claim for damages in writing, based upon a failure to transmit and deliver the telegram of 4 November. That notice is dated 16 November, 1910, and specifically confines the plaintiff's demand for damages to the negligent failure to promptly deliver the telegram dated 4 November, 1910. That notice was delivered to the defendant's agent on 16 December, 1910. The summons in this action is dated 16 December, 1910, and was served the same day. The complaint was not filed until 4 April, 1911. The defendant had a right to suppose that the action was brought to recover damages, the claim for which, based on the telegram of 4 November, had that day been delivered to its agent. The defendant had no notice whatever and no

right to suppose that the plaintiff was suing upon a cause of action relating to the telegram of 30 October. The fact that the claim in writing for damages had been presented to the defendant's agent on the very day that the summons was issued and served was well calculated to mislead the defendant's agent and to cause him to suppose that the cause of action sued upon was the failure to deliver the telegram of 4 November.

It is plain to me that where several messages, handled perhaps by different agents, are involved, the company acquires no information from the mere service of a summons such as is issued out of our courts from which it can determine on which message the suit is based, or make any intelligent investigation which will enable it to decide whether the claim is just, or prepare a defense to the action.

It is admitted that where a summons has been issued and no complaint filed, it is not a *lis pendens*, and that evidence is incompetent to show what the cause of action was. This is expressly held by Mr. Justice Walker in *Person v. Roberts*, 159 N. C. 168, 74 S. E. 322, in which he cites many supporting authorities.

Instead of the summons being any assistance to the defendant, it was positively misleading. When the plaintiff presented his claim for damages [235] in writing, based on the telegram of 4 November, exclusively, the defendant had a right to suppose that if the plaintiff had any other cause of action against him, or any other claim for damages, he would have embraced that in his written demand, also.

The fact that he made claim for only one cause of action would lead the defendant to believe that the plaintiff had no other. Consequently, when the summons was served on the same day, immediately after filing the written claim, any reasonable person would have supposed that the action was brought solely for the purpose of enforcing the written demand which had been made on the same day.

NOTE.

Commencement of Suit as Presentation of Claim within Stipulation on Telegraph Blank.

Introductory.

In accord with the holding in *Smith v. Western Union Tel. Co.* 77 S. C. 378, 12 Ann. Cas. 666, the few recent cases in point support the rule that the commencement of a suit against a telegraph company to recover damages is a sufficient compliance with a stipulation requiring a claim for damages to

be presented within a certain time after the filing of the message for transmission. *Petty v. Western Union Tel. Co.* 138 Ga. 314, 75 S. E. 152; *Western Union Tel. Co. v. McMillan (Tex.)* 174 S. W. 918. And see the reported case.

"It is well settled that the filing of a suit is the presentation of a claim" within the meaning of a stipulation requiring a claim to be "presented in writing" within a limited time. *Western Union Tel. Co. v. McMillan*, supra. So in *Petty v. Western Union Tel. Co.* supra, it was said: "Even if the condition printed upon a telegraphic blank, stating that the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission, be valid and binding, we do not think that the failure of the plaintiff to present a claim in writing within sixty days after the message was filed with the company's agent for transmission will defeat the action in this case. The suit to recover the penalty was brought and served within sixty days, and we think this was sufficient demand upon the company for the payment of the penalty."

In *Postal Telegraph-Cable Co. v. Moss*, 5 Ga. App. 503, 63 S. E. 590, it was held that the commencement of an action will be deemed to be a compliance with the stipulation if the suit is brought within the time stipulated, and the allegations are sufficiently specific, setting forth the nature of the claim and its extent.

LYONS

v.

GRAND TRUNK RAILWAY COMPANY OF CANADA.

Michigan Supreme Court—April 6, 1915.

185 Mich. 417; 152 N. W. 88.

Carriers of Goods — Delay in Transportation — Measure of Damages.

The measure of damages for delay in transporting goods to market is the difference between the market value at the time and place at which delivery should have been made and the same value when delivery was actually made, whether the difference was the result of a decline in the market or of an injury suffered by the goods in consequence of the delayed delivery.

[See note at end of this case.]

Same.

Where neither the shipper nor the carrier had any reason to believe that the shipment of beans would spoil after four or five days in a closed car, and the beans spoiled in consequence of negligent failure to transport them within a reasonable time, the carrier cannot relieve itself from liability on the ground that it had no notice that the beans were in an abnormal condition.

[See note at end of this case.]

Same.

Where, in an action for damages to a shipment of beans, due to negligent delay in transportation, it appears that defendant retained the money for which the beans were sold, and the contract price is the only evidence of the market price at the place of delivery, it is proper to instruct that plaintiff, if entitled to recover, should recover the contract price at the place of delivery at the time the shipment should have been delivered.

[See note at end of this case.]

Error to Circuit Court, St. Clair county: TAPPAN, Judge.

Action by John Lyons, plaintiff, against Grand Trunk Railway Company of Canada, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

L. C. Stanley and W. K. Williams for plaintiff in error.

Elmer E. Stockwell and C. L. Benedict for defendant in error.

[418] **BIRD, J.**—Plaintiff, a farmer living near Marine City, sold his crop of beans by sample, in the fall of 1912, to the Michigan Farmers' Elevator Company in Detroit, on the basis of \$2 for 71 pounds. On November 19, 1912, he shipped them in 204 bags to the purchaser in Detroit, via the Rapid Railway and defendant's line. The car arrived in defendant's yards in Detroit on November 21st, and the consignee was notified the same day. The consignee paid the freight and ordered the car to be delivered to its elevator, which was situated on defendant's line. Defendant neglected to deliver the car until the afternoon of November 30th. Upon inspection the beans were [419] found to be heated and musty, and the consignee refused to accept them. The plaintiff was notified, and he at once went to Detroit and conferred with defendant, and through some arrangement (which is not disclosed) the beans were sold by the defendant for \$244.80. After deducting the freight charges, it left a balance of \$220.52, which it still retains. The plaintiff's action was in tort, counting upon the defendant's failure to observe its common-law duty to transport the beans within a reason-

able time. He was awarded a verdict of \$738.14. The only question made by the briefs for our consideration is whether the trial court gave to the jury a proper measure of damages.

The trial court in substance instructed the jury that, to entitle plaintiff to recover, they must first find that the delivery of the beans to the consignee had been unreasonably delayed by defendant, and that such delay was the proximate cause of the damage claimed, and in elaboration of the latter instruction he instructed them that, in order to entitle plaintiff to recover, they must find that the beans spoiled after a reasonable time had elapsed for the transportation of them; and that, if they spoiled during such reasonable time, the plaintiff was not entitled to recover. They were further instructed that, if they found that plaintiff was entitled to recover, he would be entitled to recover the contract price at Detroit at the time they should have been delivered.

Counsel are in substantial accord upon the proposition that, whether the action be tort or contract, the measure of damages for delay in transporting goods is the difference between the market value of the property at the time and place at which the delivery should have been made, and the same value when delivery was actually made, but their disagreement arises out of what elements enter into the market value. Defendant insists that, in arriving at market [420] value, the only thing which may be considered is the difference in price for the same quality of goods, whereas the plaintiff contends that not only the difference in price of the goods may be taken into consideration, but also any deterioration in quality may be considered in arriving at the market value.

The general rule has been stated as follows:

"Where there is a delay for which the carrier is liable, the measure of damages is the difference between the market value of the property at the time and place at which the delivery should have been made, and the same value when delivery was actually made, whether the difference in value was the result of a decline in the market, or of an injury suffered by the goods in consequence of the delayed delivery." 5 Am. & Eng. Enc. of Law (2d ed.) 384.

The case of *Weston v. Grand Trunk R. Co.* 54 Me. 376, 92 Am. Dec. 552, quotes with approval the following:

"Then comes the other question, whether he is entitled to recover the difference between the value of the goods to him, if they had been delivered in proper time, and their value at the time when they were actually delivered. I am of the opinion that the consignee is entitled to recover such difference in value.' 'It is admitted,' remarks Byles,

J., in the same case, 'that deterioration in quality is to be taken in account in estimating the damage the plaintiff has sustained; it is admitted also that loss or diminution in the quantity is to be taken into account.'"

See also *Nettles v. South Carolina R. Co.* 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

We think the foregoing is a proper statement of the general rule, and that the trial court was in no error in including the question of the deterioration of the property as an element of market value, as the proofs tended to show that the deterioration of the beans was caused after a reasonable time had elapsed for their transportation.

The further contention is made that the beans were [421] in an abnormal condition; that they contained 23 per cent of moisture, whereas normal beans contain only 17 per cent; that the rule of liability would apply only to normal beans; and that, before it could be charged with loss or damage to abnormal beans, it should have notice of their condition at the time they were tendered for shipment, the same as any other perishable property. The proofs do not disclose that the beans were in any such condition as would justify a classification of them with perishable property. A witness who appeared to be qualified to speak of such matters testified that beans with 23 per cent of moisture would not take damage in a closed car under four or five days, and defendant's own proofs showed that the usual time for transporting a car from Marine City to Detroit was two or three days. Furthermore, there is no claim that plaintiff had any knowledge that the beans would be likely to spoil in a closed car after four or five days. If neither had any reason to believe they would spoil after four or five days in a closed car, but in fact they did spoil by reason of the neglect of defendant, it should bear the loss. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83.

Counsel relies upon an English case to enforce his argument, on the question of notice. In that case a quantity of rags were consigned. The delivery was delayed two weeks beyond the usual time for delivery. The rags were damp when offered for shipment, and as a result of the delay they heated and rotted. The court held that no recovery could be had because the carrier had no notice that the rags were damp and liable to spoil. *Baldwin v. London, etc. R. Co.* 9 Q. B. D. 582. The difference between that case and the one under consideration lies in the fact that proof was made in this case that the injury to the beans occurred after a reasonable time had elapsed for their transportation. If this fact had not been [422] made to appear, a like result would doubtless have been reached in this case.

Inasmuch as the defendant retains the money for which the beans were actually sold, and for the further reason that the contract price was the only evidence of market price at the place of delivery, we think the measure of damages directed by the trial court was correct.

The judgment will be affirmed.

Brooke, C. J., and McAlvay, Kuhn, Stone, Ostrander, Moore, and Steere, JJ., concurred.

NOTE.

Measure of Damages for Carrier's Delay in Transporting Goods Resulting in Depreciation in Value.

General Rule, 164.

Application of Rule, 167.

Qualification of Rule, 170.

Effect of Contractual or Statutory Limitation of Liability, 170.

General Rule.

In the absence of an express contract, there is an implied promise on the part of a carrier of goods to transport freight within a reasonable time, and if any unreasonable and unnecessary delay occurs in the transportation of the goods, the carrier is liable for the immediate and proximate damages resulting from his neglect of duty. 4 R. C. L. tit. *Carriers*, p. 737. And the loss of value resulting from the carrier's delay in transporting goods is such an immediate and proximate effect of the carrier's neglect of duty as to make it liable therefor. The measure of damages recoverable is ordinarily the difference between the value of the goods at the place of destination at the time of delivery and what their value would have been at that place at the proper time for delivery.

England.—*Collard v. South Eastern R. Co.* 7 H. & N. 79, 7 Jur. N. S. 950, 30 L. J. Exch. 393, 4 L. T. N. S. 410, 9 W. R. 697, 158 Eng. Rep. (Reprint) 400; *Dunn v. Bucknall* [1902] K. B. 614, *distinguishing* *The Parana*, 1 P. D. 452, 2 P. D. 118; *Wilson v. Lancashire, etc. R. Co.* 9 C. B. N. S. 632, 99 E. C. L. 632, 142 Eng. Rep. (Reprint) 248; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Bauld v. Smith*, 40 Nova Scotia 294. See also *Woodger v. Great Western R. Co.* L. R. 2 C. P. 318.

United States.—*Bussey v. Memphis, etc. R. Co.* 13 Fed. 330, 4 McCrary 405; *Milne v. Douglass*, 17 Fed. 482, 4 McCrary 368; *Page v. Munro, Holmes* 232, 18 Fed. Cas. No. 10,665; *In re Petersen*, 21 Fed. 885. Compare *The Gentlemen, Olc. Adm.* 110, 10 Fed. Cas. No. 5,324, *reversed on other grounds* 1 Blatchf. 196, 10 Fed. Cas. No. 5,323.

Alabama.—*Pilcher v. Central of Georgia R. Co.* 155 Ala. 316, 46 So. 765.

Arkansas.—*Chicago, etc. R. Co. v. Cunningham Commission Co.* 192 S. W. 211.

Georgia.—*Columbus, etc. Ry. v. Flournoy*, 75 Ga. 745; *Western, etc. R. Co. v. Summerour*, 139 Ga. 545, 77 S. E. 802 (construing statute). See also *Atlanta, etc. R. Co. v. Texas Grate Co.* 81 Ga. 602, 9 S. E. 600.

Illinois.—*Galena, etc. Union R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 148; *Louisville, etc. R. Co. v. Heilprin*, 95 Ill. App. 402; *Euston v. Erie R. Co.* 147 Ill. App. 594; *McCabe v. Atchison, etc. R. Co.* 154 Ill. App. 380; *Produce Reporter Co. v. Adams Express Co.* 176 Ill. App. 74. See also *Illinois Cent. R. Co. v. Holden*, 64 Ill. 147, note; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 147, note; *Jackson v. New York Cent. etc. River R. Co.* 167 Ill. App. 461; *McFadden v. Union Stock Yards, etc. Co.* 185 Ill. App. 94.

Indiana.—*Pittsburgh, etc. R. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295.

Iowa.—*Clark v. American Express Co.* 130 Ia. 254, 106 N. W. 642.

Kentucky.—*Illinois Cent. R. Co. v. Hopkinsville Canning Co.* 132 Ky. 578, 116 S. W. 758; *Illinois Cent. R. Co. v. Nelson*, 97 S. W. 757, 30 Ky. L. Rep. 114. See also *Newport News, etc. R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. 301, 16 Ky. L. Rep. 555.

Louisiana.—*Lowery v. Young*, 1 La. 232; *Rathbone v. Neal*, 4 La. Ann. 567, 50 Am. Dec. 579. See also *Murrell v. Dixey*, 14 La. Ann. 298.

Maine.—*Weston v. Grand Trunk R. Co.* 54 Me. 376, 92 Am. Dec. 552; *Dunham v. Boston, etc. R. Co.* 70 Me. 164, 35 Am. Rep. 314.

Maryland.—*Stevens v. Northern Cent. R. Co.* 98 Atl. 551.

Massachusetts.—*Cutting v. Grand Trunk R. Co.* 13 Allen 381; *Scott v. Boston, etc. Steamship Co.* 106 Mass. 468; *Fox v. Boston, etc. R. Co.* 148 Mass. 220, 19 N. E. 222, 1 L.R.A. 702. See also *Swift River Co. v. Fitchburg R. Co.* 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

Michigan.—*Houseman v. Merchants' Dispatch Transp. Co.* 104 Mich. 300, 62 N. W. 290. And see the reported case.

Mississippi.—*New Orleans, etc. R. Co. v. Tyson*, 46 Miss. 729; *Southern Pac. R. Co. v. A. J. Lyon & Co.* reported in full, post, this volume, at page 171. See also *Vicksburg, etc. R. Co. v. Ragsdale*, 46 Miss. 458.

Missouri.—*Faulkner v. South Pac. R. Co.* 51 Mo. 311; *Lesinsky v. Great Western Dispatch*, 13 Mo. App. 576; *D. Klass Commission Co. v. Wabash R. Co.* 80 Mo. App. 164; *Hardin Grain Co. v. Missouri Pac. R. Co.* 120

Mo. App. 203, 96 S. W. 681; *Cowherd v. St. Louis, etc. R. Co.* 151 Mo. App. 1, 131 S. W. 755.

New York.—*Baumann v. New York, etc. R. Co.* 35 Misc. 223, 71 N. Y. S. 632; *G. S. Roth Clothing Co. v. Maine Steamship Co.* 42 Misc. 550, 86 N. Y. S. 25; *G. S. Roth Clothing Co. v. Maine Steamship Co.* 44 Misc. 237, 88 N. Y. S. 987; *Bracco v. Merchants' Despatch Transp. Co.* 61 Misc. 60, 113 N. Y. S. 131; *Ward v. New York Cent. R. Co.* 47 N. Y. 29, 7 Am. Rep. 405; *Holden v. New York Cent. R. Co.* 54 N. Y. 662; *Sherman v. Hudson River R. Co.* 64 N. Y. 254; *Mankoff v. Erie R. Co.* 97 Misc. 415, 161 N. Y. S. 346; *Isham v. Erie R. Co.* 112 App. Div. 612, 98 N. Y. S. 609. See also *Livingston v. New York Cent. etc. R. Co.* 5 Hun 562, *affirmed* 76 N. Y. 631; *Brown v. Weir*, 95 App. Div. 78, 88 N. Y. S. 479; *Kent v. Hudson River R. Co.* 22 Barb. 278; *Briggs v. New York Cent. R. Co.* 28 Barb. 515; *Kaiser v. Fuller Express Co.* 88 Misc. 532, 150 N. Y. S. 974. *Compare* *Wibert v. New York, etc. R. Co.* 19 Barb. 36, *affirmed* 12 N. Y. 245; *Jones v. New York, etc. R. Co.* 29 Barb. 633; *Kirkland v. Leary*, 2 Sweeny 677.

Ohio.—*Baltimore, etc. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L.R.A. 117. See also *Devereux v. Buckley*, 34 Ohio St. 16, 32 Am. Rep. 342; *Ackerland v. Louisville, etc. R. Co.* 83 Ohio St. 293, 94 N. E. 423.

Oklahoma.—*Missouri, etc. R. Co. v. Foote*, reported in full, post, this volume, at page 173; *Choctaw, etc. R. Co. v. Jacobs*, 15 Okla. 493, 82 Pac. 502; *Chicago, etc. R. Co. v. Broe*, 16 Okla. 25, 86 Pac. 441. See § 2869, Okla. Rev. Stat. 1910 Ann.

South Carolina.—*Nettles v. South Carolina R. Co.* 7 Rich. L. 190, 62 Am. Dec. 409; *McKerall v. Atlantic Coast Line R. Co.* 76 S. C. 338, 56 S. E. 965; *Rutland v. Southern R. Co.* 81 S. C. 448, 62 S. E. 865; *Bullock v. Charleston, etc. R. Co.* 82 S. C. 375, 64 S. E. 234.

Tennessee.—*Illinois Cent. R. Co. v. Southern Seating, etc. Co.* 104 Tenn. 568, 58 S. W. 303, 78 Am. St. Rep. 933, 50 L.R.A. 729. See also *Jett v. Southern R. Co.* 130 Tenn. 237, 241, 169 S. W. 767.

Texas.—*Chicago, etc. R. Co. v. C. C. Mill Elevator, etc. Co.* 87 S. W. 753; *Galveston, etc. R. Co. v. Douglass*, 1 White & W. Civ. Cas. Ct. App. § 67; *Galveston, etc. R. Co. v. Watson*, 1 White & W. Civ. Cas. Ct. App. 814; *Missouri Pac. R. Co. v. White*, 3 Willson Civ. Cas. Ct. App. § 160; *Gulf, etc. R. Co. v. Barber*, 60 Tex. Civ. App. 234, 127 S. W. 258; *Southern Pac. Co. v. Booth*, 39 S. W. 585; *Gulf, etc. R. Co. v. Pickens*, 58 S. W. 156; *Foster v. International, etc. R. Co.* 175 S. W. 762. See also *Texas, etc. R. Co. v. Nicholson*, 61 Tex. 491; *Missouri, etc.*

R. Co. v. Webb, 20 Tex. Civ. App. 431, 49 S. W. 526.

Virginia.—See Norfolk, etc. R. Co. v. Potter, 110 Va. 427, 66 S. E. 34.

Wisconsin.—Peet v. Chicago, etc. R. Co. 20 Wis. 594, 91 Am. Dec. 446.

In *Ward v. New York Cent. R. Co.* 47 N. Y. 29, 7 Am. Rep. 405, the court, stating the rule and the reason therefor, said: "Where a carrier from mere negligence, from plain violation of duty, omits to transport merchandise beyond a reasonable time and its market value falls in the meantime, the true rule of damages in my judgment both upon principle and authority is the difference in its value at the time and place it ought to have been delivered and the time of its actual delivery. The rule is simple, and though it may sometimes operate harshly, easily applied. Sagacious business men rely upon their ability to judge of the market in undertaking large commercial projects. According to their views of the market, they send their merchandise by a quick or by a slow carrier, and make compensation accordingly. A contrary rule would deprive them of all benefit of a rapid transit. It would be left to the caprice of the carrier when to transport, and the owner could have no relief. It would be no answer to say that the owner might make a special contract for the transport at a given time. The contract would have to contain a special provision to pay these damages or the carrier's liability would not be altered. If a special contract be needed, I think it falls upon the defendant to make it, or the company will be liable for not delivering in a reasonable time. If the carrier would be liable for these damages upon a special contract to transport by a given time, he clearly would be for a violation of his duty. In the absence of any special agreement, the law implies that the carrier agrees to transport in a reasonable time. That is his duty. In failing to do so, he not only violates his duty, but also the contract upon which it is based. The only legal difference is that by the special contract the carrier agrees and is required absolutely to transport by a given time. In such case, no excuses will save him from damages for a breach such as will entirely shield him in the absence of a special agreement. (*Red. on Rail.* 161-3, 273; *Harmony v. Bingham*, 12 N. Y. 99.) It is well settled law that a carrier, on an entire failure to deliver, is liable for the market price of the goods at the time and place for delivery. . . . If liable for the market price at the time and place for delivery where not delivered at all, it would seem equally rational that if by reason of the inexcusably negligent delay of the carrier the value of the goods has depreciated in market, he should be liable to the

owner to the extent of that depreciation. The purpose of the law is to make the owner whole in each case. . . . Had the goods been injured by reason of improper exposure by the carrier, and thus had become depreciated in their market value, it is clear that the carrier would be liable for the loss. It was his negligence that caused it. Here his negligent delay caused the loss. It did not cause the decline in the general market, but it deprived the owner of his right to the higher market price. The defendant's negligent violation of its duty thus deprived the plaintiff of his right, and placed this loss upon him. In substance, this loss is the same to the plaintiff as if the injury had been done to the property itself and thus diminished its market value. The injury also is natural and direct. There is no second step; no action of the owner with a third person by contract or otherwise. It is true there are fluctuations in the market. They prevail to some extent as to all commodities which are the subject of transportation. That is not a sufficient reason for abolishing their use in ascertaining the rights and liabilities of parties. Confessedly they regulate the rights of parties where there is an entire failure to deliver either by a carrier or by a vendor. Legally they are the true measure of the value of the goods. Arriving so late, later by the carrier's negligence, these goods were not worth as much as at the time they should have arrived; not so much when measured by the rule that governs the commercial community. Their actual value was less when measured by the only standard that regulates values. . . . This is the only rule that does justice between the parties."

In *Wilson v. Lancashire, etc. R. Co.* 9 C. B. N. S. 632, 99 E. C. L. 632, 142 Eng. Rep. (Reprint) 248, it was said by Willes, J.: "It appears to me that the damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand and less capable of being applied usefully by the plaintiff, is the ordinary, natural, and immediate consequence of the delay, for which the carrier is answerable. I think it may be put as matter of ordinary experience, that, amongst the causes of the fluctuations in price to which merchandise is subject, is the fact that certain goods are more in demand at one time than at another, in consequence of their being more capable of being disposed of upon advantageous terms. It appears to me that that is matter of ordinary experience and knowledge, and that a loss thus arising may well be said to be the direct and immediate consequence of an unreasonable delay in the carriage and delivery of goods."

So in *St. Louis, etc. R. Co. v. Mudford*, 48 Ark. 502, 3 S. W. 814, it was said: "The

theory of the rule is this: 'Where there is a negligent delay in transportation, the thing which the owner does not receive, when he is entitled to it, is goods of their value at that time. The thing which he afterwards receives is goods of a value at a different time, which is not necessarily the same value.

. . . If the market value of the goods is less when they are actually delivered than it was when they ought to have been delivered, the fall in the market value is not a cause, but an incident, or consequence, of the diminution of the intrinsic or merchantable value of the goods, and evidence of the injury which the owner has suffered by the wrongful act of the carrier;' and the diminution in the market value is a real and actual loss of a portion of the real and intrinsic value, as much as a change for the worse in the quality of the goods. When the parties entered into the contract of shipment it is presumed that they had in contemplation this loss, as the probable result of the breach of it, and contracted with reference to it. Hence the law imposes on the carrier the duty to pay it as a compensation for the injury he has done by the failure to perform his contract. 3 Sutherland on Damages, p. 218; Hadley v. Baxendale, 9 Exch. (Eng.) 341."

It is immaterial whether the depreciation in value results from a drop in the market price of goods of the particular kind, or from a deterioration in the quality of the goods themselves, where the deterioration is proximately caused by the carrier's negligence, or whether the depreciation results from a combination of the two causes.

Alabama.—Southern R. Co. v. Langley, 184 Ala. 524, 63 So. 545; Louisville, etc. R. Co. v. Cheatwood, 14 Ala. App. 175, 68 So. 720.

Arkansas.—St. Louis, etc. R. Co. v. Phelps, 46 Ark. 485; Preacott, etc. R. Co. v. Davis, 191 S. W. 210.

Illinois.—Chicago, etc. R. Co. v. Thrapp, 5 Ill. App. 502. See also St. Louis, etc. R. Co. v. Cumbie, 101 Ark. 172, 141 S. W. 939.

Kentucky.—See Newport News, etc. Valley R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301, 16 Ky. L. Rep. 555.

Maryland.—Philadelphia, etc. R. Co. v. Duffendal, 109 Md. 494, 72 Atl. 193, 458.

Massachusetts.—Ingledew v. Northern R. Co. 7 Gray 86.

Michigan.—Loveland, etc. Co. v. Waters, 159 N. W. 477.

Missouri.—Parsons-Applegate Co. v. Louisville, etc. R. Co. 136 Mo. App. 494, 118 S. W. 101.

New York.—Scovill v. Griffith, 12 N. Y. 509. See also Place v. Union Express Co. 2 Hilt. 19.

North Carolina.—Van Lindley v. Richmond, etc. R. Co. 88 N. C. 547.

Oklahoma.—Choctaw, etc. R. Co. v. Jacobs, 15 Okla. 493, 82 Pac. 502; Chicago, etc. R.

Co. v. Broe, 16 Okla. 25, 86 Pac. 441; Missouri, etc. R. Co. v. Foote, reported in full, post, at p. 173. See § 2869, Okla. Rev. Stat. 1910 Ann.

Pennsylvania.—Ruppel v. Allegheny Valley Ry. 167 Pa. St. 166, 31 Atl. 478, 46 Am. St. Rep. 666.

Tennessee.—Illinois Cent. R. Co. v. Southern Seating, etc. Co. 104 Tenn. 568, 58 S. W. 303, 78 Am. St. Rep. 933, 50 L.R.A. 729.

Texas.—St. Louis Southwestern R. Co. v. Cates, 15 Tex. Civ. App. 135, 38 S. W. 648; Missouri, etc. R. Co. v. Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900; Gulf, etc. R. Co. v. Stewart, 141 S. W. 1020; Texas, etc. R. Co. v. Bigham, 67 S. W. 522; San Antonio, etc. R. Co. v. Josey, 71 S. W. 606. See also Texas, etc. R. Co. v. Nicholson, 61 Tex. 491.

Virginia.—Baltimore, etc. R. Co. v. Hudgins, 116 Va. 27, 81 S. E. 48.

Canada.—McGill v. Grand Trunk R. Co. 19 Ont. App. 245.

A number of cases taking into view elements which were probably overlooked rather than negatived in the statement of the rule in the cases heretofore cited state that the measure of damages for a carrier's delay in transporting goods is the difference in market value at the place of destination between the time when the goods ought to have been delivered and the time they were actually delivered, less the transportation charges, with interest on the balance from the time the goods ought to have been delivered. St. Louis, etc. R. Co. v. Mudford, 48 Ark. 502, 3 S. W. 814; Crutcher v. Choctaw, etc. R. Co. 74 Ark. 358, 85 S. W. 770; Kansas City Southern R. Co. v. Mabry, 112 Ark. 110, 165 S. W. 279; Southern Express Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227; Louisville, etc. R. Co. v. Cheatwood, 14 Ala. App. 175, 68 So. 720. See also Missouri, etc. R. Co. v. Truskett, 104 Fed. 728, 44 C. C. A. 179; Louis v. Steamboat Buckeye, 1 Handy (Ohio) 150; St. Louis, etc. R. Co. v. Coolidge, 73 Ark. 112, 3 Ann. Cas. 582, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L.R.A. 555; Chicago, etc. R. Co. v. Newhouse Mill, etc. Co. 90 Ark. 452, 119 S. W. 646; Kansas City Southern R. Co. v. Mabry, 112 Ark. 110, 165 S. W. 279; East Tennessee, etc. R. Co. v. Johnson, 85 Ga. 497, 11 S. E. 809; Pittsburgh, etc. R. Co. v. Wood, 45 Ind. App. 1, 84 N. E. 1009, 88 N. E. 709; Missouri, etc. R. Co. v. Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900; Newell v. Smith, 49 Vt. 255.

Application of Rule.

The rule that the difference between the value of the goods at the place of destination at the time they ought to have been delivered and their value at the time they are delivered is the measure of damages for the carrier's delay applies where special damages are

claimed, which cannot be recovered because of the absence of a notice, express or implied, to the carrier at the time of the shipment of the goods, of the circumstances warranting the recovery of special damages. *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. (Eng.) 329; *The Golden Rule*, 9 Fed. 334; *Central Trust Co. v. Savannah*, etc. R. Co. 69 Fed. 683; *Chicago*, etc. R. Co. v. *Newhouse Mill*, etc. Co. 90 Ark. 452, 119 S. W. 646; *Illinois Cent. R. Co. v. Nelson* (Ky.) 97 S. W. 757; *Bracco v. Merchants' Despatch Transp. Co.* 61 Misc. 60, 113 N. Y. S. 131; *Lee v. St. Louis*, etc. R. Co. 136 N. C. 533, 48 S. E. 809; *Houston*, etc. Cent. R. Co. v. *Hogg*, 2 Posey Unrep. Cas. (Tex.) 544; *Gulf*, etc. R. Co. v. *Jessee*, 2 Willson Civ. Cas. Ct. App. § 405; *Galveston*, etc. R. Co. v. *Watson*, 1 White & W. Civ. Cas. Ct. App. 814; *St. Louis Southwestern R. Co. v. Cates*, 15 Tex. Civ. App. 135, 38 S. W. 648; *International*, etc. R. Co. v. *Philips*, 63 Tex. 590; *Stevens v. St. Louis Southwestern R. Co.* (Tex.) 178 S. W. 810; *Gulf*, etc. R. Co. v. *Barber*, 60 Tex. Civ. App. 234, 127 S. W. 258; *Dorrance v. International* etc. R. Co. 53 Tex. Civ. App. 460, 126 S. W. 694. See also *International*, etc. R. Co. v. *Hatchell*, 22 Tex. Civ. App. 498, 55 S. W. 186.

Thus where the goods are shipped in fulfillment of a contract, and owing to the negligent delay of the carrier they are rejected by the purchaser, the carrier is not liable for the difference between the contract price and the market value of the goods at the place of destination at the time of their arrival. *St. Louis*, etc. R. Co. v. *Mudford*, 48 Ark. 502, 3 S. W. 814; *Murrell v. Pacific Express Co.* 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17; *Columbus*, etc. Ry. v. *Flournoy*, 75 Ga. 745; *Scott v. Boston*, etc. Steamship Co. 106 Mass. 468; *Southern Pac. R. Co. v. A. J. Lyon*, reported in full, post, this volume, at page 171; *Garlington*, Ft. Worth, etc. R. Co. 34 Tex. Civ. App. 274, 78 S. W. 368; *Chicago*, etc. R. Co. v. *C. C. Mill Elevator*, etc. Co. (Tex.) 87 S. W. 753. The contrary has, however, been held. *Louisville*, etc. R. Co. v. *Heilprin*, 95 Ill. App. 402; *Euston v. Erie R. Co.* 147 Ill. App. 594. And see the reported case. See also *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 143; *Norfolk*, etc. R. Co. v. *Wilkinson*, 106 Va. 775, 56 S. E. 808. Compare *Chicago*, etc. R. Co. v. *Thrapp*, 5 Ill. App. 502.

It seems, however, that the contract price is admissible as bearing on the market price of the goods at the time when they ought to have been delivered. *Yazoo*, etc. R. Co. v. *Peeples*, 106 Miss. 604, 64 So. 262; *Garlington*, etc. R. Co. 34 Tex. Civ. App. 274, 78 S. W. 368. And see the reported case. Compare *Columbus*, etc. Ry. v. *Flournoy*, 75 Ga. 745.

Of course where the carrier has notice that the goods are shipped in fulfillment of a con-

tract, his liability for delay will be measured by the difference between the contract price and the market value of the goods at the time they are actually delivered. *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267; *Medbury v. New York*, etc. R. Co. 26 Barb. (N. Y.) 564; *Illinois Cent. R. Co. v. Southern Seating*, etc. Co. 104 Tenn. 568, 58 S. W. 303, 78 Am. St. Rep. 933, 50 L.R.A. 729; *Houston*, etc. Cent. R. Co. v. *Hogg*, 2 Posey Unrep. Cas. (Tex.) 544; *Missouri*, etc. R. Co. v. *Hopkins*, 52 Tex. Civ. App. 166, 113 S. W. 306; *Gulf*, etc. R. Co. v. *Blalock* (Tex.) 162 S. W. 1009.

Where owing to the delay of the carrier the goods for any cause become wholly valueless, the measure of damages recoverable is what the goods would have been worth had they been delivered at the proper time. *Kansas City Southern R. Co. v. Mabry*, 112 Ark. 110, 165 S. W. 279; *Southern Express Co. v. Briggs*, 1 Ga. App. 294, 57 S. E. 1066 (construing statute); *Produce Reporter Co. v. Adams Express Co.* 176 Ill. App. 74; *Lambert-Murry Co. v. Southern Express Co.* 146 N. C. 321, 59 S. E. 991; *Missouri*, etc. R. Co. v. *Carpenter*, 52 Tex. Civ. App. 586, 114 S. W. 900; *Baltimore*, etc. R. Co. v. *Hudgins*, 116 Va. 27, 81 S. E. 48. See also *Prescott*, etc. R. Co. v. *Davis* (Ark.) 191 S. W. 210; *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227; *Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co.* 73 Kan. 295, 9 Ann. Cas. 790, 85 Pac. 406, 87 Pac. 80, 117 Am. St. Rep. 466, 6 L.R.A. (N.S.) 1058; *Baltimore*, etc. R. Co. v. *Sperber*, 117 Md. 595, 84 Atl. 72; *Poore v. Southern Express Co.* 101 S. C. 504, 86 S. E. 21.

A carrier is responsible for the damage caused by its delay in the transportation of the goods in consequence of which the goods arrive at a time when the market value of the goods is lessened by reason of the close of the season for goods of that particular kind. *Wilson v. Lancashire*, etc. R. Co. 9 C. B. N. S. (Eng.) 632, 99 E. C. L. 632, 142 Eng. Rep. (Reprint) 248; *Schulze v. Great Eastern R. Co.* 19 Q. B. D. (Eng.) 30; *Rowe v. The City of Dublin*, 1 Ben. 46, 20 Fed. Cas. No. 12,094; *McGill v. Grand Trunk R. Co.* 19 Ont. App. 245. Compare *Rosenberg v. Delaware*, etc. R. Co. 88 Misc. 1, 150 N. Y. S. 75. Thus in discussing the measure of damages recoverable for delay in the transportation of samples whereby "the plaintiff lost the season," it has been said: "The learned judge who tried the case had told the jury that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the nonarrival of the cloth in due time, and it was laid down by the court of common pleas that if the meaning of loss of season was that 'the goods by reason of their not having been delivered in due time had been lessened in value, that is, if

in consequence of the delay they had become of less value to the plaintiff, because the articles to be made up would be less marketable as the time for finding customers for them had gone by, and so the goods were left in the plaintiff's hands deteriorated or diminished in value,' then there was not any mistake in point of law in the direction of the learned judge. If it is right here to say that the railway company were bound to know that late delivery of the samples might have the effect of their being left on the consignee's hands at a time when their value to him would be lessened, then these remarks apply to this case." *Schulze v. Great Eastern R. Co.* 19 Q. B. D. (Eng.) 30. But a temporarily inflated price due to the favorable position or exigency of a few individuals is not a market price for the loss of which a carrier can be held responsible because of its delay. *Johnson-Brinkman Commission Co. v. Wabash R. Co.* 64 Mo. App. 590; *Louis v. Steamboat Buckage*, 1 Handy (Ohio) 150.

Where owing to the negligent delay of the carrier the goods shipped are no longer marketable at the place of destination, and they are then reshipped to another market, the carrier is liable for the difference between the price received for the goods at the changed destination and what they would have been worth at the place of original destination at the time they ought to have been delivered. *Lamb v. Moor*, 17 Ga. App. 549, 87 S. E. 837; *Missouri, etc. R. Co. v. Carpenter*, 52 Tex. Civ. App. 585, 114 S. W. 900; *Laurent v. Vaughn*, 30 Vt. 90. See also *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 148. Compare *Houston, etc. R. Co. v. Foster* (Tex.) 86 S. W. 44. However, it has been held that the measure of damages recoverable in such a case is the market value of the goods at the time they should have arrived and their value for reshipping at the time they actually arrived. *Ingledeu v. Northern R. Co.* 7 Gray (Mass.) 86. In *Kansas City, etc. R. Co. v. Oakley*, 115 Ark. 20, 170 S. W. 565, it was held not to be error to admit evidence of the market value of the goods at the place to which they were reshipped, where it appeared that there was no market for the goods at the place of destination at the time of their arrival.

Where the destination of the goods is changed with the consent of the carrier, it seems that the market price at the destination finally fixed determines the measure of damages recoverable for the carrier's delay. *San Antonio, etc. R. Co. v. Thompson* (Tex.) 66 S. W. 792.

In *Frey v. New York Cent. etc. R. Co.* 114 App. Div. 747, 100 N. Y. S. 225, it appeared that goods were consigned to New York "for export to London, Eng., per SS. St. Louis sailing 13 Decr." An action was brought

against the carrier to recover damages for the carrier's delay in failing to transport the goods in time to be shipped on the designated steamship, and in discussing the measure of damages recoverable, the court said: "The defendant claimed that its liability was measured by the difference between the value of the fruit in New York city, if it had been received there in time for the sailing of the steamer, and its value at the same place when it was actually received and after the steamer had sailed. The plaintiff contends that it is entitled to recover the difference between the value of the fruit in New York, if it had been received there in time for the sailing of the steamer, and the amount actually received for it in Liverpool less freight and expenses. The defendant did not contract to carry the fruit to London, the point of ultimate destination, but to New York only. The measure of damages in this state in such a case, both on principle and upon the authorities, is the difference in the value of the goods at the time and place they ought to have been delivered and the time of their actual delivery."

Of course there can be no recovery beyond nominal damages where the value of the goods when delivered by the carrier equals or exceeds their value at the time when but for the carrier's delay they should have been delivered. *Page v. Munro*, Holmes 232, 18 Fed. Cas. No. 10,665; *Smith v. Whitman*, 13 Mo. 352; *Stevens v. St. Louis Southwestern R. Co.* (Tex.) 178 S. W. 810; *Monteith v. Merchants' Despatch, etc. Co.* 1 Ont. 47, affirmed 9 Ont. App. 282. However, it has been held that under such circumstances interest is recoverable. *Smith v. Whitman*, 13 Mo. 352; *Davidson Development Co. v. Southern R. Co.* 147 N. C. 503, 61 S. E. 381; *Monteith v. Merchants' Despatch, etc. Co.* 1 Ont. 47, affirmed 9 Ont. App. 282. And a recovery of the rental value of the property has been allowed on the theory that there was no difference in the value of the property when it should have been and when it was delivered excepting the value of the loss of its use. *Detmer-Wallen Co. v. Delaware, etc. R. Co.* 89 Misc. 252, 153 N. Y. S. 287. See also *Gulf, etc. R. Co. v. Jessee*, 2 Willson Civ. Cas. Ct. App. § 405.

The rule that the measure of damages for a carrier's delay in transporting goods is the difference between the value of the goods at the time they should have been delivered and the time they were actually delivered, applies to express companies. *Murrell v. Pacific Express Co.* 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17; *Lambert-Murry Co. v. Southern Express Co.* 146 N. C. 321, 59 S. E. 991. Thus in the case last cited in discussing the measure of damages recoverable against an express company for a delay in trans-

porting goods, the court said: "The defendant did not inquire as to the contents of the box, but, when it received the box for quick transportation, what may more reasonably be supposed to have been in the contemplation of both parties than that, if, by reason of the negligence of the defendant, the package was so delayed in transmission as to become wholly or partially worthless, for any reason, the carrier who for a price had stipulated for prompt and safe delivery should be liable for any damage or loss caused by such negligence? A carrier by ordinary freight train is insurer of safe delivery within reasonable time. An express company guarantees the promptest possible delivery, and is liable for any deterioration in the value of the goods caused by failure to fill that contract."

Qualification of Rule.

It has been held that the rule that the measure of damages for a carrier's delay in transporting goods is the difference in their market value at the place of destination at the time when they ought to have been delivered and their value when they are actually delivered does not apply to a shipment of goods, such as machinery, which have no market value at the place of destination and which are intended for the personal use of the owner. *St. Louis, etc. R. Co. v. Farmers Union Gin Co.* 34 Okla. 270, 125 Pac. 894; *McKerall v. Atlantic Coast Line R. Co.* 76 S. C. 338, 341, 56 S. E. 965; *Gulf, etc. R. Co. v. Maetze*, 2 Willson Civ. Ct. App. § 636; See also *Harper Furniture Co. v. Southern Express Co.* 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L.R.A.(N.S.) 483; *Gulf, etc. R. Co. v. Jessee*, 2 Willson Civ. Cas. Ct. App. § 405 (photographer's outfit). Compare *Rankin v. Pacific R. Co.* 55 Mo. 167; *Gulf, etc. R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 22 S. W. 761.

Effect of Contractual or Statutory Limitation of Liability.

A majority of cases supports the view that a clause in a shipping contract providing that in estimating any loss or damage to the goods their value at the place and time of shipment is to be taken as the basis, does not apply in an action for the recovery of damages resulting from the carrier's delay, but that the difference between the market value of the goods at the time they should have been delivered and the time they are actually delivered is the proper measure of damages. *Chicago, etc. R. Co. v. Cunningham Commission Co.* (Ark.) 192 S. W. 211; *D. Klass Commission Co. v. Wabash R. Co.* 80 Mo. App. 164; *Hardin Grain Co. v. Missouri Pac. R. Co.* 120 Mo. App. 203, 96 S. W. 681; *Ruppel v. Allegheny Valley Ry.*

167 Pa. St. 166, 31 Atl. 478, 46 Am. St. Rep. 666. Thus in *Chicago, etc. R. Co. v. Cunningham Commission Co.* supra, the court said: "We do not think the words 'loss or damage,' as used in the bill of lading, refer to delay in transportation or delivery as contended for by counsel for appellant. We think the circuit court correctly held that these words were only applicable to cases where the goods were lost or damaged while in transit, and that they did not refer to cases of negligent delay in transportation or delivery. It can be readily seen how they could apply to cases where the goods were lost or injured in transit. If the goods were lost, the measure of damages to the shipper would be their invoice price. If the goods were injured, the measure of damages would be the difference between the market value of the goods in their damaged condition and their invoice price. It is not apparent to us how this rule could be applied in the case of negligent delay in transportation like the present case. The effect of appellant's contention would be to deny the shipper damages in cases like the present where the goods were bought for resale and the shipper was unable to carry out his contract because of the negligent delay in transporting and delivering the goods by the carrier. We think the evident meaning of the words 'loss or damage,' as above stated, refers to cases where the goods themselves are lost in transit or are physically injured while in transit." In *St. Louis, etc. R. Co. v. Coolidge*, 73 Ark. 112, 3 Ann. Cas. 582, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L.R.A. 555, which was an action to recover damages resulting from a carrier's delay in transporting goods, it was held that a clause in the bill of lading providing that the liability of the carrier for loss or damage to the goods should be confined to their value at the place and time of shipment, was held to be void as not being based on any consideration. To the same effect see *Kansas City, etc. R. Co. v. Oakley*, 115 Ark. 20, 170 S. W. 565, *distinguishing Kansas City Southern R. Co. v. Mabry*, 112 Ark. 110, 165 S. W. 279. In *The Styria*, 101 Fed. 728, 41 C. C. A. 639 (*modified* on other grounds 186 U. S. 1), it was held that a stipulation in a bill of lading limiting the carrier's liability to the invoice value of the goods did not prevent a recovery of the difference between their market value when they should have arrived and that when they did arrive.

But in several jurisdictions it has been held that the general rule as to the measure of damages recoverable for a carrier's delay in transporting goods resulting in a depreciation in value does not apply where the goods are shipped under a bill of lading stipulating that the amount of the loss or

damage for which the carrier is to become liable shall be computed at the value of the goods at the place and time of shipment. *Southern R. Co. v. Cofer*, 149 Ala. 565, 43 So. 102; *Pittsburgh, etc. R. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295; *New York, etc. R. v. Produce Exch.* 122 Md. 215, 89 Atl. 433. Thus in *Southern R. Co. v. Cofer*, supra, it was said: "The bills of lading each contain the following stipulation in respect to the rule for the admeasurement of damages in case of loss: 'The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the cotton at the place and time of shipment under this bill of lading, unless a lower value has been agreed on or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation.' It will be observed that no exemption from liability on account of negligence is involved in this stipulation, but the sole effect of it is to fix the place at which the price of the cotton shall be ascertained in respect to the admeasurement of damages. It has been held that such stipulations in bills of lading are reasonable and enforceable. This being true, the general rule which fixes the value of the goods at the place of delivery at the time at which they should have been delivered as the one for the admeasurement of damages was varied by the contract of the parties: and the court erred in the oral charge to the jury requiring the damages to be estimated with respect to the price of cotton at Selma, instead of Randolph, and in permitting evidence of the value of cotton at Selma." And in *Produce Reporter Co. v. Adams Express Co.* 176 Ill. App. 74, wherein it appeared that an article was shipped under a bill of lading stipulating that the liability of the carrier should be limited to the invoice value of the goods and that the article had become entirely valueless because of the carrier's delay, it was held that the latter's liability was confined to the invoice value of the article.

A depreciation in the value of goods resulting from the carrier's delay in transporting them is a "loss, damage, or injury" to the goods within the Carmack Amendment to the Hepburn Act (Fed. St. Ann. 1909 Supp. p. 273) making the initial carrier liable for the acts of the connecting carrier and providing that the initial carrier cannot exempt himself against liability for the acts of the connecting carrier. Notwithstanding a provision in the bill of lading, the initial carrier is liable for the depreciation in the value of the goods at the place of destination, whether the loss in value is caused by his own delay, or that of a connecting carrier. *Southern Pac. R. Co. v. A. J. Lyon*, reported

in full, immediately hereafter. *Compare St. Louis, etc. R. Co. v. Cohen* (Tex.) 55 S. W. 1123 (decided before the enactment of the Carmack Amendment). Generally as to the liability of the initial carrier under the Carmack Amendment, see the note to *St. Louis Southwestern R. Co. v. Alexander*, Ann. Cas. 1915B 77.

In *Missouri, etc. R. Co. v. Foote*, reported in full, post, this volume, at page 173, it was held that a statute confining the liability of a carrier of an intrastate shipment to responsibility for acts committed on its own line applied to the detriment caused by a delay in the transportation of goods which resulted in a depreciation of their value.

SOUTHERN PACIFIC RAILROAD COMPANY

v.

A. J. LYON AND COMPANY

Mississippi Supreme Court—October 26, 1914.

107 Miss. 777; 66 So. 209.

Carriers of Goods — Delay in Transportation — Measure of Damages.

Where goods were sold at a stipulated price if they arrived on schedule time, but the carrier was not informed of that arrangement, the measure of damages is the difference between the market price of the goods at the time when they should have arrived and when they did.

[See note at end of this case.]

Liability of Initial Carrier — Effect of Carmack Amendment.

The Carmack Amendment to the Hepburn Act, approved June 29, 1906 (34 Stat. 593 [Fed. St. Ann. 1909, Supp. p. 273]), c. 3591, § 7, pars. 11, 12, declaring that every railroad company receiving property for transportation from one state to another shall issue a receipt therefor, and shall be liable for any loss caused to it by any carrier to which the property may be delivered or over whose lines it may pass, makes an initial carrier liable for delay by a connecting carrier, though the bill of lading otherwise provided.

[See Ann. Cas. 1915B 80.]

Appeal from Chancery Court, Lauderdale county: WHITMAN, JR., Chancellor.

Action by A. J. Lyon and Company, plaintiff, against Southern Pacific Railroad Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

Bourdeoux & Venable for appellant.
McBeath & Miller for appellee.

[782] Cook, J.—This case has been before this court upon an appeal from a decree overruling appellant's demurrer to the bill of complaint, and the decisions of the court are reported in Southern Pac. R. Co. v. Lyon, 99 Miss. 186, 54 So. 728, 34 L.R.A. (N.S.) 234, Ann. Cas. 1913D 800, and in 54 So. 784. This appeal is from a decree against appellant upon the merits.

It appears from the evidence that A. J. Lyon & Company were wholesale grocers and candy manufacturers, [783] and as such bought a car load of fruit in California and delivered same to the Southern Pacific Railroad Company, appellant, to be transported over its and connecting lines to Meridian, Mississippi. These goods were bought for resale to the customers of the wholesaler and were goods for the holiday trade. The fruit had been sold in advance of shipment.

The goods were delivered to the carrier on November 2, 1906, and should have been delivered at the point of destination not later than November 25th. They were not delivered until December 11th, too late for the holiday trade, and the parties to whom they were sold refused to accept same. The owner was, therefore, forced to resell the goods at the best price obtainable. The suit was for the difference between the price for which the goods had been sold before shipment and the price for which they were actually sold, together with the necessary expenses of reselling, and it was upon this basis the decree appealed from was rendered by the court.

It is the contention of appellant that the true measure of damages was the difference in market value between the time when the shipment should have arrived and the time it did actually arrive at Meridian. There is nothing in the record to show the market value of the goods at either of these dates; the shipper proceeded entirely upon the theory that he was entitled to recover the difference in the price for which he had contracted to sell the goods and the price for which they were actually sold.

The evidence does not show that the carrier was advised that the goods had been sold for the holiday trade when it issued its bill of lading. Where goods are sold to arrive within a certain time at a certain price, but the carrier is not informed of this fact, and knows nothing of the importance to the shipper of a prompt delivery, the carrier can be held liable only for the depreciation in the market value between the time when they should have been and the time when they are delivered.

[784] Special damages can be recovered from the carrier for delayed transportation

only where it is shown that the shipper informed the carrier, at the time the contract was made, of the special circumstances requiring prompt transportation and delivery. This is the rule in this state, and seems to be universal. *American Express Co. v. Jennings*, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; *Elliott on Railroads*, sec. 1730 et seq.; *Hutchinson on Carriers*, sec. 1367.

Appellant also contends that it is not liable for the negligence of its connecting lines; that it made a special contract with the shipper which limits its liability. The bill of lading contains this clause:

"To be carried upon the conditions expressed herein, to the company's freight station at El Paso, and there delivered in like good order to the consignee or owner, or to order of said consignee or owner, or to such company or carrier (if the same are to be forwarded beyond said station), whose line may be considered a part of the route to the place of destination of said goods or packages, it being distinctly stipulated that responsibility of this company shall cease at the station where delivered to such person or carrier."

It is said that the proof conclusively shows that the delay did not occur on appellant's line, and therefore, under the contract, it is not liable. It is earnestly insisted that the act of Congress commonly called the Carmack Amendment to the Hepburn Act, approved June 29, 1906 (Fed. St. Ann. 1909 Supp. p. 273), imposes no liability on the initial carrier for a delay not caused by it but caused by the connecting carrier, in a case where the initial carrier and the shipper have entered into a contract exempting the initial carrier from all liability after it has safely and promptly transported the goods and delivered same to the connecting carrier. We quote that part of the act of Congress applicable to this case, as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a [785] point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Appellant argues:

"That there is quite a difference in imposing liability on the initial carrier for loss, damage, or injury to the goods themselves, and for consequential damages caused by a delay in transportation."

We think this view of the act of Congress is too narrow. In our opinion there is a damage or injury to the goods themselves by a delay in transportation, when it is shown that the delay in transportation has caused the goods to depreciate in value in the market of their destination.

For the failure to prove any depreciation in the market value of the goods, the cause is reversed and remanded.

Reversed and remanded.

NOTE.

In the reported case it is held that the depreciation in the value of goods in the market of their destination, resulting from their delay in transportation, is a damage or injury to the goods themselves within the meaning of the Carmack Amendment to the Hepburn Act (Fed. St. Ann. 1909 Supp. p. 273) and consequently that a clause in a bill of lading which limits the liability of the initial carrier to acts occurring on its own line is inoperative as to damages caused by a depreciation in the value of an interstate shipment because of a delay in transportation. The measure of damages for delay by a carrier in transporting goods is discussed in the note to *Lyons v. Grand Trunk R. Co.* reported ante, this volume, at p. 162.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY ET AL.

v.

FOOTE.

Oklahoma Supreme Court—May 25, 1915.

46 Okla. 578; 149 Pac. 223.

Carriers of Goods — Liability of Initial Carrier — Intrastate Shipment.

If intrastate freight, addressed to a place beyond the usual route of a common carrier who first received it, is lost or injured, or if the shipper is damaged by the unnecessary and unreasonable delay in said shipment, it must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss, injury, or damage did not occur while it was in its charge, or because of unnecessary and unreasonable delay caused by it, or it will be liable therefor. The demand for such proof must be direct and specific, and a simple request or demand for

payment of the loss or damage does not bring the shipper within the requirements of the statute, which provides for a demand for proof that the damage or injury was not caused by the initial carrier.

[See 101 Am. St. Rep. 392.]

Same.

The only liability assumed by an initial common carrier of intrastate commerce in this state, unless it contracts for a greater responsibility, is that it will deliver the shipment to the end of its route, in the proper direction of its destination, to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and when it has done that its responsibility ceases, subject, of course, to a proper response to the demand of the shipper for proofs that the loss, injury, or unnecessary delay did not occur on its line.

Delay in Transportation — Measure of Damages.

Under section 2869, Rev. Stat. 1910 Ann. the detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered and the day of its actual delivery.

[See note at end of this case.]

Same.

One seeking to recover special damages for breach of contract must show that such damages were within the contemplation of both parties to the contract; otherwise, he can only recover such damages as in the usual course of things flow from the breach.

[See note at end of this case.]

Same.

In an action for damages occasioned by unnecessary and unreasonable delay in the shipment of freight, only such damages may be recovered as were contemplated, or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage, and if the shipper expects to charge the carrier with any special damages, he must communicate to the carrier, at or prior to the time of shipment, all the facts and circumstances of the case which do not ordinarily attend the carriage of such freight, or the peculiar character and value of the property carried; otherwise, such peculiar circumstances cannot be contemplated by the carrier.

[See note at end of this case.]

(Syllabus by court.)

Error to County Court, Bryan county: RAFFOLEE, Judge.

Action by J. T. Foote, plaintiff, against Missouri, Kansas, and Texas Railway Company et al., defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. REVERSED.

Clifford L. Jackson, W. R. Allen and M. D. Green for plaintiff in error Railroad Company.

W. F. Semple for plaintiff in error Ramsey.

Utterback, Hayes & MacDonald for defendant in error.

[580] ROBERTS, C.—This action was commenced before a justice of the peace in Bryan county, by the Durant Nursery Company, as plaintiff, against the Missouri, Kansas & Texas Railway Company, as defendant. The plaintiff therein sought to recover from the defendant therein, one of the present plaintiffs in error, the sum of \$175.52 and interest. An amended bill of particulars were filed after the case was appealed to the county court, wherein the amount prayed for was \$177.82. The action was for the alleged delay by the Missouri, Kansas & Texas Railway Company in the transportation of two shipments of fruit trees from the Durant Nursery Company consigned to J. T. Foote, at Washington, Okla., and Blanchard, Okla., respectively, both of which were delivered to the Missouri, Kansas & Texas Railway Company at Durant on December 3, 1910. Judgment was rendered in favor of the Nursery Company by the justice for \$175.52, and the case thereupon was appealed by the Missouri, Kansas & Texas Railroad Company to the county court of Bryan county.

On motion of the Missouri, Kansas & Texas Railway Company, the Oklahoma Central Railway Company was made a party defendant in the case, and later, on motion of the Missouri, Kansas & Texas Railway Company, Asa E. Ramsey, as receiver for the Oklahoma Central Railway Company, was substituted as a party defendant in lieu of the Oklahoma Central Railway Company. During the course of the trial in the county court, J. T. Foote, the defendant in error herein, was substituted as plaintiff instead of the Durant Nursery Company, and thereupon filed his bill of particulars, which is as follows, omitting the caption and signatures:

"Comes now the plaintiff, J. T. Foote, of Durant, Bryan county, Oklahoma, by his attorneys, Utterback, Hayes & MacDonald [581] and for his cause of action against the defendant, the Missouri, Kansas & Texas Railway Company, a corporation organized and existing under and by virtue of the laws of the state of —, would respectfully show to the court as follows, to wit:

"That heretofore, to wit, on the 3d day of December, 1910, the said defendant company was a common carrier for hire, with a line running through Bryan county, Oklahoma. That as such common carrier for hire it accepted freight to be transported by it to the different places in the country, and especially in the state of Oklahoma; that on said date

above alleged, to wit, December 3, 1910, this plaintiff had delivered to the said defendant company two certain shipments of fruit trees, consigned to J. T. Foote at Washington, Oklahoma, and the other to J. T. Foote at Blanchard, Oklahoma; the bills of lading for the said shipments being attached to the original bill of particulars as filed herein, and which are introduced as exhibits in this cause, and which are hereby specially referred to and made a part of this substituted and amended bill of particulars, and which said bills of lading were signed by W. H. Reilly, the local agent of the said defendant company.

"That under and by virtue of said contract of transportation the said defendant company agreed and became bound to deliver the said shipments of trees to the destinations therein stated within a reasonable time, for which transportation the said plaintiff paid to the said defendant, as freight charges, \$2.67 on the Washington shipment, and \$3.20 on the Blanchard shipment. That the said defendant company, in contravention of its contract, negligently, unlawfully, and in violation of its agreement, unreasonably delayed the said shipments, to the damage of this plaintiff in the sum of \$177.82; said damage being for the expenses of men in locating the trees and delivering the same after the delay occasioned by the said negligence of the said defendant company, and which said damage was directly caused by the negligence and unlawfulness of the said defendant company, its agents, and employees, in handling and transporting the said shipments above mentioned.

"Wherefore plaintiff prays that he have judgment against the said defendant corporation, the Missouri, Kansas & Texas [582] Railway Company, for the said sum of \$177.82, with interest thereon from the 24th day of December, A. D. 1910, until paid, at the rate of 6 per cent. per annum, and that he have his costs in this action laid out and expended. As in duty bound, he will ever pray."

On the 11th day of December, 1911, plaintiff in error Missouri, Kansas & Texas Railway Company filed its answer, which is as follows:

"Comes now the defendant, by leave of court first had and obtained, and for its answer to plaintiff's bill of particulars denies each and every material allegation thereof not hereinafter specifically admitted.

"Further answering, defendant states that on or about December 3, 1910, it received from the Durant Nursery Company at its station at Durant, Oklahoma, two shipments, one consigned to J. T. Foote at Washington, Oklahoma, and the other consigned to J. T. Foote at Blanchard, Oklahoma, and defendant states that said shipments were received

and forwarded under and by virtue of the terms of two written contracts of shipment, copies of which are hereto attached, marked Exhibits A and B, respectively, and made a part of this answer.

"Further answering, defendant states that by the terms of said contracts it was provided that in issuing said bills of lading this company agreed to transport said shipments only over its own line.

"Further answering, defendant states that by the terms of said contract it was provided that no carrier should be liable for loss, damage, or injury not occurring on its own road, or its portion of the through route, nor after said property had been delivered to the next carrier, except as such liability might be imposed by law.

"Further answering, defendant states that by the terms of said contracts it was provided that the amount of any loss or damage for which the carrier might be liable should be computed on the basis of the value of the property, being the bona fide [583] invoice price, if any, to the consignee, including freight charges, if prepaid, at the place and time of shipment under said contracts, unless a lower value had been represented in writing by the shipper or agreed upon, or was determined by tariffs and classifications.

"Further answering, defendant states that by the terms of said contracts it was provided that in the event of loss or damage to said shipments the value thereof should not exceed five dollars per hundred pounds, and if there is any liability therefore against this defendant, which, however, is denied, same should in no event exceed five dollars per hundredweight.

"Further answering, defendant states that the shipment consigned to Washington, Oklahoma, weighed 752 pounds, and the shipment consigned to Blanchard, Oklahoma, weighed 728 pounds.

"Further answering, defendant states that it transported both of said shipments in due course of its business as a common carrier, and delivered them at Lehigh, Oklahoma, to its connecting carrier, the Oklahoma Central Railway Company, on December 6, 1910, and defendant states that, if there is any liability therefore for any loss or damage to said shipment, such liability is against the said Oklahoma Central Railway Company, and not against this defendant, and defendant therefore asks that said Oklahoma Central Railway Company be made a party defendant herein, and be summoned to appear and answer and defend this suit.

"Defendant prays that it be adjudged to go hence without day, with its costs."

Attached to the answer are copies of the bills of lading covering the shipments in question.

On the 19th day of April, 1912, the Durant Nursery Company filed a reply to the answer of the Missouri, Kansas & Texas Railway Company which is as follows:

"Comes now the plaintiff, the Durant Nursery Company, and for its reply to the answer of the defendant the Missouri, Kansas [584] & Texas Railway Company alleges and would show to the court as follows, to wit:

"The plaintiff denies each and every material allegation of new matter in the answer of the said defendant contained."

On the 19th day of April, 1912, the receiver for the Oklahoma Central Railway Company filed its answer, which is as follows:

"Comes now the defendant Asa E. Ramsey, receiver of the Oklahoma Central Railway Company, and for his answer herein to plaintiff's bill of particulars denies each and every material allegation thereof, except that which is hereinafter admitted.

"I. Further answering, the defendant states that on or about the 6th day of December, 1910, it received at Lehigh, Oklahoma, from the Missouri, Kansas & Texas Railway Company, two shipments of fruit trees, one consigned to Blanchard, Oklahoma, the other to Washington, Oklahoma, receipts for said shipments having been heretofore executed by the Missouri, Kansas & Texas Railway Company to the plaintiff at Durant, on December 3, 1910, copies of which receipts and contract of shipment are attached to the answer of the defendant Missouri, Kansas & Texas Railway Company herein, marked Exhibits A and B, and are made a part of this answer.

"II. This defendant further states that by the terms of the said contract of shipment above referred to it was provided that in event of loss or damage to shipment the value thereof should not exceed \$5.00 per hundredweight. That the weight of said shipments is shown by said receipts and contract, and if this defendant is liable at all, which is denied, same should in no case exceed \$5.00 per hundredweight, calculated on the basis of the weight shown in said contract.

"III. For further answer this defendant denies that the plaintiff incurred the amount of expense in locating the trees and delivering the same as alleged in this bill of particulars, and states, if such expenses were incurred, they were not necessary in locating the said shipments and delivering same, and this defendant is not liable therefor.

[585] "Defendant prays that it may go hence without day and have its costs."

On the 19th day of April, 1912, the Durant Nursery Company filed its reply to the answer of the receiver for the Oklahoma Central Railway Company as follows:

"Comes now the plaintiff, the Durant Nursery Company, and for its reply to the answer of the defendant A. E. Ramsey, receiver of the Oklahoma Central Railway Company, alleges and would respectfully show to the court as follows, to wit:

"Plaintiff denies each and every material allegation of new matter contained in the said answer of the said defendant as set forth in paragraphs first, second, and third of the said answer."

The case was tried to the court and jury, and verdict for plaintiff as prayed. After overruling of motion for new trial, judgment was rendered for \$177.82, to draw 8 per cent interest from date thereof. Defendants bring error.

For convenience, the plaintiff below will be designated as plaintiff, and the defendants below as defendants herein. The conditions under which the Missouri, Kansas & Texas Railway Company received said articles for transportation as expressed in the bill of lading and shipping contract, so far as they relate to the questions involved in this case, are as follows:

(1) "Received, subject to the classifications and tariffs in effect on the date of issue of the original bill of lading, at Durant, Oklahoma, December 3, 1910, from Durant Nursery Company, one box trees, weight 752 pounds, in apparent good order, which said company agrees to carry to its usual place of delivery at Washington, Oklahoma, if on its road; otherwise, to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of the said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all [586] the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns."

(2) "In issuing this bill of lading this company agrees to transport only over its own line, and, except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line. No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law; but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed."

(3) "No carrier is bound to transport said property by any particular train, or in time for any particular market, or otherwise

than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classifications or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amounts to govern such computation, whether or not such loss or damage occurs from negligence. Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

On the face of said contract in typewriting is the following:

"Collect. Released at \$5.00 per 100 lbs. and valuation and freight charges guaranteed by shipper."

[587] The other contract is the same as this, except the destination is Blanchard, Okla., and the weight 728 pounds.

The bills of lading are not signed by the shipper, defendant in error; but he bases his cause of action on them, and attached them to his bill of particulars, and made them a part thereof, and afterwards introduced them in evidence to prove his contract of shipment. He will therefore be bound by all the terms and conditions of said bills of lading, as shipping contracts, as fully as if he had personally signed the same.

By the terms of said contracts, expressed in perfectly plain language, the defendant Missouri, Kansas & Texas Railway Company as the initial carrier undertook and agreed with plaintiff: (1) That it would transport his freight over its own lines and no further. (2) That it would not be liable for loss, damage, or injury which did not occur on its own road, or its portion of the through route; nor after said property had been delivered to the next carrier, except such liability as might be imposed by law. (3) That in case of loss or damage to said shipments the value thereof should not exceed \$5 per 100 pounds; the shipment to Washington being 752 pounds, and the shipment to Blanchard 728 pounds. The evidence

shows, and it is not denied by plaintiff, that the defendant Missouri, Kansas & Texas Railway Company received these shipments on Saturday evening, December 3, 1910, after the last train carrying like traffic had gone out, and, as there was no Sunday train, the shipments did not leave Durant until Monday morning, December 5th, and were delivered to the defendant Oklahoma Central Railway Company at Lehigh, Okla., on the next day.

It is conceded that both destinations, Washington and Blanchard, are not on the Missouri, Kansas & Texas, but are on the Oklahoma Central. The evidence is somewhat conflicting as to date of receiving destinations—plaintiff claiming the 24th, and [588] the defendants the 21st, of December. In either case it would seem that the delay was unreasonable, and the jury must have so found. There is no claim for loss or damage to the trees, nor depreciation in value—only such damage as was caused by reason of the delay in reaching destinations. The evidence shows, and the plaintiff admits, that he never made the statutory demand on the Missouri, Kansas & Texas Railway Company to furnish proofs and facts as to which road caused the delay, or that the loss or injury did not occur while the shipment was in the possession or in charge of its road, as provided in section 846, Rev. Stat. 1910 Ann. which is as follows:

"If freight addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor."

Plaintiff did demand payment for the damage caused by the delay, but under the rulings of this court that did not satisfy the requirements of the statute. The law applicable to the facts in this case, fixing the duty of the shipper, is laid down and clearly defined in the recent case of *Chicago, etc. R. Co. v. Diggs*, 42 Okla. 183, 140 Pac. 1160, by Judge Rittenhouse, speaking for the court, in which he says:

"In the absence of proof on the question as to whether the injury occurred while the goods were in possession of the initial or the connecting carrier, it will be assumed that the goods were in the same condition when delivered to the connecting carrier that they were in when received by the initial carrier, and, if the shipment was damaged when it reached its destination, there is no presumption that the injury occurred while the goods were in the hands of the initial carrier."

In that case the claimant made inquiry of the initial carrier as to the location of the goods, but made no demand for the proofs
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[589] provided for in the statute (section 846, supra), and upon the sufficiency of such inquiry the court says:

"It is evident that the plaintiff did not bring himself within the provisions of" that section, "and therefore cannot claim the benefits derived therefrom."

The liability of carriers, in this particular, is clearly defined and well established by the laws of this state. The only liability assumed by an initial common carrier of intrastate commerce in this state, unless it contracts for a greater responsibility, is that it will deliver the shipment to the end of its route, in the proper direction of its destination to some other competent carrier carrying to the place of address, or connected with those who thus carry. When it has done that, its responsibility ceases, subject, of course, to a proper response to the demand of the shipper for proofs that the loss or injury did not occur on its line. As said in the *Diggs* case, supra:

"Under section 845, the initial carrier, in accepting an intrastate shipment of freight to a point beyond its own line, must deliver the same to the connecting carrier, having made such delivery, its liability ceases."

We are of the opinion that the law, as to the damage or entire loss of the goods, would apply to the question of injury caused by delay, so far as it relates to the manner of fixing the liability of the carrier; but it is not necessary to seek to apply that rule here, for the plaintiff says he did not demand of the Missouri, Kansas & Texas Railway Company as initial carrier proofs and facts as to which road was responsible for the delay, and as a matter of fact such a demand would have been unnecessary in this case, except for the purpose of holding the initial carrier, for the reason that it was well established by the evidence that the shipments were delivered to the connecting carrier within a reasonable time, to wit, the 6th day of December. In the case of *St. Louis, etc. R. Co. v. Close*, 42 Okla. 105, 140 Pac. 1176, [590] a like question arose in an action for damages caused by the delay in shipment of a merry-go-round. The Frisco was the initial carrier, and was not the cause of the delay. In speaking as to the liability of that road, the court says:

"It is clear, from our constitutional and statutory provisions, that it is the duty of the connecting carrier to accept shipments of freight under such circumstances, unless a valid reason for refusal exists, and that the liability of the initial carrier ceases when such delivery is made. There is no denial that the Frisco delivered the shipment promptly and tendered same to the Midland Valley, and that all the delay in further transportation was chargeable to the Midland

Valley. . . . It follows, therefore, that the initial carrier was under no further obligation than to promptly deliver the shipment to a connecting carrier and that it is the duty of such connecting carrier to forward same without delay. It is apparent, under the record and the foregoing provisions of our Constitution and statutes and the authorities above, that, whatever damages the plaintiff may have shown himself entitled to recover, the Frisco was not liable therefor. It had discharged every obligation which the law imposed upon it under the circumstances."

The decision is in strict accord with section 845, Rev. Laws 1910, which is as follows:

"If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery."

So it must be conceded in this case that, whatever damages the plaintiff may have sustained, the Missouri, Kansas & Texas Railway Company is not liable; for by the delivery of these shipments to the connecting carrier on the 6th day of December it discharged every obligation it had assumed under the contracts [591] of shipment and which the law imposed upon it. Under the facts, and the plain language of the statute, the Missouri, Kansas & Texas was in no sense blamable for the delay or injury, if any, occasioned thereby.

This brings us to the question of the liability of the Oklahoma Central Railway Company as connecting carrier. The evidence shows that the delay occurred on that road, and that it was unnecessary and unreasonable; but the question of the right of plaintiff to recover damages for the class and kind of injury alleged is a more difficult proposition. It will be borne in mind that plaintiff's only cause of action is for the recovery "of damage for expenses of men in locating trees and delivering the same after the delay occasioned by the negligence of the company." No damage was claimed for injury to the trees, nothing for depreciation in intrinsic value, and nothing for depreciation in the market value thereof. No special time was agreed upon for the delivery of the shipments. The bill of particulars does not charge, and bills of lading and shipping contract do not show, and there is no evidence tending to prove, that either of the defendants knew, or had any notice of the purpose for which the trees were being shipped, or that plaintiff was expecting or intending to deliver the trees to his customers on the 17th day of December, or at any other time, or that he had employed anyone to be at the places

of destination for any purpose. Nothing of the kind was alleged or proved. Under such circumstances, would the plaintiff be entitled to recover, and, if so, what would be the measure of damages? Section 2869, Rev. Laws 1910, provides:

"The detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered and the day of its actual delivery."

[592] This section came before this court for construction in the case of *Chicago, etc. R. Co. v. Broe*, 16 Okla. 25, 86 Pac. 441. That action was to recover for delay in shipment of a car load of nails and wire. As a part of the measure of damages claimed by plaintiff was the loss of trade during the delay of the freight, and that question was submitted to the jury in the following interrogation:

"Q. If you find for the plaintiff, state by what you measure the amount of his damages. A. Depreciation in value of goods, and loss in trade."

In reversing this case Justice Burwell says:

"The jury had absolutely no justification for allowing the consignee anything for loss of trade. There was no evidence on which to base such a finding, and, even if there had been, it could not be considered, as the carrier's liability is fixed by the statute above quoted (section 2869), and loss of trade is not referred to therein. From the record we cannot determine the amount awarded for loss of trade. It cannot be separated from the award for depreciation of the market value of the property."

As stated before, in the instant case neither of the railroad companies had notice of the intentions of the plaintiff to dispose of the shipments, nor of the fact that he was contemplating expenses of any kind in that behalf. Such expenses and subsequent damages were not in contemplation of the company or in the mind of the employees of the defendants at the time of the shipments. Speaking upon that subject, the Supreme Court of the state of Florida in *Williams v. Atlantic Coast Line R. Co.* 56 Fla. 735, 48 So. 209, 24 L.R.A.(N.S.) 134, 131 Am. St. Rep. 169, says:

"Only such damages may be recovered as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier

all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property [593] carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier."

That was a case in which the shipper transported orange boxes to be used in packing a crop of oranges, and preparatory thereto he had employed men for that purpose, who were awaiting the arrival of the boxes; but it appears that the shipper failed to notify the carrier of his intentions in regard to the use of boxes. In consideration of the case the court further says:

(1) "In an action against a railroad company for damages caused by the failure of the company to deliver within a reasonable time orange boxes intrusted to the defendant to transport for hire, the plaintiff cannot recover the loss and damage in the enforced idleness of persons employed to pack and ship his oranges on his orange groves, where the defendant was not informed that men had been employed to pick the oranges, or the time within which the oranges were to be picked, and the contract of carriage did not fix any specific time for the transportation and delivery of the boxes.

(2) "In an action against a railroad company for damages caused by its failure to transport and deliver orange boxes, within a reasonable time, the allegations of the declaration, 'that by reason of the premises the plaintiff incurred loss and damage in being unable to pack and ship part of his oranges for the Christmas market,' are not stated with such certainty as to show the liability of the defendant therefor.

(3) "The freezing of plaintiff's oranges on the trees is not so direct, natural, and proximate a result of the failure of a railroad company to deliver to the plaintiff, within a reasonable time, orange boxes intrusted to the defendant company to transport for hire, as to make such company liable therefor by reason of such delay, where the contract of carriage did not fix any specific time for the transportation and delivery of the boxes, and the defendant company was not informed that the plaintiff would leave the oranges on the trees, exposed to the dangers of the cold, until the boxes were delivered."

[594] The items of damage claimed by plaintiff are railroad fare of men sent to the different destinations to distribute the trees to customers, hotel expenses, telephone calls while there, their railroad fare back to their respective residences, and other such like expenses. These items certainly could not have been in contemplation of the parties at the time the shipping contract was entered into. There is nothing in the pleadings or the evidence that even tends to establish such a condition. The rule laid down in Had-

ley v. Baxendale, 9 Exch. (Eng.) 341, Sedgwick's Leading Cases on Measure of Damages, 126, which has been followed by the Supreme Court of the United States and most of the states of the Union, establishes this doctrine:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally, according to the actual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of it."

In the case of Illinois Cent. R. Co. v. Johnson, 116 Tenn. 624, 94 S. W. 600, parties had the contract for boring a deep well in the state of Arkansas, and in contemplation of such work they delivered to the railroad company machinery for the purpose of doing the work. The party who made the shipment stated to the agent of the company that the machinery was needed right away, and that the shipment was for immediate delivery—that the shipper was at heavy expense in keeping a crew awaiting the arrival of the shipment for the purpose of carrying out the contract. The shipment was delayed, and the parties brought suit. Under that state of facts, recovery was denied, and in so doing the court said:

(1) "One seeking to recover special damages for breach of a contract must show that such damages were within the contemplation [595] of both parties to the contract; otherwise, he can only recover such damages as in the usual course of things flow from a breach.

(2) "Plaintiffs, having a . . . contract in Arkansas for the boring of a deep well, shipped certain pipe therefor over defendant's railroad, and at the time notified defendant's agent that the pipe was needed very badly, and that they were putting in another well at some place in Arkansas. Held, that such information did not give the carrier notice that plaintiffs had a contract which would be forfeited in the event of a failure to deliver the pipe promptly, or that plaintiffs were boring the well for others than themselves, and was insufficient to charge the carrier with loss of profits occasioned by a cancellation of the contract for delay and loss sustained in the purchase of other appliances for the work."

The Supreme Court of Kansas, having a like question under consideration in Sauter v. Atchison, etc. R. Co. 78 Kan. 331, 97 Pac. 434, held:

"A mere statement of the station agent of a railroad company, to one about to deliver goods to the company for shipment over its

railroad, that the goods should arrive at the proposed destination at a certain time, does not constitute a contract to carry them within such time."

It seems entirely unnecessary to cite further authorities along this line. The defendant in error neglected to file briefs, but, notwithstanding that fact, we considered the case of such importance that we felt it was our duty to consider it to some extent. This we have done without the aid of counsel for defendant, but, being clearly of the opinion that the doctrines herein laid down are supported by practically an undivided line of authorities, we are forced to the conclusion that this case should be reversed and remanded, with instructions to the trial court to render judgment in favor of the defendants.

By THE COURT.—It is so ordered.

NOTE.

A statute confining the liability of an initial carrier on an intrastate shipment to responsibility for acts committed on its own line is held in the reported case to apply to the detriment caused by a delay in the transportation of goods which results in a depreciation of their value. It also holds that special damages caused by a delay in the transportation of goods are not recoverable in the absence of notice to the carrier at the time of shipment of circumstances warranting their recovery. These questions are treated in the course of a general discussion of the measure of damages for delay in transporting goods in the note to *Lyons v. Grand Trunk R. Co.* reported ante, this volume, at p. 162.

HULBERT

v.

HULBERT ET AL.

New York Court of Appeals—January 4, 1916.

216 N. Y. 430; 111 N. E. 70.

Judgments — Lien — After-acquired Property.

Judgments became liens on the after-acquired realty of the judgment debtor received by inheritance from his father at the time of its acquisition by the debtor.

Necessity of Issuing Execution to Create Lien.

Under Code Civ. Proc. § 1250, providing that a judgment required to be docketed nei-

ther affects real property nor is entitled to a preference until the judgment roll is filed and the judgment docketed, and section 1251, providing that a judgment docketed in a county clerk's office is a charge upon the debtor's real property in the county for ten years after filing the judgment roll, a judgment, upon being filed and docketed, becomes a lien upon the real estate of the debtor, and it is no longer necessary that an execution should be issued upon the judgment to cause it to become a lien upon realty.

Priority between Judgment Liens — Effect of Issuing Execution.

Under Code Civ. Proc. § 1250, providing that a judgment required to be docketed neither affects real property nor is entitled to a preference until the judgment roll is filed and the judgment docketed, and section 1251, providing that a judgment docketed in a county clerk's office is a charge upon the debtor's real property in the county for ten years after filing the judgment roll, where a judgment debtor inherited realty from his father, so that the liens of the judgment creditors, whose judgments had been docketed, attached thereto simultaneously on the death of the father, one creditor cannot obtain a preference over the others through the issuance of execution and the advertising of the property for sale by the sheriff.

[See note at end of this case.]

Hulbert v. Hulbert, 165 N. Y. App. Div. 858, modified.

Appeal from Appellate Division of Supreme Court, Fourth Judicial Department.

Action by Talman F. Hulbert, plaintiff, against Fred Hulbert et al., defendants. Order of Special Term of Supreme Court affirmed by Appellate Division of Supreme Court. Helen Story et al., as executors of Leonard Story, deceased, appeal. The facts are stated in the opinion. MODIFIED.

George E. Zartman for appellants.

William F. Bacon respondent, in person.

[432] SEABURY, J.—This a proceeding in an action of partition for the distribution of the proceeds of a sale of real property. On March 7th, 1904, St. Paul's Church of the village of Waterloo, N. Y., docketed a judgment for \$906.84 against Fred Hulbert. On April 21st, 1904, judgments for \$2,830.57 and \$2,351.71 respectively were docketed against said Hulbert by the defendant Story now deceased. All of these judgments were filed and docketed in the office of the clerk of Seneca county. At the time these judgments were docketed Hulbert was without property. In 1910, on the death of his father, Hulbert inherited an undivided one-third interest in the real estate which it was sought to partition in this action. On November 24th, 1913, pursuant to leave granted

by the court, the St. Paul's Church issued an execution on its judgment against the property of said Hulbert. On February 6th, 1914, the sheriff of Seneca county sold Hulbert's undivided interest in said real estate to one Bacon who is a defendant herein, for the sum of \$1,437.10 and issued to him a sheriff's certificate of sale which he now holds. The present action for partition or sale was not commenced until after the execution of the St. Paul's Church had been placed in the hands of the sheriff. The interest of the defendant Hulbert in said premises was sold in the partition action March 28th, 1914, for \$1,753.36, which sum has been paid into the court subject to its further order. The proceeds of this sale are insufficient [433] to pay all of the judgment liens in full. The appellants, who are executors of the estate of Story, claim that these proceeds should be applied *pro rata* on all of the liens. The respondent Bacon claims, and he has been accorded by the court below, a preference for his lien and the payment thereof has been ordered to be made in full. It is clear that Bacon acquired no rights as against the owner of the Story judgments, by virtue of the sale of the property to him and the delivery by the sheriff of a sheriff's certificate of sale, unless the fact that the execution issued by the St. Paul's Church and the act of the sheriff in advertising the property for sale served to give to the lien of the St. Paul's Church a preference over the liens of the Story judgments. It is necessary, therefore, to inquire what the status of the judgment liens was and whether the act of the St. Paul's Church in issuing an execution upon its lien and the act of the sheriff in advertising the property for sale gave to that lien a preference over the others. Pursuant to the settled rule, which is not questioned by either party upon this appeal, the three judgments referred to became liens on the after-acquired property of the judgment debtor at the time of its acquisition by the debtor. (Matter of Hazard, 73 Hun 22, 25 N. Y. S. 928; *affd.* on opinion below, 141 N. Y. 586, 36 N. E. 739.) The liens of these three judgments, therefore, attached simultaneously to the interest of Hulbert upon his acquiring title to that interest on the death of his father. It was held below that the judgment of the St. Paul's Church acquired priority by reason of the execution issued thereon and the act of the sheriff in advertising the property for sale. The theory upon which the ruling was made was that the act of the St. Paul's Church in issuing the execution was such an exhibition of diligence as to entitle that judgment creditor to a preference over the liens owned by the other judgment creditors. The only authorities relied

upon by the learned Appellate Division to sustain [434] this view were the cases of Adams v. Dyer, 8 Johns. (N. Y.) 347, 350, 5 Am. Dec. 344, and Waterman v. Haskin, 11 Johns. (N. Y.) 228. In Adams v. Dyer (*supra*) there is a short *per curiam* opinion which says: "Perhaps, the mere act of delivery of the execution to the sheriff, did not gain a preference *as to the lands*, but by the act of the sheriffs in making advertisement of the lands for sale, the first execution was begun to be executed. Here was an act by which priority, in some respects, was gained. There was priority as to the time of sale, and that priority could not be defeated by the second execution." The case of Waterman v. Haskin (*supra*) announces the same conclusion relying solely upon the authority of Adams v. Dyer (*supra*). Although our attention has not been called to any subsequent case in this jurisdiction which has followed the decision announced in these two cases, it must be conceded that the rule announced by them has been followed in other jurisdictions. (Elston v. Castor, 101 Ind. 426, 51 Am. Rep. 754; Lowry v. Reed, 89 Ind. 442; Smith v. Lind, 29 Ill. 24; Lippencott v. Wilson, 40 Ia. 425; Burney v. Boyett, 1 How. (Miss.) 39.) Notwithstanding that the decision in Adams v. Dyer (*supra*) and Waterman v. Haskin (*supra*) has been followed in other jurisdictions, the rule announced by these decisions was early questioned in this state. In Wood v. Colvin, 5 Hill (N. Y.) 228, 230 [1843], Bronson, J., speaking for the court, said: "It has on several occasions been taken for granted that there must be a levy on real estate; but the point has never been so adjudged. The cases are collected in Green v. Burke, 23 Wend. 498. When the judgment is a lien upon the land, it is not necessary that the sheriff should make any formal levy or seizure before proceeding to advertise and sell. It would be an idle ceremony for him to go to the land, or make an inventory of it, or do any other act of the like nature. The judgment binds the land, which is already in the custody of the law before the execution issues. The execution comes as a power to [435] enable the creditor to reap the fruits of the seizure already made.

"After lands were subjected to sale on execution, and before the judgment was made a lien, (see *per* Chancellor Lansing in Catlin v. Jackson, 8 Johns. 546), the sale of lands and of goods on execution stood substantially upon the same footing, and a levy or seizure was necessary in the one case as well as in the other. But when the judgment was afterwards made a lien on the land, there was no longer any reason for requiring a levy before the sheriff proceeded

to advertise and sell. The seizure was already made when the execution came to his hands. Lawyers and judges have still continued to speak of the supposed necessity of a levy upon land, without adverting to the fact that the reason for the rule had entirely ceased. But as there is nothing but *dicta* upon the point, we feel ourselves at liberty to say, that since the judgment has been made a lien upon the land, no formal levy or seizure by virtue of the execution is necessary."

A good deal of confusion has arisen and the decisions seem not to be in harmony as to the status of the judgment lien. This condition seems to have arisen because of the statutory changes that have been made. A review of the changes which the law upon this subject has undergone will tend to a better understanding of the existing rule which we are called upon to apply to this case. At common law when a judgment has been rendered for a debt the sheriff was directed to cause the sum needed to be made (*fieri facias*) out of the goods and chattels of the defendant or levied (*lirari facias*) out of his goods and the fruits of his land, but the land itself was not subject to be taken in satisfaction of the debt. "Our common law," say Pollock & Maitland in their History of English Law, "will not seize his land and sell it or deliver it to the creditor; seignorial claims and family claims have prevented men from treating land as an available asset for the payment of debts." (Vol. 2 [2d ed.], p. 596.) In 1285, [436] by virtue of the statute of Westminster 2 (13 Edw. I), c. 18, the *election* was given to a creditor who sued for such debt or damages to have a writ to the sheriff "for levying the debt of the lands and chattels, or that the sheriff deliver to him all the chattels of the debtor (except his oxen and beasts of the plough) and a moiety of his land until the debt be levied." The writ of *elegit* was founded upon this statute. It was subject to certain restrictions and operated differently even as to chattels from a *fieri facias*. (2 Tidd's Prac. 939.) These restrictions need not now be commented upon, as our purpose will be served by tracing the procedure that was pursued under it in reference to the lands of the debtor. If the debtor had no land the sheriff need not take or return an inquisition. If there were lands it was necessary that the inquisition should be taken and returned, describing the land with convenient certainty, and after it is taken the sheriff delivers a moiety to the plaintiff by metes and bounds. (2 Tidd's Prac. 940.) It was formerly usual for the sheriff to deliver actual possession of a moiety of the lands, but at the time Mr. Tidd wrote his practice of the King's Bench (1807) the

sheriff was only required to deliver legal possession, and in order to obtain actual possession the plaintiff must proceed by ejectment. The writ of *elegit*, however, has been said to be "almost unknown in the United States." (Freeman on Executions, § 370.) There are, however, instances of its use in Virginia, Alabama, North Carolina and Delaware. (Freeman on Executions, § 370.) Although authorized in New York, in practice it is doubtful if it was ever adopted. In commenting upon it Chancellor Lansing said: "Whether the *elegit* was ever introduced in practice, is doubtful, as the small value of the income of real estates, afforded little inducement to resort to it, as a means of satisfying a debt due upon a judgment." (Catlin v. Jackson, supra, at p. 547.)

Prior to 1732 no judicial sale of land could be made [437] in New York under any common-law process. Such a sale was expressly prohibited by the so-called "Charter of Libertyes & Priviledges" which was enacted by the colonial legislature October 30th, 1683. (Laws of the Colony of New York, 1664-1719, vol. 1, p. 111.) By a subsequent statute passed soon afterwards by the same legislature a levy "by extent on the defendant's lands or against the debts goods and chattels & for want thereof his person" was authorized. (Nov. 2nd, 1683, chap. 12, Laws of the Colony of New York, 1664-1719, vol. 1, p. 134.) While these colonial statutes seem to have sanctioned the *elegit*, it is probable, as already remarked, that in practice that writ was not used. The act of 5 Geo. II, c. 7, which was applicable to the "Plantations and Colonies in America," provided that after September 29th, 1732, the lands of the debtor "shall be liable to and chargeable with all just debts, etc." This statute was intended to enable British subjects in England to sell real estates on execution in the colonies in order to satisfy the debts due to them. It received a liberal construction which extended it to all judgments. (Catlin v. Jackson, 8 John. [N. Y.] 520, at p. 547.) Under this statute the *fieri facias* was the appropriate writ under which the lands could be sold, but in several essentials the effect of the execution was necessarily different from a *fieri facias* levied upon personal property only. (Catlin v. Jackson, supra, at p. 547; Hanson v. Barnes, 3 Gill & J. [Md.] 359, 367.)

By the act of 1774 (Laws of the Colony of New York, 1769-1775, vol. 5, p. 637) provision was made for docketing judgment in the name of the person against whom the judgment was entered, and it was declared that a judgment "not Docketed and entered in the Books" should not affect lands as to purchasers or mortgagees, or have any preference against heirs, executors or adminis-

trators. In 1787 (Laws of New York, 1785-1788, vol. 2, ch. 56, p. 467) and in 1801 (Laws of [438] 1801, ch. 105) these provisions were substantially re-enacted. These statutes provided that the land of the debtor should be subject to sale in the same manner as his personal property, and made provision for the docketing of the judgment, and provided that a judgment not docketed should not affect lands as to purchasers or mortgagees. Whether the legal effect of these statutes was to make the judgment itself a lien upon the real estate of the debtor it is not necessary to determine. In *Koning v. Bayard*, 2 Paine 251, 2 U. S. Law Int. 34, 14 Fed. Cas. No. 7,924, decided in 1829, it was held that such was their legal effect. The first statute to specifically declare that "the said judgment shall be a *lien* on such lands, etc.," was the Revised Laws of 1813 (Vol. 1, ch. 50, p. 501). By that statute it was enacted "That all and singular the lands, tenements, and real estates, of any person against whom any judgment shall have been obtained in any court of record, for any debt, damages, costs or other sum of money, shall be subject to be sold upon execution to be issued upon such judgment, and the said judgment shall be a *lien* on such lands, tenements, and real estates: Provided, etc." This statute also provided that a judgment not docketed should not affect any lands and tenements *as to purchasers and mortgagees*. This statute has been several times re-enacted, amended and amplified (2 R. S. part 3, ch. VI, title 4, art. 2, sections 11 and 12, and Laws of 1840, ch. 386), and the substance of it is expressed in the present provisions of the Code of Civil Procedure relating to this subject. (See sections 1250 and 1251 of the Code of Civil Procedure.)

By virtue of the statutory changes which have been made in relation to this subject a judgment upon being filed and docketed becomes a lien upon the real estate of the debtor. It is no longer necessary that an execution should be issued upon the judgment in order to cause the judgment to become a lien upon real estate. *Adams v. Dyer* (supra), decided in 1811, and *Waterman v. Haskin*, decided in 1814, had under consideration judgments [439] that were docketed prior to the enactment of chapter 56 of the Revised Laws of 1813. At the time these two cases were decided the legal effect of the statutory change that had taken place had not been determined. *Waterman v. Haskin* (supra) was decided solely upon the supposed authority of *Adams v. Dyer* (supra), and the short opinion that was rendered in *Adams v. Dyer* ignored the question whether any statutory change had been made. Whether this was because the judgment itself was not deemed a *lien* prior to the statute of

1813, and the judgments under consideration in these cases were entered prior to the passage of that act, it is needless to speculate.

Of course it is true that if the judgment actually became a lien upon the land it can make no difference whether it is a lien by virtue of express statutory enactment or by necessary implication from other language used in the statute. It is, however, a significant fact that at the time *Adams v. Dyer* (supra) and *Waterman v. Haskin* (supra) were decided it was an open and undecided question in this state whether the lien attached upon the filing of the judgment or whether subsequent action by way of execution must be taken in order to cause the lien to attach. It was not until more than fifteen years after these cases were decided that it was first held in *Koning v. Bayard* (supra) that under earlier statutes by implication the judgment became a lien from the date of filing. Even after this decision, as Judge Bronson pointed out in *Wood v. Colvin* (supra) the effect of the statutory provision was not fully appreciated by judges and lawyers. The fact that this question was undetermined when *Adams v. Dyer* (supra) and *Waterman v. Haskin* (supra) were decided, and that it was not determined until subsequent statutory enactments had made the original legislative purpose clear, explains why the court in these cases assumed that the rule prevailing as to the acquisition of a lien upon personal property also prevailed as to real property and accorded a [440] preference to the judgment creditor, first taking proceedings by way of execution. The statute has now removed any doubt that may have existed on the subject and declared that the lien attaches as to land from the filing of the judgment. Under these circumstances the ruling in *Adams v. Dyer* (supra) and *Waterman v. Haskin* (supra) should not be so applied as to make the unnecessary act of issuing an execution the ground for according, as between creditors of equal rank, to one creditor a priority over another. To so apply these decisions is to fail to give effect to the existing statutory provisions on this subject.

Whatever the legal effect of the early statutes may have been it is perfectly clear that since 1813 the judgment itself is a lien upon the real property of the debtor. The legal effect of this statutory rule is that from the moment a judgment is duly filed and docketed legal rights in the real estate of the debtor attach. In the case now under consideration the liens of the three judgments attached simultaneously to the property of Hulbert upon his acquisition of the interest derived from his father. By virtue of the statute they were at that time equal liens entitled to share *pro rata* in the proceeds of

the debtor's property. Such being the case, how can it be held that the issuing of the execution and the advertising by the sheriff—acts which would be an idle ceremony—should give a preference to the creditor? Once a lien is acquired it is a right which cannot be lost by the performance of an unnecessary act by another creditor. With as much reason could it be held that as between two mortgagees holding mortgages of equal rank, the one who showed the greatest diligence in commencing an action of foreclosure should acquire a preference over the other. Under the terms of the statute the judgments of the appellants became liens on the real property of Hulbert of equal rank with the lien of the judgment of the St. Paul's Church. The lien of these judgments of the appellants, having attached, did [441] not forfeit their position of equality and become subordinate to a lien of equal rank, merely because its owner did not do a useless thing. In *Rankin v. Scott*, 12 Wheat. 177, 179, 6 U. S. (L. ed.) 592, 593, Chief Justice Marshall said: "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution, has never been considered as such an act." The diligence of a junior judgment creditor could not affect the lien of a senior judgment creditor, and if it could not affect the lien of a senior judgment creditor, it cannot affect the lien of equal rank. The principle that equity favors the diligent has no application where one creditor displays his diligence in the doing of useless and unnecessary things. The liens of the three judgments attached when Hulbert acquired the property. The issuing of an execution upon one of the judgments could not affect the relative rank of the liens as between themselves. It is urged that, although this reasoning was adopted in *Rockhill v. Hanna*, 4 McLean 554, 20 Fed. Cas. No. 11,980, where the court refused to follow *Adams v. Dyer* (supra) and *Waterman v. Haskins* (supra), that case was not followed in the United States Supreme Court. In *Rockhill v. Hanna*, 15 How. 189, 196, 14 U. S. (L. ed.) 656, 659, the United States Supreme Court considered the question presented in *Rockhill v. Hanna*, 4 McLean 554, 20 Fed. Cas. No. 11,980, and intimated an opinion in accord with the rule declared in *Adams v. Dyer* (supra) and *Waterman v. Haskins* (supra), but the decision of the court was not placed on that ground, the court saying: "But we do not think it necessary

to rest the decision of this case, merely on the question of diligence, or to decide whether this doctrine has been finally established as the law of Indiana. The [442] plaintiff's lien does not, by the statement of this case, stand on an equality as to date with that of the other judgments. By electing to take the body of his debtor in execution he has postponed his lien, because the arrest operated in law as an extinguishment of his judgment."

Under the circumstances disclosed, and in view of the fact that *Adams v. Dyer* (supra) and *Waterman v. Haskins* (supra) declare a rule contrary to our existing statute we feel compelled to hold that these decisions are no longer controlling upon us and that we should give effect to the rule declared in the statute.

The order appealed from should be modified by directing that the fund now deposited in court should be distributed *pro rata* between the three judgments, and as so modified the order should be affirmed, without costs to either party.

WILLARD BARTLETT, Ch. J. (dissenting).—I dissent from the judgment about to be rendered in this case. I think it is in conflict with the established law of this state as it has existed for more than a century. It squarely overrules two decisions of our old Supreme Court, the doctrine of which has been adopted in other states and approved by the Supreme Court of the United States, and this without any change in conditions which in my opinion suffices to justify such action.

In the present case, three judgments stood duly docketed in Seneca county against the defendant Hulbert, when, in 1910, upon the death of his father he inherited a one-third interest in the real estate sought to be partitioned in this action. The three judgments thus simultaneously became liens upon the property so acquired by the judgment debtor. (*Matter of Hazard*, 73 Hun 22, 25 N. Y. S. 928; *affd.* on opinion below, 141 N. Y. 586, 36 N. E. 739.) Prior to the commencement of the partition suit, and pursuant to leave of court, duly granted, an execution against the property of the defendant Hulbert had been issued to the [443] sheriff of Seneca county, on one of the three judgments which was in favor of St. Paul's Church of Waterloo, N. Y.; and the sheriff subsequently sold the judgment debtor's interest in the real estate inherited from his father to the respondent William F. Bacon. The question presented by this appeal is whether St. Paul's Church acquired a preference for its lien over the liens of the other two judgments by the steps which it had taken to enforce its judgment—to wit, the issue of an execution and causing the property to be advertised for sale thereunder.

The courts below have held, without dissent, that the judgment in favor of St. Paul's Church had thus become entitled to priority.

The leading cases relied upon as authority for this decision—which it is now proposed to reverse—are *Adams v. Dyer*, 8 Johns. (N. Y.) 347, 5 Am. Dec. 344, and *Waterman v. Haskin*, 11 Johns. (N. Y.) 228, both decided by the old Supreme Court, the former in 1811, when Kent was chief justice and the latter in 1814 when Kent had become chancellor and had been succeeded as chief justice by Smith Thompson, who subsequently became an associate justice of the Supreme Court of the United States. With them on the bench were such men as Ambrose Spencer, William W. Van Ness and Joseph C. Yates; so that the judicial ability of the court can hardly be questioned by New York lawyers. They decided that where judgments were equal as to the date of the lien, the issue of execution upon one of the judgments, the advertisement of the lands for sale thereunder and the sale thereof by the sheriff entitled the plaintiff in that judgment to have his claim first satisfied out of the property. In the second case it was held to be enough to establish the priority of such a judgment that the sheriff who received the execution thereon had begun to execute the process first; he "thereby turned the scale of equal right and gained a priority by his vigilance." (*Waterman v. Haskin*, supra.)

[444] That the doctrine of these cases and cases to the same effect in other states has been regarded as establishing the law generally in accordance with the rule therein laid down appears from the statements by the leading text writers and in the American and English Encyclopaedia of Law.

"If two or more judgments, on account of their contemporaneous rendition or docketing, or from any other cause, are equally entitled to precedence as liens on the real estate of the judgment debtor, this equality may be destroyed, in order to give precedence to the lien holder who first attempts to subject any specific real estate to the payment of his lien." (2 Freeman on Judgments [4th ed.] section 374.)

In Rorer on Judicial Sales, section 703, the author states the rule thus: "If several judgment creditors have judgments of equal date, and their judgments are in law all liens on the real estate of the same defendant, the one that levies thereon first obtains priority."

In the American and English Encyclopaedia of Law (2d ed. vol. 17, p. 796) we find: "It may be laid down as a general rule that where liens of judgment are equal, one judgment creditor may acquire a priority over another by superior vigilance in executing his judgment. Thus in some cases it has been held that when judgments in favor of

different persons and against the same defendant are rendered or recorded on the same day, the judgment creditor first issuing execution and levying upon the debtor's property acquires a prior right to satisfaction. And the same rule has been applied to judgments rendered at the same term where by statute such judgments are made equal liens on the defendant's real estate."

I make these quotations simply to show that the doctrine of priority by execution where the judgment liens are equal is not a peculiarity of New York jurisprudence. I will cite a few cases from other jurisdictions in which it has been adopted and applied.

[445] The case of *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754, resembles the present case in the fact that the judgment debtor became the owner of the lands in controversy after the rendition of the several judgments against him. These previously existing judgments, therefore, became equal liens on the land; but it was held that the one of the holders of such liens who first caused execution to be issued and levied on such land obtained a lien which was superior to that of the other judgments. The rationale of the doctrine is thus explained in the opinion: "Judgments are liens upon the real estate of the judgment debtor because the statute makes them such. This lien is given for the purpose of collection. Mr. Freeman says: 'A judgment is not a specific lien on any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens.' 'In short a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy on the land.' § 338. And so it was said in the case of *Gimbel v. Stolte*, 59 Ind. 446, 451, distinguishing a mortgage and judgment lien. 'There can be no doubt that a law which gives a judgment creditor a lien on the real estate of the debtor, relates solely to the remedy.' When the liens are thus equal, and one of the judgment creditors first pursues the remedy and exercises the power of making his lien effectual by following up the steps of the law by an execution and levy, he thereby makes his consummated lien superior, which until then was but equal."

To the same effect is *Smith v. Lind*, 29 Ill. 24, where the court said: "While the lien was made equal, diligence was left to its reward. Under the general law the lien of judgments is equal, but the vigilant creditor can acquire a preference in the payment of his judgment by [446] first issuing his execution. If one creditor who is precisely equal

to another in point of lien shall get an advantage by the use of superior diligence in discovering property, making a levy and sale of it, where is the hardship or injustice?"

In *Bruce v. Vogel*, 38 Mo. 100, 106, the Supreme Court of Missouri followed the rule in *Adams v. Dyer* (supra), saying: "While the statute makes the liens equal, it does not deprive a party of any advantage he may gain by the exercise of superior diligence. If one creditor who is exactly equal to another as regards liens, by energy, perseverance and diligence, discovers property whereon to levy and make his money, justice demands that he shall reap the fruits of his industry. He may have gone to great labor and expense in investigating records and ferreting out and bringing to light property out of which to satisfy his execution; and to allow another person who had slept on his rights, and neither encountered labor or furnished money, to stand on an equality with him, would be inequitable. '*Vigilantibus, non dormientibus, jura subveniunt.*' The laws assist those who are vigilant, not those who sleep over their rights. We are well satisfied, on principle, that where judgment liens are equal, one judgment creditor can get priority over another by his superior vigilance and watchfulness. The execution issued on the judgment rendered in favor of Brown was fairly entitled to priority, as it was first placed in the hands of the officer, and the levy and sale were made under it; and the money could not be diverted from it and applied to others subsequently issued, and under which there was neither levy nor sale."

In *Bliss v. Watkins*, 16 Ala. 229, decided in 1849, the Supreme Court of Alabama said: "It seems to be well settled in New York, where judgments constitute a lien upon land, that where two judgments are rendered on the same day, although neither judgment creditor has the preference as a lien, yet if one of the creditors first take [447] out execution, and proceed to levy and sell, his execution must be first satisfied, by reason of his superior diligence although the other creditor put his execution in the hands of the sheriff before the sale. (Citing *Waterman v. Haskin*, supra, and *Adams v. Dyer*, supra.) . . . Where the liens created by the judgments are equal, the money should be awarded to the creditor who first begins execution of his judgment. There is nothing unreasonable in this, and it is but carrying out the spirit of our statute in respect to the subject of lien. It is giving the priority to the most vigilant, as is done by the statute in respect to personal property, which gives the preference to the party who first places his *fi. fa.* in the sheriff's hands, although it may have issued upo na junior judgment."

In Iowa it is held that where judgments are entered on the same day, and become liens

against the real estate of the judgment debtor, the judgment debtor who first issues execution and sells, obtains a preference (*Lippencott v. Wilson*, 40 Ia. 425), but the courts of that state make a distinction as to after-acquired property. It is held that under such circumstances a different rule prevails and that the issuance of execution and the sale do not give a preference. No reason for the distinction is stated except that the two cases do not come within the same rule. (*Kisterson v. Tate*, 94 Ia. 665, 63 N. W. 350, 58 Am. St. Rep. 419.) I am unable to perceive any difference in principle.

This review of the development of the rule asserted in the cases of *Adams v. Dyer* (supra) and *Waterman v. Haskin* (supra) indicates that it is rather firmly imbedded in our general jurisprudence. On what ground is it proposed to overrule these time-honored authorities, the doctrine of which appears now for the first time to be questioned in this state? As I understand the prevailing opinion it is simply because the judgments under consideration in the *Adams* and *Waterman* cases were docketed prior to the enactment of chapter 50 of the Revised Laws of 1813 which contained the first *express* declaration [448] that a judgment should be a lien on land. It is perfectly clear, however, that the judgments considered in these two cases *were* liens upon the lands of the judgment debtor. In the first place in each case the court said so. I quote: "We must then consider the judgments equal as to the date of the *lien*," etc., etc. (*Adams v. Dyer*, supra.) "By the second section of the act concerning judgments and executions passed the 31st of March, 1801, a judgment lien attaches upon the time of filing the record of judgment." (*Waterman v. Haskin*, supra.) While it is quite true that under the statutes then in force judgments were not expressly declared to be liens upon real estate, those statutes necessarily implied that such was the law. The phraseology of the act of 1801 referred to in the *Waterman* case was substantially the same as that of the act of 1787 considered by the Circuit Court of the United States in *Koning v. Bayard*, 2 Paine 251, 2 U. S. Law Int. 34, 14 Fed. Cas. No. 7,924, decided by Mr. Justice Smith Thompson, sitting as circuit justice in 1829; and he held that the declaration in the act of 1787 that no judgment should affect land but from the time of the filing of the roll and the docketing of the judgment necessarily implied that upon that being done the judgment should affect the land and was equivalent to saying that it should then become a lien.

If a judgment actually is a lien upon land I cannot see what difference it can possibly make whether it has become a lien by reason of an express statutory declaration to that

effect or by reason of necessary implication from other language used in the statute. If, as was virtually held in the case last cited, the declaration in the Revised Laws of 1813 merely expressed what had been necessarily implied before, I cannot comprehend how the enactment of the later statute can be regarded as furnishing any basis for the distinction made in the prevailing opinion.

One of the main purposes for which this court exists is [449] to preserve the harmony and consistency of judicial decisions, finally determining the rights of litigants; and this can only be done by maintaining a due regard for precedents. If we overrule these two precedents, it seems to me that we warn counsel and the lower courts that they can no longer rely on authority to guide the former in giving advice or the latter in rendering decisions. If the lapse of time or later statutory enactments had brought about changed conditions which required us to take a different view from that taken by the old Supreme Court, I might agree with my brethren; but I can discover no change which affects the principle on which those cases were decided.

For these reasons I dissent and vote for the affirmance of the final order appealed from without modification.

Chase, Collin and Hogan, JJ., concur with Seabury, J.; Cuddeback and Pound, JJ., concur with Willard Bartlett, Ch. J.

Order modified, etc.

NOTE.

Issuance of Execution as Giving Priority to One of Several Equal Judgments.

The reported case holds that as between several judgments, no one of which has priority over the others, no priority is gained by the issuance or levy of an execution. In so holding the decision not only runs counter to the great weight of authority but overrules two early decisions in the same jurisdiction (*Adams v. Dyer*, 8 Johns. 347, 5 Am. Dec. 344, and *Waterman v. Haskin*, 11 Johns. 228) on the authority of which many of the decisions in other jurisdictions were rendered. The court argues that at the time of the decisions referred to it was not established that a judgment was a lien on land, and that the existence of a judgment lien being now established by statute the relative positions of the liens cannot be altered by acts such as the levy of execution which add nothing to the lien as it existed from the rendition of the judgment.

While one early decision seems to be in accord with the reported case (see *Metzler*

v. Kilgore, 3 Pen. & W. (Pa.) 249, 23 Am. Dec. 76) it has been held by an otherwise unbroken line of authority that as between several equal judgments the creditor who first issues execution gains a priority with respect to the property levied on thereunder.

United States.—*Rockhill v. Hanna*, 15 How. 189, 14 U. S. (L. ed.) 656, 4 McLean 554, 20 Fed. Cas. No. 11,980. See also *McLean v. Rockey*, 3 McLean 235, 1 West. L. J. 300, 16 Fed. Cas. No. 8,891.

Alabama.—*Bliss v. Watkins*, 16 Ala. 229.

Illinois.—*Smith v. Lind*, 29 Ill. 24; *Gay v. Rainey*, 89 Ill. 221.

Indiana.—*Michaels v. Boyd*, 1 Ind. 259; *Lowry v. Reed*, 89 Ind. 442; *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754; *Hollcraft v. Douglass*, 115 Ind. 139, 17 N. E. 275.

Iowa.—*Cook v. Dillon*, 9 Ia. 407, 74 Am. Dec. 354; *Lippencott v. Wilson*, 40 Ia. 425; *Wilson v. Baker*, 52 Ia. 423, 3 N. W. 481. See also *Kisterson v. Tate*, 94 Ia. 665, 63 N. W. 350, 58 Am. St. Rep. 419.

Kentucky.—See *Million v. Com.* 1 B. Mon. 310, 36 Am. Dec. 580.

Mississippi.—*Burney v. Boyett*, 1 How. 39.

Missouri.—*Bruce v. Vogel*, 38 Mo. 100; *Shirley v. Brown*, 80 Mo. 244. See also *Bradley v. Heffernan*, 156 Mo. 653, 57 S. W. 763.

New Jersey.—See *Rammel v. Watson*, 31 N. J. L. 281; *Bogert v. Lydecker*, 45 N. J. L. 317; *Clement v. Kaighn*, 15 N. J. Eq. 47; *Close v. Close*, 28 N. J. Eq. 472; *Larison v. Dilts*, 32 Atl. 1059.

Ohio.—See *Waymire v. Staley*, 3 Ohio 366; *Sellers v. Corwin*, 5 Ohio 398.

Wisconsin.—See *Knox v. Webster*, 18 Wis. 406, 86 Am. Dec. 779.

Thus in *Cook v. Dillon*, 9 Ia. 407, 74 Am. Dec. 354, the court said: "As between judgment creditors whose liens are of the same date, he who first takes the property in execution has the preference to be first paid out of its proceeds. And this is the rule, whether the property be real or personal estate, or choses in action not subject to actual or manual seizure, and which by our statute are taken and seized only by garnishment." So in *Hollcraft v. Douglass*, 115 Ind. 139, 17 N. E. 275, wherein it appeared that the judgments were rendered by the same court on the same day, the court said: "Neither, therefore, had priority as a lien upon the real estate of the judgment defendants. So far as shown, no execution has been issued upon Douglass' judgments and levied upon the lots in question. The execution on the bank judgment, having been first issued and levied upon the lots, gave to the bank a lien superior to that in favor of the owner of the other judgments." Likewise in *Lowry v. Reed*, 89 Ind. 442, wherein it appeared that judgments against a replevin bail became

liens on his property on the same day the court said that the appellee by his superior diligence in issuing and levying his execution, secured the preference. In *Smith v. Lind*, 29 Ill. 24, the court said: "The plaintiff's execution had gained a priority if his judgment had none, as he had placed it first in the hands of the officer, and had a levy and sale made, and this could not be defeated, or impaired, by another execution." So in *Michaels v. Boyd*, 1 Ind. 259, wherein it appeared that neither of the judgments was a lien on the land at the time of its rendition but that they became liens afterwards at the same time when the judgment debtor acquired the land, the court said that the creditor whose execution was first issued and levied had the preference. Compare as to after-acquired property *Kisterson v. Tate*, 94 Ia. 665, 63 N. W. 350, 58 Am. St. Rep. 419.

In *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754, the court said that where there are different judgments, which are equally liens on the lands of the judgment debtor, the judgment creditor who first issues and levies an execution thereby obtains a lien which is superior to that of the other judgments on which executions are subsequently issued, or on which no executions are issued. The result of this is that the first execution so far subordinates the lien of the other judgments, that the owners of them may redeem from the sale on the first execution, under a statute providing that junior judgment creditors may redeem.

In *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76, it appeared that after the first execution had been returned "no property found" a creditor was diligent in ordering an alias *fi. fa.* to issue and the other judgment holders delayed to do so until later. The court said: "These judgments . . . were rendered at the same term of court at which appellee obtained his judgment, and were therefore liens on this same real estate, and the holders of them were entitled, under the statute, to share pro rata in the proceeds arising from a sale by the sheriff, no matter on which judgment and execution the sale was actually made, all the executions being at the time in the sheriff's hands."

In *Townsend v. Henry*, 26 Miss. 203, it appeared that two persons had each a judgment of the same date against another. Executions were levied at the same time but the sheriff refused to sell without first being indemnified. One judgment creditor refused to give indemnity but on demand it was given by the other. Holding that the latter creditor was entitled to a prior satisfaction of his judgment the court said: "From the whole record, it is manifest that the sale of the property was but the result of the superior dili-

gence, risk, and responsibility of Townsend and Millikin. By their bond, the liability of the sheriff is shifted to them; and they are liable, not only for the amount of the judgment, but for the actual value of the property sold under their execution. It would, under these circumstances, be palpably unjust to permit the parties to share equally the money, when they had refused to divide that responsibility necessary to be assumed to induce efficient action on the part of the officer. Without the indemnity, there would have been no sale; and the defendants in error are only left by this decision in the situation they elected to place themselves."

In *Clafin v. Doggett*, 3 Colo. 413, it was held that where two attaching creditors, recovering their judgments at the same term, are under the statute entitled to share pro rata, the fact that the property attached is sold under execution issued in one case only does not affect the right of the creditor not ordering the execution. The effect of the sale is merely to transfer the attachment lien from the property to the fund. See also *Rawles v. People*, 2 Colo. App. 501, 31 Pac. 941.

THOM

v.

SINCLAIR.

England—House of Lords—March 8, 1917.

[1917] A. C. 127.

Workmen's Compensation Acts — Accident Arising Out of Employment — Fall of Wall on Adjacent Premises.

Where a person working in a shed is injured by the fall thereon of a wall on adjacent premises not belonging to the employer, the accident is one arising out of and in the course of the employment within the workmen's compensation act.

[See note at end of this case.]

[127] Appeal from an interlocutor of the second division of the court of session in Scotland [1916] Sc. Ct. Sess. 85 (the Lord Justice Clerk, Lord Dundas, [128] Lord Salvesen, and Lord Guthrie) recalling a determination of the sheriff-substitute of Aberdeen under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of Lord Parmoor:—

"The appellant, who was a fish-worker in the employment of the respondent, was engaged in packing kippered herrings into boxes

in a shed belonging to the respondent which had brick walls 7 feet high, a roof of corrugated iron, and was lit by obscured windows in the roof.

"Between 10 and 11 on the morning of January 26, 1915, when the appellant was so engaged, a brick wall about 20 feet high, and in the course of erection close to the respondent's property, fell by reason of its own instability on the shed, bringing down the roof and part of the wall, and burying the appellant under the wreckage. The appellant received injuries so serious that she was rendered totally incapable for work.

"The sheriff-substitute found 'that the conditions of the appellant's employment obliged her to work where she was, and exposed her to the risk of the said accident,' and held that the accident to the appellant arose out of and in the course of her employment. The question of law to be determined is whether upon the facts it was competent for the sheriff-substitute to find that the injuries sustained by the appellant were caused by accident arising out of her employment within the meaning of the Workmen's Compensation Act, 1906. The second division of the court of session have answered this question in the negative, and it is against this decision that the appeal is brought before your Lordships."

Knocker and Arthur P. Duffes for appellant.

Alex. Moncrieff, K. C. and T. M. Cooper for respondent.

John Cuthbert, for *T. M. Pole*, solicitor, Leith, Edinburgh, agent for appellant.

R. S. Taylor, Son & Humbert, for *Macpherson & Mackay, S. S. Co.*, Edinburgh, agents for respondent.

[132] **VISCOUNT HALDANE**.—My Lords, Lord Kinnear requests me to say that he concurs in the judgment which I am about to read.

My Lords, in this case the question is whether the appellant, who was employed in packing herrings by the respondent, a fish-curer in Aberdeen, is entitled to recover compensation from him under the workmen's compensation act, 1906, for injury caused by accident. What happened was that a brick wall, about 20 feet high, in course of erection on ground belonging to some one else but contiguous to the curing-shed of the respondent in which the appellant was employed, fell by reason of its instability on the shed. The consequence was that the roof of the shed and part of its wall tumbled in, and the appellant and other workers were buried under fallen material composed mainly of corrugated iron and rafters which belonged to the roof of the shed, and of bricks from the

wall on the adjoining property. The sheriff-substitute of Aberdeen decided that the accident to the appellant arose "out [133] of and in the course of the employment" within the meaning of the statute, and awarded compensation for her injuries. But he stated a case so as to raise a question of law for the opinion of the court. The second division, differing from his view of the law, reversed his decision, and hence this appeal.

It will, I think, be convenient in considering the question of law raised, which is one of construction of the words of the act, to examine it in the first instance apart from authority, and then to see whether the decided cases, looked at in the light so obtained, admit of freedom in interpretation. This is the more expedient because the decided cases, as was established in the course of the able and elaborate arguments which were addressed to your Lordships from both sides of the bar, are not altogether in harmony. Under these circumstances I turn to the words in the statute on which the question depends. It will be observed that the legislature has imposed a double condition for the liability of the employer for injury from accident, a condition that the injury must arise not only in the course of the employment but out of it. It is easy in a case like the present to determine the satisfaction of one of these conditions. The appellant was actually employed when the accident occurred, and she was obviously injured by an accident in the course of the employment. But did the accident arise out of the employment? As to the meaning of these words two contentions have been put forward.

According to one of them the language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this and it is said that no further causal connection need be sought.

I think that this interpretation is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field in the farm on which he was employed. Yet he might just as readily have been struck while walking elsewhere off the farm. A further condition seems to be required, the condition that the injury should have arisen, not merely by reason of presence in a [134] particular spot at a particular time, but because of some special circumstance attending the employment of the workman there. His duty may have occasioned his being near a tree which attracted

the lightning, or being under a roof which for some reason fell in.

According to the other contention a still fuller and more definite causal relation than this is essential. Unless, it is argued, the accident was due to something the man was doing in the course of his employment or was exposed to as a peculiar danger by the nature of his employment, the conditions required by the statute are not fulfilled. This view of its requirements was adopted in the judgments of the second division in the present case, who thought that it derived countenance from expressions used by the master of the rolls in *Craske v. Wigan* [1909] 2 K. B. 635, to which I will refer later. The foundation of the argument is that the mere fact of a man being, by reason of the locality of his employment, in the place where an accident happens to him does not distinguish his case from that of mankind generally if the accident is one, such as a stroke by lightning, which might have happened to him as readily in some other spot as in the one where he was employed. In order that the accident may be truly said to have arisen out of the employment it is argued that the character of the employment must be shown to have actively contributed to its occurrence.

My Lords, there are no doubt many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may therefore be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. [135] The question really turns on the character of the causation through the employment which is required by the words "arising out of." Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty

on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged.

My Lords, the expression "cause" is almost invariably used in a way which lacks precision. In strict logic the cause cannot be pronounced to be less than the sum of the entire conditions. But in ordinary speech and practice we select some one or more out of what is an infinite number of conditions to be treated as the cause. From the practical standpoint of the man in the street the cause of the setting the house on fire was the striking of a match, while from that of the man of science it was the presence of all the conditions which enabled potential to be converted into kinetic energy. On the other hand, for the court which tries a question of arson the cause is the intention of the accused and any deed done which has accomplished this intention. What, then, is the special point of view which the Workmen's Compensation Act of 1906 directs us to take in the practical selection of the circumstances which are to determine whether an event has arisen out of the employment which has amounted to injury by accident within the meaning of the act? I think that the court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established. For the reasons which I assigned in this House in *Trim Joint Dist. School Board of [136] Management v. Kelly* [1914] A. C. 667, Ann. Cas. 1915A 104, reasons which I abstain from repeating, I am of opinion that the governing purpose of the statute makes it as irrelevant to look beyond the immediate cause of the accident for explanations or for remoter causes as it would be in a case arising on a policy of marine insurance, provided that the circumstances bring the immediate cause within the definition. Where the question is one of the construction of an obligation to insure against accident the law looks to the proxima causa of the accident as decisive and does not look behind it. If, therefore, the language in question were to be construed upon principle and apart from authorities I should be prepared to hold that it was satisfied where, as here, it has been established as a

fact that it was as arising out of her employment that the appellant was under the roof by the falling in of which she was injured. Behind the fact that the roof fell we cannot go. The limiting words in the act do not refer to any act of negligence on the part of the employer as to be looked for, but simply to a restriction of the class of accident against which he is to provide insurance. The appellant was injured because she happened at the moment of the accident to be working in the shed where she was employed to work, and I think that, unless authority constrains us to hold the contrary, the act ought to be construed as signifying that an accident such as this comes within the class against which she is insured. Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment not the less if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof.

I turn now to the authorities to see what bearing they have on the construction of the statute. The first observation I must make is that decided cases afford less guidance than usual on such a question. The reason is that the appellate tribunals have consistently shown a proper reluctance to look beyond findings of [137] fact by the arbitrator. This has been particularly so in the course of the decisions on the act in your Lordships' House. *Warner v. Couchman* [1912] A. C. 35, the frost-bite case, is an excellent illustration of this, and in consequence nothing that was said there is authority on which the appellant here can rely. After examining what has been decided in this House I have come to the conclusion that we are free on the present occasion, so far as decisions in this House are concerned, to construe the statute in the sense I have indicated. I wish particularly to say that in my view there is nothing in *Plumb v. Cobden Flour Mills Co.* [1914] A. C. 62, Ann. Cas. 1914B 495, which really touches the point here.

But in the court of session and in the court of appeal in England opinions have occasionally been indicated which apparently militate against this construction, and if there had been anything like a uniform course of decisions to that effect I shall naturally have hesitated before disturbing them. However, on examining the authorities I find that they are far from harmonious. I deal with some of the more important.

Guthrie v. Kinghorn [1913] Sc. Ct. Sess. 1155, was a case in which a carter in charge of a horse and lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building. The second division of the court of session held that the case was not within the act because what had happened was not an ordinary risk of the employment. I doubt whether this was right. But the decision, which proceeded on the narrower interpretation of the statute, was followed by the second division in the present case. It was thought to have proceeded on a principle believed to have been laid down in *Craske v. Wigan* [1909] 2 K. B. 635, 638, where the accident was caused by a cockchafer which flew in at an open window, and so frightened a lady's maid, who was doing needlework for herself, that she threw back her hand and injured her eye. It was held that the mere fact that she was in her employer's house was not enough, for it did not really contribute to a risk which was common to humanity. That may well have been the correct interpretation of the facts. What the master of the rolls said as to its being necessary to say more than that "the accident would not have happened [138] if I had not been engaged in that employment or if I had not been in that particular place," is quite true when referred to the facts with which he was dealing. When he adds that the claimant must say that "the accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some particular danger," that is also quite true as a criticism of the kind of claim that was before him. But I am not sure that the exposition of the act by Buckley L.J. is not unduly abstract, and in consequence apt to mislead in some of its language. He said that the words "out of" point to the origin and cause of the accident, and the words "in the course of" to the time, place, and circumstances under which the accident takes place. In saying this he adopted what he had previously said to the same effect in *Fitzgerald v. Clarke* [1908] 2 K. B. 796, I doubt whether the time, place, and circumstances can properly be so sharply distinguished from other conditions which are described as belonging to the origin and cause as these words suggest. *Mitchinson v. Day* [1913] 1 K. B. 603, is, I think, a more doubtful case. There a carter in charge of a horse and van was murderously assaulted, and it was held that the risk of being attacked by a man who was drunk did not arise reasonably out of the employment. In any view the facts differ from those in the present case, but I am not sure that the interpretation of the act was not too narrow. In *Martin v. Lovibond* [1914] 2 K. B. 227, a brewer's drayman who was driving the dray in the course of

his employment left his dray to get a glass of beer, and in returning was knocked down by a motor car. His dependants were held entitled to claim. The court of appeal held that what had happened arose out of and in the course of his employment. The case shows how far the courts have sometimes gone in the direction of the wider interpretation of which I have spoken. *Wicks v. Dowell* [1905] 2 K. B. 225, 2 Ann. Cas. 732, was the case of a workman employed in unloading coal from a ship who had to stand by the open hatchway through which the coal was being brought up from the hold. He was seized with an epileptic fit while so engaged, and fell into the hold and was injured. *Collins, M. R.* and the court of appeal held that the *causa proxima* of the accident was his necessary nearness to the [139] open hatchway, and, following the principle of the marine insurance cases to which I have already referred, held that, in interpreting the act, this, the *causa proxima*, and not the idiopathic condition of the person injured, was to be looked to.

My Lords, I think that the main current of authority in the court of appeal in this country does not militate against the view taken by *Collins, M.R.*, and in the court of session it seems to me that the weight of authority is in its favour and against what has been argued for by the respondent here. In *Millar v. Refuge Assur. Co.* [1912] Sc. Ct. Sess. 37, a collector for the company had fallen down a stair which he had to use while seeking to collect a premium. Lord President *Dunedin* and Lord *Kinnear* agreed in holding the company liable. The latter said that a risk was specially connected with a man's employment if it was due to the particular place where his employment required him to be at the time. *Adamson v. Anderson* [1913] Sc. Ct. Sess. 1038, is a decision of the first division recognizing this construction, and so, I think, are the decisions in *Hughes v. Bett* [1915] Sc. Ct. Sess. 150, and *Nicol v. Young's Paraffin Light, etc. Oil Co.* [1915] Sc. Ct. Sess. 439, *Avery v. White* [1916] Sc. Ct. Sess. 209, proceeds on the same principle, and so, as it appears to me, does the earlier case of *M'Neice v. Singer Sewing Mach. Co.* [1911] Sc. Ct. Sess. 12.

My Lords, it is not necessary to proceed further in the examination of the authorities. For those to which I have referred show that there is no such uniform exposition of this very recent statute as precludes this House from feeling itself free, if it should be so disposed, to give effect to the construction which I am suggesting. For this construction decided cases disclose indeed a great deal of support.

In the result I move your Lordships that the judgment appealed from be reversed and

that of the sheriff-substitute restored, and that the appellant should have such costs in this House and in the courts below as are consistent with her appearance here in forma pauperis.

LORD SHAW OF DUNFERMLINE.—My Lords, the question which arises in this case is somewhat narrow, but I have had little [140] hesitation in agreeing with your Lordships upon it. There have been many cases dealing with the consideration of those words in the workmen's compensation act, namely, "arising out of the employment." The criticism is, of course, correct that those words must be taken to signify something more in the sense of limitation than "in the course of" the employment, and that both of those expressions of condition must be satisfied before the act can apply. The decided cases are numerous, and the dicta therein cannot always be reconciled; but a further consideration of the language of the statute itself—to which language one must go as the absolute test of liability—has confirmed my view that the decision pronounced by the learned sheriff-substitute was correct.

On January 26, 1915, the appellant, who was then a fish-worker in the employment of the respondent, a fish-curer, was engaged in packing herrings into boxes. The work had to be performed in a brick shed 7 feet high, roofed with corrugated iron and lit by obscure windows in the roof. The appellant was accordingly obliged, as part of the conditions of her service, to be within the shed when engaged in her work and to be there at the time when the accident occurred. The accident itself was caused by reason of the collapse of a brick wall 20 feet high. This was being erected on an adjacent building, and it fell upon the roof of the shed where the appellant was working, bringing down the roof and part of the working shed, so that the appellant and other workers were buried under the wreckage; three of them were killed and six others, of whom the appellant was one, were injured.

The learned sheriff-substitute found that the conditions of the appellant's employment "obliged her to work where she was and exposed her to the risk of said accident." As a statement of fact, this of course cannot be denied; but the respondent's argument before this House is that no liability is imposed under the statute, because such a situation is not covered by the words "arising out of the employment" when these words are properly construed. The main argument relied upon—the argument being successful in the second division of the court of session—was that the words of the act "arising out of the employment" should be construed to mean "arising out of the nature of the employ-

ment." And a further construction is maintained to be correct, namely, [141] that the words not only mean "the nature of the employment" in general, but the nature of the injured servant's employment. For myself I cannot so narrow the statutory words, either in the general or in the particular sense.

The test applied by the learned master of the rolls, Lord Cozens-Hardy, in the case of *Craske* [1909] 2 K. B. 635, 638, and referred to by the learned judges as an inviolable rule is that "it is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.'" This dictum has been given effect to in its full extent by the learned judges in the court below. The Lord Justice-Clerk observes "it seems to me that the accident must have arisen because of the nature of the employment in which the injured person was engaged at the time." Lord Dundas puts the point with much clearness in application to the present case when he says "it seems to me impossible to say that it was because the poor woman was a fish-curer that the accident befell her." And the other learned Lords decide upon the same ground.

My Lords, with much respect to the learned judges, I am unable to agree in such a limitation upon the words of the Act of Parliament. When a miner is engaged to hew coal, and in the course of his work brings down upon himself a mass of superincumbent material, it is plain that such a case would fall within the limited construction just cited. But such a case is comparatively rare. I ask myself what would result under the statute in those infinitely more numerous cases of accident to underground workers, the specific nature of whose employment was, for instance, not in actual excavation, but merely in the haulage of the coal or the lighting or watching of the pit? Accidents arise, not from anything in the nature of the particular miner's work, but possibly from causes, say, subsidence, fires, or escapes of gas, taking their origin it may be miles away, communicating along the strata of the earth and in no way causally connected with the particular workman's job. I think, accordingly, that the statute is not satisfied by asking the question as to whether [142] the nature of the employment of the injured person had any causal relation to the accident, because it is clear that in very many instances the accident arose out of the employment as such, apart from the particular nature of the serv-

ice which the injured workman had to render. When, in fact, the statute uses the words "arising out of the employment" it refers, in the first place at least, not alone to the individual's particular service.

There may be causes of danger arising to all employees, which causes are not confined to the individual situation, but are general and applicable to the employment as a whole. It may be that that employment is underground, with all the risks attached to underground work. It may be in the air or on the sea, with a special exposure to the dangers relative to such elements; or it may be on the surface of the earth, in surroundings which are those of peril. In all such cases it is quite possible to figure injuries by accident in the course of and arising out of the employment, which are totally disconnected with the nature of the employment upon which the workman was generally or for the moment engaged, but which, without any doubt, sprang from the employment in the sense that it was on account of the obligations or conditions thereof, and on that account alone, that he incurred the danger. In short, my view of the statute is that the expression "arising out of the employment" is not confined to the mere "nature of the employment." The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute "arising out of the employment" apply. If the peril which he encountered was not an added peril produced by the workman himself, as in the cases of *Plumb* [1914] A. C. 62, *Ann. Cas.* 1914B 495, and *Barnes* [1912] A. C. 44, in this House, then a case for compensation under the statute appears to arise.

It is said in the present case that the injury by accident arose not because of the nature of the employment, which was packing herrings; and if decisions and dicta, such as those above cited, to the effect that the statutory words "the employment" can only [143] be satisfied by "the nature of the employment," this is conclusive. But upon the other hand it is quite plain that it was part of the conditions of the appellant's labour and part of the obligations which she undertook as a servant of the respondent that she should at the time of the accident occupy this particular place of work which turned out to be a place of special danger. Her service there and not anywhere else brought her into the position of being subjected to this peril. It was not a peril which might fall upon the public at large, such as the severity of the weather, as in *Warner v. Couchman* [1912]

A. C. 35, and *Karemaker v. Steamship Corsican*, 4 B. W. C. C. 295, but it was a peril attached to the particular location in which by the obligation of service the appellant was placed. In my humble opinion this latter case falls within the act, upon a sound construction of its terms.

I am glad to be fortified in this view by a large body of decided cases. In *Morgan v. Steamship Zenaida*, 2 B. W. C. C. 19, where a seaman painting the outside of his ship in Mexican waters, and receiving from his position at work both the force of the direct and the reflected rays of the sun, underwent sunstroke, he was held entitled to recover under the act. In *Davies v. Gillespie*, 105 L. T. N. S. 494, 5 B. W. C. C. 64—also a case of sunstroke—liability attached because the workman was placed by the conditions of his work within a zone of special danger, namely, for some hours on a blackened steel deck under the blazing sun of Hayti. In *Millar v. Refuge Assur. Co.* [1912] Sc. Ct. Sess. 37, an assurance company's collector, engaged in collecting premiums, was injured in a stair to which he had by the obligations of his service to go; in *M'Neice v. Singer Sewing Mach. Co.* [1911] Sc. Ct. Sess. 12, an accident overtook a salesman who was cycling in the course of his duty in a public street. In both of these cases liability was held to attach to the employer, and for the same reason, namely, that it was part of the obligations of the service that the workman was placed within the zone of special danger. I venture to give my particular adhesion to the opinion delivered by my noble and learned friend Lord Kinnear in the former of these cases. In *Andrew v. Failsforth Industrial* [144] Soc. [1904] 2 K. B. 32 (a lightning case) the position in which the man was doing the work and the place he had necessarily to occupy were a position and a place of special danger, and so the act was held to apply. In *Pierce v. Provident Clothing, etc. Co.* [1911] 1 K. B. 997—a street accident to a collector on a bicycle—the Scotch case of *M'Neice* [1911] Sc. Ct. Sess. 12, just referred to, was followed. In *Coyle v. Watson* [1915] A. C. 1, this House, reversing the second division of the court of session, held that, a workman having been by the conditions of his service placed in a position of danger from extreme chill, causing pneumonia and death, there was liability under the act. In *Martin v. Lovibond* [1914] 2 K. B. 227, the same decision was given as in the analogous street cases of *M'Neice* and *Pierce*.

My Lords, the cases above cited, nine in number, are in truth all what might be termed "location" cases, and, although there is much variety of expression by the learned judges, I think that they form a body of authority in support of the construction of

the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations, or incidents of the employment by which the workman was brought within the zone of special danger that injury by accident was pronounced to have arisen out of the employment.

In conclusion, my Lords, I desire to say that the case of *Guthrie* [1913] Sc. Ct. Sess. 1155, is inconsistent with these decisions and with the present judgment and cannot be supported.

LORD PARMOOR (*after stating the facts*).—My Lords, apart from authority it appears to me to be reasonably clear, and in accordance with the ordinary natural meaning of the language of the statute to hold, that if the conditions of his employment oblige a workman to work in a particular building or position which exposes him at the time and on the occasion of the accident to the injury for which compensation is claimed, then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed, such accident arises out of his employment, [145] as incident, not to the character of the work, but to the dangers and risks of the particular building or position in which by the conditions of his employment he is obliged to work. The workmen's compensation act cannotes no distinction between such dangers and risks and dangers and risks incident to the plant required in the employment, or to the particular machine at which the workman may be engaged at the time of the accident. In either case the workman is subjected to an accident which arises out of his employment. Mr. Moncrieff, in his able argument, suggested a distinction between inherent defects in a building and wreckage caused by the outside carelessness of some third party. This consideration appears to me to have no weight under the insurance principle of the workmen's compensation act, in which compensation is not dependent in any way on the conduct or negligence of the employer. It was further argued that all mankind were subject to the risk of a falling wall in the proximity of new buildings, and that this consideration negated the suggestion that the accident arose out of the employment, although the sheriff-substitute had found that the appellant was obliged, under the conditions of her employment, to work in this particular shed, which was wrecked by the fall of an adjoining wall.

I am unable to assent to this argument. The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment. Any stranger

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walking along a road in a mine may be exposed to the risk of an accidental fall of coal, but this does not affect the claim of a miner who in the course of his duty, or to obtain access to his work, is unfortunately injured by such fall. It is, no doubt, not sufficient merely to allege that the accident could not have happened if the appellant had not been in the particular shed, but this is not the case made on behalf of the respondent, and would be inconsistent with the findings of fact by the sheriff-substitute.

A large number of cases were cited to their Lordships during the argument, but it is not necessary to refer to them further after the exhaustive review in the opinion of the noble lord Viscount Haldane, and I propose only to refer to the cases on which the Lord Justice-Clerk relies in support of his opinion.

[146] In *Craske v. Wigan* [1909] 2 K. B. 635, 638, it was held that it was not enough for the applicant to say "The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." I do not think that the present appeal necessitates any departure from this principle. The master of the rolls then adds the applicant must go further and say "The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger." The words "nature of the employment" do not occur in this part of the statute, but it is unnecessary to raise any matter of mere verbal criticism. In my opinion, if the conditions of the workman's employment oblige him to work in a particular building and thereby expose him to the risk of the accident which has happened, this may be described as a peculiar danger to which from the nature of the employment the workman is exposed. I think, however, that it is preferable to adopt the actual words of the statute in testing their applicability to the facts of a particular case.

In the case of *Plumb v. Cobden Flour Mills Co.* [1914] A. C. 62, 68, Ann. Cas. 1914B 495, decided in this House, Lord Dunedin says, "A risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself," and adds, "Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind, and not accentuated by the incidents of the employment." A risk may be accentuated by the incidents of the employment when the conditions of the employment

oblige the work to be carried on in a particular building which exposes the workman to the risk of the accident which in fact has occurred. An example of the application of this principle is found in the case of *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 34, which is approved in the opinion of Lord Dunedin.

Collins M.R. says: "Though it" (the accident) "may not be connected with, or have any relation to, the work the man was doing, yet, if in point of fact the position in which the man was doing the work, and the place he must necessarily occupy while doing the [147] work are a position and a place of danger which caused the accident, it may fairly be said that it arose out of the employment, not because of the work, but because of the position." Cf. *Martin v. Lovibond* [1914] 2 K. B. 227. The only other case decided in this House to which the Lord Justice-Clerk refers is *Trim Joint Dist. School Board of Management v. Kelly* [1914] A. C. 667, Ann. Cas. 1915A 104, but this is not a case which can be quoted to support the contention of the respondent.

My Lords, in my opinion, the appeal should be allowed with costs.

Interlocutor of the second division of the court of session in Scotland reversed and interlocutor of the sheriff-substitute restored. The respondent to pay the costs of the action in the Court of Session and also the costs of the appeal to this House, such last-mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

NOTE.

The reported case is one of a number wherein the British court of last resort has to some extent clarified the meaning of the phrase "arising out of and in the course of the employment," as used to limit the accidents falling within the scope of a workmen's compensation act. That phrase, originating in the English act, has been adopted quite generally in the various American acts. In the reported case it is held that an injury to a person working in a shed caused by the crushing in of the roof by the fall of a wall on adjacent premises arises out of and in the course of the employment. The earlier cases interpreting the phrase under consideration are collated in the notes to *Parker v. Hambrook*, Ann. Cas. 1913C 1; *Plumb v. Cobden Flour Mills Co.* Ann. Cas. 1914B 495, and *Parker v. Ship Black Rock*, Ann. Cas. 1916B 1290.

**JOHN STEWART AND SON (1912),
LIMITED**

v.

LONGHURST.

England—House of Lords—March 23, 1917.

[1917] A. C. 249.

Workmen's Compensation Acts — Accident Arising Out of Employment — Returning from Work.

Where a workman on a vessel leaving at the end of a day's work crosses a private dock which he is permitted to use for that purpose and in so doing falls off the dock and is drowned, the accident is one arising out of and in the course of the employment within the meaning of a workmen's compensation act.

[See note at end of this case.]

[249] Appeal from an order of the Court of Appeal (Lord Cozens-Hardy M. R., Pickford L. J., and Warrington L. J.) reversing an award of the county court judge of Middlesex under the Workmen's Compensation Act, 1906 [1916] 2 K. B. 803.

The facts sufficiently appear from the judgment of the Lord Chancellor.

Hollis Walker, K. C. and W. H. Duckworth for appellants.

Shakespeare for respondent.

Carpenters, solicitors for appellants.

Pattinson & Brewer, solicitors for respondent.

[251] LORD FINLAY, L. C.—My Lords, this is an appeal against the decision of the Court of Appeal allowing the claim for compensation under the Workmen's Compensation Act, 1906, in respect of the death of the respondent's husband, Herbert Longhurst.

The appellants are engineers and ship repairers, and were engaged in effecting repairs to the barge *Forward*, which was lying in the South-West India Docks, and the deceased, who was a carpenter, was in their employment on this work. The docks are under the control of the Port of London Authority: they are not open to the public for traffic, but the appellants and their workmen had the permission of the Authority to pass through the docks on their way to and from the barge on which they were at work. The deceased left the barge on November 9, 1915, a few minutes before 8 P. M. In the darkness he missed his way while passing along the quay, fell into the lock and was drowned. The county court judge disallowed the claim holding that when the deceased got off the barge on to the quay the relation-

ship of master and servant ceased as completely as if he had got off the barge on to the high road. On appeal by the respondent to the Court of Appeal the judgment of the county court judge was reversed, and it was directed that there should be an award of 300*l.* to be apportioned among the dependants of the deceased. [The amount of compensation was agreed by the parties.]

The employers appealed to this House and ask that the decision of the county court judge in their favour should be restored.

[252] It was contended in support of the appeal that the finding of the county court judge in a case of this nature should not be interfered with. It is, however, quite plain that the finding of the county court judge was not on fact but on law. He considered that, as a matter of law, the accident did not occur in the course of the employment, on the ground that, in his view, the employment ceased when the deceased reached the quay. In my opinion this view is erroneous. It has been established by a series of decisions that employment for the purposes of the Workmen's Compensation Act may in many cases be regarded as existing before the actual operations of the workman have begun, and that it may continue to exist after the actual work has ceased; for instance, if a workman is employed in a factory the employment normally would begin as soon as the workman has entered the premises for the purpose of his work and continue until he leaves them after the actual work is done.

There was a decision in your Lordships' House on March 16, 1905, in the case of *Cross v. Catterall* [Unreported] which has been repeatedly cited, but has not yet been reported. The case and appendix and the transcript of the judgments are in the library of your Lordships' House. In that case the colliery in which the man was engaged was approached by a bridge built by the employers over a canal for the convenience of their workmen, and the workman fell into the canal from the bridge while going to his work. Lord Halsbury said in giving his opinion: "I do not agree that his employment only begins at the moment he strikes the coal with his pick. I think the man was really in the employment the moment he reached the bridge. He was doing something on his master's behalf; that is to say, he was on his way to the colliery for the purpose of working."

The decision in that case established that the employment *may* begin as soon as the workman has reached his employer's premises or the means of access thereto. And in the same way the employment *may* be considered as continuing until the workman has left his employer's premises.

The case would be different if the workman was at the time of the accident on the public highway on his way to or from his work. His employment cannot be considered as having begun if he is [253] merely in transit in the public street or road to or from his employer's premises. Of course, if his employment were of a kind which is pursued on the highway he might be in the course of his employment while there, but I am speaking of cases in which he is in the public way merely in exercise of the public right of passage there on his way to or from his employer's.

The present case belongs to a class of cases where the thing on which the workman is employed is lying in a dock or other open space to which he obtains access only for the purposes of his work. Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there on his way to and from his work, and he *may* be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies. Such passage is within the contemplation of both parties to the contract as necessarily incidental to it.

The case of *Cook v. Ship "Montreal"* 6 B. W. C. C. 220, was much relied on by the appellants, but seems to me to have no application. That was the case of a sailor who had been paid off on board his ship at the end of the voyage, and from the ship got on to a "dolphin," or floating stage, connected with the quay by fixed steps and fell into the water between the "dolphin" and the quay. According to the view taken of the facts in that case, he had reached the shore before the accident took place, and on that view of the facts it was held that his employment had terminated. It may be that a different view might have been taken of the facts as regards the termination of the workman's transit from the ship to the shore, but that is immaterial. On the view taken of the facts the case has no bearing on the present one. In the subsequent case of *Webber v. Wansborough Paper Co.* [1913] 6 B. W. C. C. 583; on appeal [1915] A. C. 51, the Court of Appeal, apparently in deference to *Cook v. Ship "Montreal,"* decided against the claim, but their decision was reversed in the House of Lords on the ground that the ladder from which the accident took place formed the ordinary means of access to the ship, so that the accident was held to take place in the course of the employment.

There is, however, a decision in the Court of Appeal in *Holness v.* [254] *Makay* [1899] 2 Q. B. 319, which appears to me to be in conflict with the view which I have above indicated. In that case contractors

were ballasting a siding which could be reached only by going for some distance through the premises of the railway company. On a foggy morning a workman, while proceeding to his work, got on to the main line and was run over and killed. *A. L. Smith, L. J.* and *Vaughan Williams, L. J.* held that the accident did not arise in the course of the employment, the former pointing out that there was an entire absence of control by the employer over the premises where the accident occurred. *Romer, L. J.* differed from his colleagues, and in the course of his judgment made the following observations [1899] 2 Q. B. 328.

"The deceased man was in the employment of the appellants, who had contracted with the railway company to do certain work at a spot substantially surrounded by lines of railway, and the access to which was not unattended with danger. By their contract with the railway company the appellants had to provide access for their workmen at their own cost, and accordingly they directed the men that they must cross the line to get to their work. The men were bound by the necessities of their employment and as part of its duties and dangers to cross the lines and to have, through the appellants, a special right or licence from the railway company to cross them; that special right or licence being given by implication. When the workmen began to cross the lines, they were acting under this right or licence obtained for them by the appellants; they were doing something which they were specially bound to do under their contract of employment, and which they could not lawfully do but for that contract. Under these circumstances I think that the employment in this case substantially began when the deceased began to act upon the implied right or licence to cross the lines. I am of opinion, therefore, that the county court judge was justified in holding that the accident occurred in the course of the deceased's employment. I think also that his finding was correct as to the circumstances under which the accident occurred. The deceased had been told to go to the Waterloo gate; it was his nearer and more convenient way to get to his work, and it was in evidence that he was never known to use the other gate. On the facts, I should come to the conclusion that he did go by the Waterloo gate, [255] and that he lost his way owing to the fog, and that the accident arose directly by reason of his being obliged to cross the dangerous zone of lines in order to get to his work. I think, therefore, that the deceased man at the time of the accident acting in the course of his employment, and that the accident arose out of his employment. The cases show that the Court is not bound by a hard

and fast line to consider that a workman is not acting in the course of his employment until he actually begins the work which he has to do. To my mind the present case is like that of a workman whose work lies in a particular part of a large factory, and who in order to get to it has to go through the rest of the factory and meets with an accident while so going. It is said that there is a distinction because all the parts of the factory are under the control of the same employer; but I consider that case analogous to the present; for the railway company had given the contractor the right to bring his men to their work across the lines, and the contractor had in a sense a right of control over the lines by virtue of which alone the men used the lines. In principle, therefore, I think that this case cannot be distinguished from that of the factory. This case is not like that of an injury received on the public highway by a man while going to work, when of course the employer, having nothing directly to do with the highway or its user by the men, would not be liable. Looking at the facts, I think that the very able judgment of the county court judge was correct, and that this appeal ought to be dismissed."

If the judgment of the majority of the Court of Appeal in that case were right, it would seem to me to follow that the appeal in the present case should succeed. In my opinion, however, the judgment of the majority was erroneous, and *Romer, L. J.*, in the passage which I have quoted correctly states the principles of law upon the subject. The principles, as stated by him, are, in my judgment, as applicable to the present case as they were to that with which he was dealing, and in my opinion this appeal should be dismissed with costs.

LORD LOREBUEN.—My Lords, I agree, and will only add that in every case the question for the arbitrator is whether the facts come within the words of the Act and that most of the decisions [256] are instances of the application of those words. They do not qualify the Act itself, and there is always a danger of arguing from analogy from the facts of one case to the facts of another, or of treating the opinions of judges which are true in regard to the case before them as though they were placing a gloss on the statute. Judicial opinions on such a matter illuminate the statute but do not displace it.

LORD DUNEDIN.—My Lords, I think the judgment of the Court of Appeal was right.

The question is, Did the accident occur to the deceased man in the course of his employment? It is obvious that the word "employment" does not postulate that the work-

man must be actually working. No general rule can be laid down as to when employment begins and ceases, for the simple reason that each case arises in accordance with its own circumstances. Sometimes it will be easy to decide either for or against the workman. No one, for instance, would doubt if a collier was injured in the cage on his way to the face at which he was to work that the injury arose in the course of his employment, though the face might be a mile away from the pit bottom; nor would any one doubt that if the same man were starting from his house in the village and was injured while in the street before he approached the precincts of the colliery the opposite result would be arrived at. There are, however, many cases which are, so to speak, near the line, and the decisions in such cases can only be sued as more or less illuminating examples of the application of the phrase "course of the employment" to divers circumstances—they can never be held as laying down absolute rules. I have thought it necessary to say this because of the stress that was laid in the argument upon the question of "control" of the premises where the accident occurred. "Control" was sought to be raised to the position of affording an absolute test whether employment had begun or ceased. I venture to go so far as to say that control of the place where an accident happens, so far from being conclusive, is neither here nor there except in so far as it may represent a fact tending to show that the accident arose in the course of the employment. The cases of *Gilmour v. Dorman* [1911] 4 B. W. C. C. 279, in England and *Hendry v. United Collieries* [1910] Sc. Ct. Sess. 709, 3 B. W. C. C. 567, in Scotland are [257] both illustrations of positions where there was control on the part of the employer of the locus of the accident and yet no liability. These cases were, in my opinion, rightly decided. I am therefore bound to say as I do, with great deference to a most learned judge who has specially illumined this branch of the law, that I think that proposition (b) in the judgment of the Master of the Rolls is too absolutely put. It is not a universal rule, though the authorities he refers to are cases where the control of the premises afforded, with the other circumstances of the case, the necessary evidence.

As regards the facts of this case, I cannot do better than borrow the words of *Pickford, L. J.*: "The workman in this case in order to get to the actual place of work had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment."

I ought perhaps to mention the case of Cook [1913] W. C. & Ins. Rep. 206, 6 B. W. C. C. 220, as great reliance was placed on it by the appellants. To my mind it presents no difficulty. It was explained by Lord Hal-dane in Webber [1915] A. C. 51. In a word, the seaman had been paid and his service was entirely finished when he got away from the ship and got to land; and the "dolphin" was held equivalent to land.

My only difficulty in the case has arisen from the fact that we are arriving at a different result from that arrived at by the learned arbitrator, and had he arrived at it by determining a pure question of fact I do not think his judgment could have been disturbed. But on reading his judgment I feel that he misdirected himself in law, for I read his judgment as turning on the point that employment must cease when actual work has ceased and the workman has passed on the premises which do not belong to his employer.

LORD ATKINSON.—My Lords, I concur. I think this is a perfectly plain and simple case. The only question for discussion is whether the workman was in the course of his employment when he fell into the dock. To answer that question one must find out from his contract of employment what he was employed to do: what rights [258] this contract conferred upon him, what obligations it imposed. It unquestionably conferred upon him the right, if permitted by the dock company, to traverse the premises of that company from the dock gate to the place where the barge he was working on lay. It imposed upon him an obligation to do so. He had no right or obligation to do this save under and by virtue of his contract of employment. In my view he was as much employed by his employer to get to the barge as he was to work upon it. Each of these remarks applies equally to the return journey from the barge to the dock gates when he knocked off work upon the barge. In argument some distinction was attempted to be drawn between the case where the workman has to traverse the private property of his employer to get to his work, and that where to do so he has to traverse the private property of another with the consent of that other. I do not think that is a sound distinction. When a man walks along the public streets to get to his work he is doing something which he has a perfect right to do irrespective altogether of his employment. The right does not spring from his employment at all. It belongs to him as a member of the public. I am clearly of opinion that this unfortunate accident happened to the workman in the course of his employ, and I do not think any of the au-

thorities cited is inconsistent with this conclusion. I am therefore of opinion that the decision appealed from was right and should be affirmed, and this appeal be dismissed with costs.

LORD BUCKMASTER.—My Lords, in this case there is no dispute as to the facts; indeed, there was no conflict of testimony before the county court judge calling for decision. Had it been otherwise, his determination of the result of rival evidence would, in the absence of extreme and unusual circumstances, be accepted as final. In my opinion, however, the learned county court judge has fallen into error in his endeavor to obtain from decided cases a fixed standard of measurement by which to test the meaning of the words in the statute "in the course of" and "arising out of" employment. Some of the reported cases, which have been fully referred to by the Lord Chancellor, appear to me to have made the same mistake and to have [259] attempted to define a fixed boundary dividing the cases that are within the statute from those that are without. This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase.

In the present instance the respondent was employed by the appellants to do work upon a barge which they had contracted to repair. The barge was situated on certain premises, namely, the South-West India Dock, under the exclusive control of the Port of London Authority. Access to and egress from these premises could only be obtained by the dock gate. In the circumstances of this case it was only as a workman employed to work upon the barge that the deceased was entitled to enter or remain upon the premises.

The accident that cost him his life occurred on his leaving the barge and while he was lawfully on the dock premises on his way out.

These circumstances are, in my opinion, sufficient to show that it was in the course of his employment that he met with his death. That the accident arose out of the employment has not been disputed.

I think, therefore, that the Court of Appeal was right and that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

NOTE.

The reported case illustrates aptly the doctrine that the words "course of the employment" as used in a workmen's compen-

sation act do not limit the scope of the act to accidents occurring while the workman is actually engaged in his employment. It is held that a workman who after finishing his day's work on a barge started to go home in the usual way over a private dock which he and his fellow workmen were permitted to use for that purpose, and in so doing fell from the dock and was drowned, was killed by an accident arising out of and in the course of his employment, and his widow was permitted to recover compensation from the employer. Whether an accident occurring while going to or returning from work or during a temporary interruption of employment arises out of and in the course of the employment is discussed in the notes to *Parker v. Hambrook*, Ann. Cas. 1913C 1; *Plumb v. Cobden Flour Mills Co.* Ann. Cas. 1914B 495, and *Parker v. Ship Black Rock*, Ann. Cas. 1916B 1290.

LANCASHIRE AND YORKSHIRE RAILWAY COMPANY

v.

HIGHLEY.

England—House of Lords—March 23, 1917.

[1917] A. C. 352.

Workmen's Compensation Acts — Accident Arising Out of Employment — Temporary Interruption of Employment.

An accident to a railroad employee does not arise out of and in the course of his employment within the meaning of a workmen's compensation act where, while waiting at a station for a train to take him to his place of work, he goes out to get water for a meal, and, being free to choose his route, attempts to pass under the trucks of a standing train, by a movement of which he is killed.

[See note at end of this case.]

[353] Appeal from a decision of the Court of Appeal (Lord Cozens-Hardy, M.R., Pickford, L.J., and Warrington, L.J.) reversing an award made under the Workmen's Compensation Act, 1906, by the county court judge of Yorkshire in favour of the employers (the appellants).

The facts and the material parts of the judgment of the county court judge are set out in the judgment of the Lord Chancellor, and the facts are sufficiently summarized for the purposes of the argument in the head-note.

Holman Gregory, K. C. and *J. P. Perks* for appellants.

W. Shakespeare, Edgar Dale and Edgar Latch for respondent.

Woodcock, Ryland & Parker, for *A. deC. Parmiter*, Manchester, solicitors for appellants.

Burton, Yeates & Hart, for *Hart, Jackson & Sons, Barrow-in-Burness*, solicitors for respondent.

[355] LORD FINLAY, L.C.—My Lords, this case arises upon a claim for compensation under the Workmen's Compensation Act made by the respondent in respect of the death of her husband.

The claim was disallowed by the county court judge, but he added that if he had been able to make an award he would have given 175*l.*, and on appeal the Court of Appeal allowed the claim, directing an award for that amount.

From this decision the railway company now appeal to your Lordships' House, asking that the decision of the county court judge in their favour should be restored.

The case turns upon the question whether the accident arose out of and in the course of the employment of the deceased.

The deceased, George Thomas Highley, was employed by the appellants as a labourer on their railway. Early on the morning of [356] August 12, 1915, he "checked on" at Sowerby Bridge, near Halifax, and was told by his foreman that he was to go to Goole to work there. He went with his foreman and other workmen by passenger train as far as Wakefield, where they were to change trains for Goole, and had to wait there for an hour and a half. The men had food with them, but in order to get hot water to prepare their breakfast they crossed from the platform on the north side of the Wakefield Station over the lines of railway between them and a mess-room on the south side, as shown in the plan. At the mess-room the man in charge was in the habit of supplying hot water to any servant of the company who applied for it. On arriving at the branch Goole line (coloured pink on the plan), to the south of the main line, the men found a train there which they supposed to be "dead," as, owing to the convexity of the line, the engine was not visible to them. They proceeded to pass under the couplings of the carriages, and the deceased was in the act of doing so when the train moved on and he was killed on the spot. The men could have got round to the mess-room from the down platform on which they were, without crossing any line of railway, if they had gone by a bridge over the line some little distance to the west, which would have taken them to the Calder Vale Road, but this would

have taken some five or six minutes. They could also have avoided crossing the main line by making use of the subway shown in the plan, but this also would have been longer than the route which they took.

The foreman, Baker, stated in his evidence as follows, according to the judge's notes: "8—8:30, usual breakfast time. Usually we took our breakfast so as to go by 7:25 to Goole. Customary for us to go to this mess-room. We crossed metals—force of habit. Never warned not to take it. Have taken it since. Standing goods train there often, and we often pass through. No prohibition and no warning."

Cross-examined: "Could have got there without crossing metals at all; five or six minutes by the safe route. We had one and a half hours at Wakefield this morning. We went to east end of down platform and then crossed nine lines and turned to right to mess. There is a subway, and if we used that we would have only two lines to cross and the goods train would not have been in our way. We could have rounded the train, the end being only five or six trucks [357] off, but we went under. We chose the way we did for our own convenience. We knew we could go what way we thought fit."

Under these circumstances the county court judge held that the accident did not arise out of the employment. The most material part of his judgment is as follows: "Mr. Lawn, for the applicant, argued that the taking of his meals in the course of his working hours was part of the duty he owed to his employers. I thought this argument quite untenable, having regard to *Parker v. Ship Black Rock* [1916] A. C. 725, Ann. Cas. 1916B 1290, and several other cases. There was no 'contractual obligation here' (to use Lord Sumner's words), 'no duty owed to the employer' (Lord Parker), that the deceased should be where he was in order to get food or for any other purpose. He chose to go that way for purposes of his own, and in doing so to run an additional and quite unnecessary risk in going between the waggons. Hence I found the accident did not arise out of his employment. Mr. Perks, for the respondents, put in certain rules of the company prohibiting what the deceased did here. But in view of Baker's evidence that they had always crossed this way without warning or prohibition 'by force of habit,' I could not hold the prohibition in the rules to be a 'genuine prohibition' as these words are employed by Lord Loreburn in *Barnes v. Nunnery Colliery Co.*" [1912] A. C. 44.

There is a certain amount of obscurity about this passage, but I think upon the whole that the learned county court judge must be taken as basing his judgment on two separate grounds: First, that the deceased,

while going to make preparations for his breakfast, was engaged on his own business and not his master's, and second, that by going between the waggons as he did he ran an additional and quite unnecessary risk, and that for this reason the accident did not arise out of his employment. I regard the later passage with regard to the company's rules as relating merely to the fact that the deceased had walked upon the rails in infraction of rule 26 of the rules and regulations of the railway company, and as having no relation to his conduct in passing under the waggons.

The Court of Appeal reversed this decision. They held that getting their breakfast was covered by the men's employment, and on this they were, I think, right. They further held that crossing [358] the line under the trucks did not prevent the accident so occasioned from arising out of the employment, and in doing so appear to have been chiefly influenced by the decision of the Court of Appeal in *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 545, 546, 547. In that case the workman was injured while crossing a line of railway which was covered with trucks, the train having been set in motion while the plaintiff was crossing by getting under the buffers of the trucks. The county court judge had found that the accident did not arise out of and in the course of the employment, but his decision was reversed by the Court of Appeal. The ground of their decision was most clearly stated by Farwell, L.J. and by Kennedy, L.J. The former said speaking of the judgment of the county court judge: "He also found that the way the man went on the day of the accident was the usual one for him to go, and the usual one for other men to go. I understand that to mean that, notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route." And the latter (Kennedy, L.J.) says: "No doubt one does look, as Farwell, L.J. has said, with some closeness to the question when you have, as you have here, a way which at the time had trucks across it; but I read the finding of the learned judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself authorized by them to take, during the eighteen months he had been there."

The decision in *Gane's Case* [1909] 2 K. B. 539, 545, 546, 547, proceeded, therefore, entirely upon the finding that passage across a line of railway by going under the trucks which were upon it was recognized and authorized by the railway company. In the present case the Master of the Rolls, after re-

ferring to *Gane's Case* [1909] 2 K. B. 539, 545, 546, 547, said: "It seems to me that the principle in that case really covers this, and its facts are almost identical with it." Pickford, L.J., says: "I agree that the appeal should be allowed on the authority of *Gane v. Norton Hill Colliery Co.*" [1909] 2 K. B. 539, 545, 546, 547. Warrington, L.J., says: "So also with regard to the standing trucks upon the line. It seems to me that we cannot consistently with the case of *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 545, 546, 547, hold that that fact would make the crossing of that place outside the sphere of the man's employment." [359] And again: "If I am right in the way in which I have worked out the position, that the man was within the sphere of his employment in going to the mess-room, and in going to the mess-room across some lines of railway, and even between some standing trucks, then, even if in doing so he incurred an unnecessary risk (that is to say, if he might have gone some other way which would have been safer), that might be an improper way of doing that which was in the sphere of his employment, but it does not take it outside that sphere."

My Lords, a finding of fact in one case cannot be a safe guide as to a finding of fact in another case. *Gane's Case* [1909] 2 K. B. 539, proceeded solely upon the ground that what the man did was authorized by the company. Whether that finding was right or wrong is for the present purpose immaterial. I feel myself unable to draw any such inference from the facts in the present case, and I read the judgment of the county court judge as containing a finding that the deceased was not acting in the course of his employment in crossing under the trucks, and, therefore, that the accident did not arise out of it. It is on that ground I think his judgment right.

No doubt the distinction between acts done in the course of the employment but in an improper way and acts done outside the course of the employment altogether may be a fine one. This is illustrated by the difference of opinion in this House in the case of *Herbert v. Fox* [1916] 1 A. C. 405, Ann. Cas. 1916D 578. In the present case the facts seem to me to put it under the second of these two categories, and I am certainly not prepared to reverse the finding of the county court judge, which is, as I read it, to the effect that it was outside the course of employment.

It has been often pointed out that it is highly undesirable that findings of fact by the county court judge in workmen's compensation cases should be overruled in Courts of appeal. I would refer especially to what was said on this subject in the case of *Baker*

v. Bradford, 9 B. W. C. C. 436, in your Lordships' House.

For these reasons, in my opinion, the decision in the Court of Appeal should be reversed and the decision of the county court judge restored.

[360] VISCOUNT HALDANE.—My Lords, I think that in order to satisfy the words "Injury by accident arising out of and in the course of his employment" the workman, or those claiming on his account, must show that two conditions have been satisfied. The injury by accident must have occurred as something which would not have occurred but for the circumstance of the employment and as having been something due to it, the employment, and it must further have occurred during its currency. As to the second of these conditions, there appears to me to be no room for doubt that it was fulfilled in the case before us. The real question which arises relates to the first condition.

As to this it must be borne in mind that the county court judge has expressly found that it was not fulfilled, and that a Court of appeal ought not to review his finding unless it is clear either that there was no evidence to support it, or that the finding was on the face of it erroneous in law.

My Lords, I think that there were facts proved on which the county court judge could find that to pass between the trucks of the goods train was not an act which the directions given to the men employed required them to do, and the only question open is whether it was an act which they were entitled in law to treat as one within their discretion in the execution of their duty. It was not found that the servants of the company had any general authority to walk over the line. There was indeed a rule, rule 26, which appears to have forbidden it excepting where some duty actually required it to be done. But it was also found that the company's servants had been in the habit of disregarding this rule, and that it was not enforced. Although, therefore, it might have been negligent to act as the workman did in the case before us, that would not in itself prevent the respondent from recovering. But none the less I think the existence of the rule was relevant evidence on the question whether what happened was due to the circumstances of the employment, and could be taken into account by an arbitrator in deciding whether the injury by accident was due to a risk assumed independently of the employment and outside it, as distinguished from being an injury which was the result of a mere act of negligence in executing the employment. In doing what he did in crossing the line by going under the trucks without ascertaining [361] whether the train

[1917] A. C. 352.

might not begin to move, was the workman arrogating to himself a title to do something which he was neither engaged nor entitled to perform? This is one of the tests prescribed in the judgment of Lord Dunedin in *Plumb v. Cobden Flour Mills Co.* [1914] A. C. 62, Ann. Cas. 1914B 495, and I think it is the test which should be applied in the present case. It explains the meaning of the phrase which is often used, "added peril," as meaning a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself.

There are grounds for criticism of the language in which the county court judge applied the law as thus laid down. He seems to have thought that the taking of his meals was not within the scope of the employment of the workman. But when he goes on to say that there was no duty on him "to be where he was in order to get food or for any other purpose" he does seem to find that the nature of the employment was not the cause of his going between the trucks. And I do not think that there was any evidence on which he could have found otherwise. The workman could easily have got the hot water he wanted without taking the altogether unnecessary peril of passing between the trucks, and I can discern no evidence which would justify a finding that this peril was other than an independent one which he added quite superfluously and entirely of his own initiative. It was accordingly not a case in which, as the Court of Appeal seems to have thought, he was doing what was within the sphere of his employment merely in a wrong way. In *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, an authority on which the Court of Appeal relied, the workman was indeed injured when trying to pass under a train of trucks. But there the way was taken was the usual and most convenient one, and it was habitually taken by the workmen generally with the knowledge and consent of their employers. Here there is no evidence which establishes a real analogy to that case. Although I think that the county court judge might have given more precise reasons for his finding, I am of opinion that there was evidence to warrant it, and that it discloses on its face no error in law. The Court of Appeal ought therefore to have accepted it.

[362] LORD DUNEDIN.—My Lords, the learned county court judge, as arbitrator, found that the accident did not arise out of the employment. It is said that this finding is in the circumstances not a finding of fact, but a conclusion reached upon a wrong view of the law. Much of the argument was accordingly directed to the determination of the precise import of two sentences of his

judgment. After citing *Parker v. Ship Black Rock* [1915] A. C. 725, Ann. Cas. 1916B 1290, as negating the proposition that a workman when he goes for material for his dinner is fulfilling a duty to his employers (it is unnecessary here to examine what that case actually did determine), he goes on to say: "There was no contractual obligation here, no duty owed to the employer that he should be where he was in order to get food, or for any other purpose. He chose to go that way for purposes of his own, and in doing so to run an additional and unnecessary risk in going between the waggons. Hence I find that the accident did not arise out of the employment."

Now the first remark that must be made on this is that if "purposes of his own" meant purposes which under the conditions of his employment he was neither compelled to do nor was contemplated as doing, then there was no actual need to say more. I can best make my meaning clear by citing the case of *Reed v. Great Western R. Co.* [1909] A. C. 31, 33, where Lord Macnaghten expressed himself as follows: "Here the evidence shows" (the engine-driver had left his engine and gone across the lines to get a book from another engine-driver) "that it was for a purpose of his own, and not in the execution of his duty or in the interest of his employers, that the injured man exposed himself to the risk which caused his death. . . . At the time when the accident happened the man was about his own business, not about the business of his employers. For the moment he had put himself outside the area of protection which the Legislature has carefully marked out." Nevertheless, the learned judge, in saying more, may quite justifiably have given an additional reason for his judgment. If so, the second part of the sentence may legitimately mean that the man by his own unnecessary action incurred an added peril foreign to the ordinary perils of his employment, and that the accident accordingly did not arise out of the employment. In other words, suppose the judgment had run thus: The case fails [363] in two particulars, either of which failures is fatal. I find as a fact that the man was engaged at the time on purpose of his own unconnected with his employment. I also find that the peril he encountered was not a peril which can be regarded as a possible incident of his employment, but was one of his own creation by his own ultraneous action. Such a judgment might have been attacked on the ground that there was no evidence which could reasonably support the findings, but it would, I apprehend, have been quite unimpeachable in point of law.

The respondent's counsel, however, argues, and I think in this he has to a great extent the support of the learned judges of the ap-

peal Court, that the real meaning of the second sentence is that in going the way he did the workman did not go out of the sphere of his employment, but only made his employment more dangerous by his own carelessness.

My Lords, if I had to decide, I should prefer the former construction, but in the view I take it is not necessary to determine which of these views is correct in order to decide this case. For the most that can be made of the second sentence for the respondent is that it does not actually find that the workman had, by adding a peril to his employment, so gone beyond his employment that the accident did not arise out of his employment. It is true that counsel argued that the reading of the sentence as he read it amounted to a finding, or rather amounted to an inferred finding, that the workman was in the course of his employment, and that the accident arose out of it. That appears to me to be a hopeless contention, and if upheld, would, I think, astonish no one so much as the learned county court judge. Leaving, therefore, as undetermined the true meaning of the second sentence, the case stands upon its own facts as proved and the inferences to be drawn therefrom. That, indeed, is the way that the Court of Appeal took it, and they then decided it upon the view that it was ruled by *Gane's Case* [1909] 2 K. B. 539, which bound them. *Gane's Case* [1909] 2 K. B. 539, is not binding upon your Lordships, though it has been cited with seeming approval in at least one case in this House. *Gane's Case* [1909] 2 K. B. 539, however, when properly understood, was, in my view, rightly decided; but, with deference to the learned judges of the Court of Appeal, I do not think they have fully appreciated the [364] state of facts on which the soundness of the decision in *Gane's Case* [1909] 2 K. B. 539, 546, 547, entirely depends. They have treated it as if it settled that where a man left work by going over a siding and crawling under a waggon, and it was shown that many men had done so before, the risk entailed by crawling under the waggon was a risk of the employment. *Gane's Case* [1909] 2 K. B. 539, 546, 547, did not decide that. It depended entirely on the view as to the facts that the method of leaving the works by a particular route which entailed crossing the siding and crawling under trucks, if any were standing there, was not only the usual method but was recognized as such by the employers. Farwell, L. J., says: "Notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route:" and Kennedy, L. J. says: "I read the finding of the learned judge clearly to mean that the applicant in going by this way, with or without trucks

on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself authorized by them to take, during the eighteen months he had been there." This is right, for if an employer, well knowing the facts, acquiesces in the employment being conducted in a certain way, even though that way involves what may be called an added peril, then really he is content that that peril should be held as an ordinary peril of the employment. But if it was not for that finding the judgment in the case of *Gane* [1909] 2 K. B. 539, 546, 547, could not, in my opinion, be supported. Whether the finding was justified on the evidence is a matter with which we have nothing to do, but it is on that finding and that finding alone, that the law of the case depends. I should like to add that, though a decision of a Court of higher or equal authority binds another Court as to propositions of law, it cannot bind them as to the findings in fact. No doubt if the facts of two cases are so similar as to be practically identical the second Court will hesitate long before it comes to a different conclusion. Nevertheless, the facts of two different cases cannot, *ex ratura rei*, be actually identical, and it is never incumbent on a Court to import the finding of fact in one case into another.

As to the law on the subject of added perils, I cannot add to what was said in the case of *Plumb* [1914] A. C. 62, *Ann. Cas.* 1914B 495, as to which I would like to point out that, although it is contained in a judgment which bears my name, [365] that was really the considered judgment of the House, and does not therefore at all rest on my individual authority. It is with insistence laid down in that judgment that the question is always whether the case falls within the words of the Act, and that "added peril" is a test only, though a very convenient test in certain circumstances. I refer particularly to the closing words of the judgment.

Now here there is not a shred of evidence bringing home to the appellants an acquiescence in the man choosing as a regular practice to crawl under trucks instead of going round them. That there was acquiescence in the practice of going to the mess-house, and of doing so by crossing the lines, I do not doubt. Neither do I doubt that the getting of hot water to prepare his breakfast was a legitimate incident of the man's employment, so that the facts here would not warrant a finding of the same sort which formed the basis of judgment in *Reed's Case* [1909] A. C. 31. I hold that the man was entitled to go to the mess-house and entitled to cross lines to get there. But then it must be remembered that this is not the case of a defined road or track. The lines might be

crossed at any point. They were free to be crossed on this occasion if the man had deviated five truck lengths to the right. Instead of that he ducked under the couplings of a set of trucks, not in a proper siding or lye, but on the regular goods running line, without taking the trouble to see if there was an engine attached. In doing so, in my judgment, he clearly added a peril to his employment to which the employer had given no sanction, with the result that the ensuing accident was not an accident arising out of his employment. I think the appeal should be allowed and the judgment of the county court judge restored.

LORD ATKINSON.—My Lords, I concur. The learned Lords Justices appear to me to have based their judgments in this case on the supposed authority of the case of *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539. I arrive at that conclusion from reading the following passages from their judgments. The Master of the Rolls, in commenting on the latter case, said: "It seems to me that the principle in that case really covers this, and its facts are almost identical with it." Pickford, L.J., said: "Now, all I can say is, that it seems to me that that state of things is governed by the case of *Gane v. [366] Norton Hill Colliery Co.* [1909] 2 K. B. 539; and on that authority, assuming the going to the mess-room at all to be within the man's employment, I think the learned county court judge was wrong. I agree that the appeal should be allowed on the authority of *Gane v. Norton Hill Colliery Co.*" [1909] 2 K. B. 539. Warrington, L.J., expressed himself to a like effect. With all respect to the learned Lords Justices, I am quite unable to accept their view on this point. I think the facts of *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, are quite different from those of the present case, as I shall presently endeavour to show, and that the cases are therefore distinguishable. If they are not distinguishable, then, speaking for myself, I have no hesitation in saying that I think the case of *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, was not rightly decided. I cannot accept the principle that, if an employer should give his workman, employed by the day, permission merely to leave his place of work and traverse his employer's close to get to a place fit for him to eat his dinner or take his breakfast, the workman would be doing something within the sphere of his employment in scrambling over or crawling under a machine of the employer's which he might find in the close, especially when he was not confined to the use of any particular path in the close and could with ease quickly walk round the machine. If permission was given to the deceased and his fellows to cross the

line at all from the down platform to the mess-house, no precise line of route was in any way defined or indicated either by the points of departure and arrival or in any other way. The evidence shows that the men were free to choose their own particular route, to deviate, for instance, from the line they actually took at the start, so as to go round the tail of the train only five waggons away from the site of the accident. They must have seen this train, and with the opportunity of walking round it easily available they deliberately, and for all purposes unnecessarily, chose to advance upon the train of trucks itself and pass under it. In my view the mere permission to traverse a close not on any marked path or by any prescribed route does not imply a permission to climb over or scramble under a machine which may happen to lie across the route chosen arbitrarily by the person receiving the permission. Such an act if done by a workman would not, I think, amount to the negligent doing of an act within the scope of his employment according to the [367] principle of the case of *Blair v. Chilton* [1915] 8 B. W. C. C. 324, but would be an act done altogether outside the sphere of that employment, according to the principle laid down with such clearness by Farwell, L.J., in this very case of *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 545. He there said: "All those things he (i.e., the workman) is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment. I would qualify this by saying that he must make a reasonable user of the facilities and rights which are given to him in this way. I am led to make that observation by Mr. Simon's argument with regard to the swing bridge. It is obvious to my mind that it cannot be said that because by the terms of a man's employment he was entitled to use a way out of the works over a swing bridge, he is entitled to jump across when the swing bridge is open for the purpose of some boat or barge passing through. It would not be a question of negligence or misconduct, or anything of the sort, but it would not be within the terms of his employment that he should use the swing bridge when open at all. It may well be within the terms of the employment to use a track when it is properly and fairly open, but not to use it when it is not." He then proceeds to deal with the finding of the county court judge, and said: "He does not rely on the fact that the trucks were there as shewing that the path was not open to the man to use if he thought fit, but he has found that the trucks and engines were put upon the line, and that the trucks would reach up to the screen where the coal was put on. He also

found that the way the man went on the day of the accident was the usual one for him to go and the usual one for other men to go. I understand that to mean that, notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route." Kennedy, L.J., says [1909] 2 K. B. 547: "No doubt one does look, as Farwell, L. J., has said, with some closeness to the question when you have, as you have here, a way which at the time had trucks across it; but I read the finding of the learned judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself [368] authorized by them to take, during the eighteen months he had been there. On this particular occasion, it appears that two men immediately in front of him had passed over in safety, doing the same thing he did; therefore, if there was any inference to be drawn, it would be this—that somebody carelessly, although he ought to have known that the employers recognized this as the daily method of going from the works used by a large number of men, chose to set the trucks in motion when this unfortunate man was in a position to cross, and when he had a right to say 'This is the way which my employers recognize, and their servants ought to know that it is being used by us.' But, be that as it may, I am quite sure, if there had been anything which you might call a deviation from the natural course of the servant's employment in going as he did, the learned judge would have found it; and, what is more, I have no doubt evidence would have been adduced by the other side to shew that it was so." The facts of the case are not very fully stated. It is found that the trucks on this occasion went up to the screens where the coal was put on. How far they extended down the line, or whether they could have been readily out-flanked or gone round, as it were, does not appear, or whether or not the route the men were authorized to take was direct from the foot of the stairs to the other side of the line. All the county court judge found upon this point was that route No. (3) "was down some steps to the rails crossed by the bridge and across the rails on the level." From these remarks of the learned Lords Justices, Farwell and Kennedy, I think it is clear that they thought the respondents' workmen, including the applicant, were authorized by their employers not only to cross the rails at the particular point, but that when they should find their progress obstructed by trucks standing upon the rails they were also authorized to get through the line of trucks by passing under the buffers as the applicant

had attempted to do. If that was the conclusion to which the Court of Appeal came as to the method of crossing expressly or impliedly authorized by the applicant's employers, then it appears to me that there is not anything to quarrel with in their decision; but if they meant to decide that, wherever permission or authority is given by an employer to his workmen merely to cross a line of railway, that necessarily impliedly authorizes them to pass under or over any trucks they may, when [369] crossing, find in front of them, even when they can readily deviate and walk round those trucks, then in my view the decision was erroneous, and I refuse to follow it.

Now if one contrasts the findings of the county court judge in this last case with the findings in the present case one will be struck at once with their dissimilarity. In the former the learned county court judge found that the way the applicant went on the day of the accident was the usual one for him to go, the usual way for the men who lived in the other direction to go, and the only way which he and they went except on Saturdays. He then adds: "I am driven to the conclusion, that being so, that it was with the knowledge of the respondents that the men went that way, and that the respondents never suggested to the men that they should not go that way." In the latter the only findings at which the learned judge arrived are: (1.) That the prohibition in the rules was not a genuine prohibition within the meaning of Lord Loreburn's judgment in *Barnes v. Nunnery Colliery Co.* [1912] A. C. 44; (2.) that the accident did not arise out of the workman's employment. There is no finding by him, such as there was by the county court judge in the former case, to the effect that it was the usual practice for men in the position of the deceased and the other employees of the respondents who desire to reach the mess-house to cross these rails where the deceased attempted to cross them; no finding to the effect that it was the usual practice of such persons, when in the act of crossing they happened to find before them a train of trucks they could readily have walked round, to pass under the train instead of going round it; nor yet a finding to the effect that these practices, if they existed, were ever known to or consented to by the respondents or their agents. No doubt it is well established, where the relevant and material facts in such a case as this are either found or not disputed, that the question of whether the accident arose out of the workman's employment is a question of law, not of fact: *Herbert v. Fox* [1916] 1 A. C. 405. *Ann. Cas. 1916D 578*; *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 544. In the absence of all findings such as above men-

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tioned it is necessary to examine the evidence somewhat in detail to discover what material or relevant facts were taken as undisputed. I do not know [370] whether I am correct in thinking that in the Court of Appeal it was rather assumed that if once it was shown that the deceased had the right to cross to the mess-house there was an end of the case, and that in doing what he did he was acting within the sphere of his employment—negligently, no doubt, but still within the sphere of his employment. If it was so assumed, then, with all respect, I think the assumption was erroneous. It might well be that the deceased had permission to go across the line to the mess-house, and yet, on the sound principle laid down by Farwell, L.J., in *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 544, that the act done by him amounted to an unreasonable use of the facilities and rights given to him, and was therefore an act outside the sphere of his employment and not merely an act within that sphere done negligently. Of course, if the deceased was entitled in crossing the line to choose a route which brought him up against a train of trucks which he could readily have avoided, and then to pass under them, as he attempted to do, his omission to ascertain whether the train was a live or dead train before he attempted to pass would amount to negligence.

The notes of the learned judge on the user of this privilege are rather condensed. Baker, who, like the deceased, was not a member of the Wakefield staff, was the chief witness for the applicant. Both of these men were rather in the position of travellers who had missed their train and had one and a half hours to wait for the succeeding train to their destination. In his examination-in-chief Baker said: "It was customary for us to go to this mess-house. We crossed metals—force of habit: Never warned not to take it (i.e. the route) across. There were goods trains there often, and we passed through—no prohibition and no warning." Hirst, a goods train guard, says trains often stand on the granary siding and men pass through often. He does not say whether these men were members of the Wakefield staff or not. It is clear from this evidence, and was not disputed, that, as I have already pointed out, there was no marked or defined route across the line which men took on their way to the mess-house—no particular point from which they should start or at which they should arrive. They might, consistently with this evidence, have crossed the line where they chose, no limits being [371] indicated. This, therefore, is the kind of thing which must be held to have been expressly or impliedly authorized by the respondents in order to sustain the applicant's case. It is

a thing wholly different in kind from passing over an obstacle which so blocks the way and arrests the privileged wayfarer's progress that he must either stand still and give up the attempt to pass or surmount the obstacle; so that even if it be assumed that the deceased had the right to go to the mess-house, which has not been found, his act in attempting to pass as he did was, I think, outside his sphere of employment, and accordingly the accident by which he lost his life did not arise out of his employment. I do not think that the case of *Brice v. Lloyd* [1909] 2 K. B. 804, 809, referred to by the Master of the Rolls, is in conflict with this conclusion. The decision in that case did not mean that a workman is at liberty to take his meals on any part of the employer's premises, however dangerous or unsafe the place may be. And Farwell, L.J., repeated what he had said in *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, in reference to the swing bridge and proceeded to say: "It is now well settled that the word 'employment' in the Act is not to be confined to actual work. In my opinion it extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises and to take his meals on the premises. But he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden. . . . In the present case, this place being a dangerous place was obviously forbidden to the men, not in the sense of express prohibition, but in the sense that it would not occur to any one that it would be allowed." It was accordingly held that the act which brought about the accident was outside the scope of the deceased's employment, and that the accident therefore did not arise out of that employment. It will be observed that the learned Lord Justice put unreasonable acts and forbidden acts on the same level, each lying outside the sphere of the workman's employment. Well, if all the privilege given to the workman in the present case was merely to cross the rails to the mess-house, nothing could well be more unreasonable than the mode in which he attempted to exercise it. [372] It is exactly on a par with jumping over the gap made by the opening of the swing gate.

The appeal should, I think, be allowed, with costs here and below.

LORD SUMNER.—My Lords, whether in any given case an accident arises on the one hand out of the injured person's employment, although he has conducted himself in it carelessly or improperly, or, on the other hand, arises not out of his employment but out of the fact that he has gone outside the

scope of it, or has added to it some extraneous peril of his own making, or has temporarily suspended it while he pursues some excursus of his own, or has quitted it altogether, are all questions which, often as they arise, are susceptible of different answers by different minds, and are always questions of some nicety. So it is here. I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts. There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury.

My Lords, on the facts of this case, uncontradicted, accepted on all hands and found by the learned county court judge, the deceased was killed because he was passing between two of the trucks of a train at the moment when the engine shunted it. I accept that it was in the course of his employment that he should have been preparing to get his breakfast at the time in question, that he should [373] have been going to the mess-room for hot water for that purpose, and that, in order to get the hot water, he should have been traversing a number of pairs of rails, one of which was and others of which might have been in use by moving or movable trains. All the same, the question is how came he between the trucks when the train was put in motion, not how came he upon the part of the station yard occupied by rails.

The plan which was put in evidence before the county court judge shows that there was no fixed track across the railway lines leading from the platform at which the deceased alighted to the mess-room, nor was there any evidence that the workmen were left free to shape their own course across the rails. There was no evidence of any practice known to the employers for workmen to pass be-

tween the trucks of a train, whenever and wherever they encountered them, in order to save the trouble of going round the end of it. I think that the present case is within the principles applied in the cases of *Hendry* [1910] Sc. Ct. Sess. 709, and of *M'Laren*, [1911] Sc. Ct. Sess. 1075, and is distinguishable from that of *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, the basis of which I take to be that in that case there was found to have been a track or route between given points by which the workmen, to the knowledge of their employers, were accustomed to leave work when so minded, although it was occasionally obstructed by a line of waggons drawn across it.

My Lords, the reasons which the learned county court judge gives for his award in the present case show sufficiently that he found the deceased and his companions to have been making a route for themselves in circumstances not only of additional but of obvious and unnecessary peril rather than following a recognized route, which, by being tolerated in spite of the printed regulations, had come within the ambit of the employment. I do not, therefore, think it necessary to consider whether his reasoning was in all respects right, though, as it seems to me, he pressed the observations quoted from the case of the steamship *Black Rock* [1915] A. C. 725, Ann. Cas. 1916B 1290, to purposes for which they were not intended.

With great respect to the judgments of the Court of Appeal in a matter where opposite opinions may well be entertained, I think [374] that on the uncontradicted evidence, accepted, as I take it to have been, by the judge of fact, the present is a case of an accident arising not out of but outside of the employment, since at the time of his death the workman was in no sense doing that which was part of or fell within his employment (whether he was or was not acting with care therein), but was for his own purpose, namely, the convenience of the moment, thoughtlessly pursuing a course which fell outside of his employment. In that act unhappily he met his death. The proposition before the Court of Appeal was that the learned county court judge had arrived at his award on the facts either in a manner which showed that his conclusion had been controlled by some error of law, or on a supposition of the existence of evidence, of which in fact there was none that a judicial tribunal could reasonably give effect to. I do not think this proposition was made out, and therefore the appeal should succeed.

Order of the Court of Appeal reversed and award of the county court judge restored. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

NOTE.

While, as appears from the preceding case (John Stewart & Son v. Longhurst, reported ante, at page 196) and the notes hereinafter referred to, an accident to a workman may arise out of and in the course of his employment though he is at the time not actually working thereat, that doctrine is necessarily confined within narrow limits. In the reported case the accident for which compensation was sought is held not to have arisen in the course of the employment, it appearing that railroad laborers being transported to work were waiting at a station where they changed cars, and that one of them, on his way to get hot water for their breakfast, unnecessarily attempted to pass under a waiting train and was killed. The earlier cases discussing what is an accident arising out of or in the course of employment are collected in the notes to Parker v. Hambrook, Ann. Cas. 1913C 1; Plumb v. Cobden Flour Mills Co. Ann. Cas. 1914B 495, and Parker v. Ship Black Rock, Ann. Cas. 1916B 1290.

MAHLSTEDT

v.

IDEAL LIGHTING COMPANY.

Illinois Supreme Court—December 22, 1915.

271 Ill. 154; 110 N. E. 795.

Negligence — Liability of Manufacturer — Manufacturer Installing Plant.

Evidence in an action for death from explosion of gas from a gasoline lighting system in deceased's house held to warrant a finding that, as between deceased and defendant, the manufacturer, defendant, and not a local agency, sold and undertook to install the system, and so could be held liable in that capacity, and not merely as manufacturer.

[See Ann. Cas. 1914A 877; 111 Am. St. Rep. 701.]

Witnesses — Credibility — Interest in Event.

The testimony of a witness for plaintiff cannot be disregarded because another action for the same injury is pending against him, and he is interested in having the responsibility placed on defendant; but the weight of his testimony is for the jury.

Gas — Injury from Explosion — Contributory Negligence.

Whether deceased, killed by explosion of gas from a gasoline lighting system sold to him and installed in his house by defendant, was guilty of contributory negligence in not

Ann. Cas. 1917D—14.

covering the carburetor, and in lighting a match in the cellar, is held to be, under the evidence, a question for the jury.

Negligence — Contributory Negligence — As Question of Law or Fact.

The question of contributory negligence becomes one of law for the reviewing court only when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the injured person, and could have been avoided by the use of reasonable precautions.

Same.

Where reasonable men, acting within the limits prescribed by law, could reach different conclusions from the admitted or established facts, questions of contributory negligence are for the jury.

Appeal and Error — Scope of Review — Weight of Testimony.

The supreme court, in passing on a motion to take a case from the jury, either at the close of plaintiff's evidence or of all the evidence, can only consider whether there is any evidence in the record fairly tending to support plaintiff's cause of action, and it is never a question of the weight of the testimony; all controverted questions of fact being settled by the verdict and the judgment of the appellate court.

Death by Wrongful Act — Evidence — Property Left by Deceased.

While, in an action for the death of one who left a widow, but no children, it would be improper to show what property she received from him, admission of evidence of the amount of property he left, it not appearing what disposition of it he made by his will, or what debts he left, cannot be said to have been prejudicial to defendant.

Witnesses — Competency — Husband and Wife — Effect of Death of One Spouse.

Under the proviso to Evidence Act (Hurd's Rev. St. 1913, c. 51), § 5, that nothing in the section shall permit husband or wife to testify to any admissions or conversations of the other, whether made by one to the other or to a third person, except in causes between the husband and wife, which is but a recognition and re-enactment of the common law, the wife cannot, even after death of her husband, and in an action between others in which she has no interest, testify to a conversation between her husband and others.

[See note at end of this case.]

Same.

The common-law rule that a wife is not competent to testify to any fact or transaction, knowledge of which was obtained by means of the marriage relation, does not prevent her after his death testifying in behalf of his estate to facts relating to him coming to her knowledge independently of him, and not because of any confidential relation between them.

[See note at end of this case.]

Expert Witnesses — Qualification — Discretion of Trial Court.

The question of the qualification of an expert rests largely in the discretion of the

trial court, depending somewhat on the subject and the particular witness.

[See Ann. Cas. 1912D 817.]

Subjects of Expert Testimony — Gasolene Explosion.

It requiring peculiar skill and judgment by those who had experience in such matters to state how the gasolene, by the explosion of which plaintiff's testate was killed, might have got into his cellar, it was proper to allow experts to give their judgment thereon.

Evidence — In Action for Explosion — Booklet Issued by Manufacturer of Gas Machine.

A booklet issued by defendant relative to its gasolene lighting systems, one of which it sold to deceased and installed in his house, is, in an action for his death by explosion of gasolene therefrom, properly admitted in evidence, he having been seen reading it, and its statements being such as to tend to lead him to think that precautionary measures were unnecessary in the operation of the system.

Error to Appellate Court, Second District.

Action by Jennie Mahlstedt, executrix, plaintiff, against Ideal Lighting Company, defendant. Judgment for plaintiff in Circuit Court, Rock Island county: OLMSTED, Judge. Judgment affirmed by Appellate Court. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

Searle & Marshall for plaintiff in error.
George W. Wood for defendant in error.

[156] CARTER, J.—This action was brought by defendant in error in the circuit court of Rock Island county to recover from plaintiff in error damages for the death of her husband, which, it was alleged, was caused by the negligence of plaintiff in error. On a trial before a jury a verdict was returned in favor of defendant in error and judgment entered thereon. On appeal to the Appellate Court that judgment was affirmed. The cause has been brought here on petition for certiorari.

Daniel Mahlstedt, at the time of his death and for several years previous, resided with his wife on his farm about fifteen miles east of the city of Rock Island. He was injured on May 21, 1911, by an explosion of gas or vapor in his farmhouse, and afterwards died of blood poisoning caused by those injuries. Plaintiff in error is a corporation located in Davenport, Iowa, engaged in the manufacture and sale, among other things, of gasoline lighting and heating systems. Whiteside Bros., located in Joslin, Rock Island [157] county, Illinois, a few miles from the Mahlstedt farm, were engaged in the general implement business, and while conducting that business had handled and installed a

number of the plaintiff in error's lighting systems or machines. These systems appear to have been sold to a large extent in the country districts, being installed in homes where illuminating gas or electricity was not available. H. S. Busier was a traveling salesman for plaintiff in error. A short time before the accident to Mahlstedt, Busier called at the store of Whiteside Bros. and suggested that one of them go out with him to see if they could not work up some business, and George Whiteside accordingly drove around the adjoining country in his automobile with Busier, calling on Mahlstedt among others. The evidence is not very complete as to what took place during this visit, as Mahlstedt and Busier are both dead. As a result, however, of this trip Mahlstedt agreed to purchase one of the lighting systems, and drove from his farm to plaintiff in error's factory at Davenport, Iowa, May 18, 1911, and took the machine home with him in his wagon, and also took with him some gasoline from the Standard Oil Company. There is a controversy as to whether Whiteside Bros. or plaintiff in error was to install the machine. We think it is clear, however, that Whiteside Bros. were to furnish the necessary materials and do the work for the installation of the system and that plaintiff in error was to send an expert to look over the work and start the plant. The work was commenced by George Whiteside and a helper on Friday, May 19, and continued on Saturday. Busier came out Saturday morning from Davenport and remained all day on the farm, taking part in the installation of the system. The plant consisted of a carburetor, a blower, the apparatus that ran the blower, and various connecting pipes. The carburetor was placed in a hole dug in the ground outside of the building and was intended to be covered with earth. It contained two compartments, in one of which gasoline was placed. By means [158] of a heavy weight and fan the blower forced air through the gasoline in said carburetor, forming a gasoline vapor, which was then led to the house through a pipe and distributed through various pipes to the stove and gas-burners. By Saturday evening, May 20, the lighting system was sufficiently installed so that it could be started and used for house purposes, but the carburetor, placed in a hole in the yard, twenty or thirty feet from the house, had not yet been covered by dirt. The lighting system was operated that evening at Busier's suggestion, he himself starting it, and Mrs. Mahlstedt used it for getting supper for all the people there. There was something more to be done to finish the installation, including the covering of the carburetor with earth, and Busier and Whiteside left with the understanding that Whiteside should return Monday and complete the

work. The next day, Sunday, May 21, was bright and hot. The Mahlstedts used the plant for lighting and cooking purposes during the day, but towards night Mrs. Mahlstedt was unable to light a burner. She so informed her husband, and he went into the basement to investigate, and, lighting a match to see what was the matter, was fatally injured by an explosion of gas, as was also a young girl who assisted Mrs. Mahlstedt with her work.

Counsel for plaintiff in error insist that the machine was sold to Mahlstedt by Whiteside Bros., who were to instal it, and therefore plaintiff in error cannot be held liable for any defect in installation; that the evidence shows no defect in the machine that would make said company liable, in selling goods to a retailer, for an injury to one purchasing from said retailer. On May 18, when Mahlstedt obtained this lighting system from plaintiff in error at its factory, in accordance with an arrangement made the day Busier and George Whiteside called at Mahlstedt's farm, plaintiff in error sent Whiteside Bros. an invoice of the items they had delivered to Mahlstedt, stating, among other things, "Sold to Daniel Mahlstedt and charged to Whiteside [159] Bros.," and a letter accompanying said invoice, saying, "We trust you will lose no time in installing the outfit for our customer." There is some controversy as to what conversation took place at the factory at the time this lighting outfit was delivered to Mahlstedt, one of the company's employees stating that Mahlstedt said that Whiteside Bros. were to install it, while other witnesses testified that no such statement was made by Mahlstedt. Mahlstedt at that time may not have known with certainty whether he was buying from plaintiff in error or Whiteside Bros., because he asked whom he should pay, and was told by one of the company's officers that it made no difference,—that he could pay either, as he desired. The invoice sent to Whiteside Bros. was subject to a commission and discount. As between plaintiff in error and Whiteside Bros. it was treated as a sale by the latter, and the purpose of plaintiff in error in furnishing its agent, Busier, to solicit trade was doubtless to create a demand for its goods, which were to be handled in that locality by Whiteside Bros. in their business as retail merchants. Beyond question, however, the weight of the evidence shows that Busier sold the lighting system and tends to show that he was in charge when it was installed. We shall have occasion to refer to this later, however, in discussing the questions involved herein. Manifestly, on this record the jury were warranted in finding that as between Mahlstedt and plaintiff in error it was plaintiff in error, and not Whiteside Bros., that sold and under-

took to install the system, and therefore that plaintiff in error could be held liable in that capacity and not merely as manufacturer. Instructions were given for plaintiff in error which correctly stated the law as to the right to recover from plaintiff in error if the jury believed that the sale was made by Whiteside Bros. and not by plaintiff in error. This being so, it is unnecessary to consider or discuss the numerous authorities cited by plaintiff in error that there can be no recovery against it as manufacturer of this lighting system.

[160] Defendant in error insists that the air-pipe between the carburetor and the blower was not properly installed; that it was not erected of sufficient height so that the weight of the column of gasoline standing in it would overcome the vapor pressure before the column of gasoline would reach the top of the pipe, and that on this account the gasoline was forced through the pipe and blower into the cellar and thus made possible the explosion; that the carburetor was improperly placed and improperly left uncovered. Whatever may be the fact as to the placing of the pipes properly or improperly, without doubt the cause of the accident was the effect of the sun's heat on the gasoline in the carburetor on Sunday, May 21, and had the carburetor been covered before it was used the accident would not have happened. George Whiteside testified that when he left Saturday night he told Mahlstedt that the carburetor must be covered before using it, to prevent the heating of the gasoline, but that Busier, who was taking part in the conversation, said it didn't make much difference. Whiteside further stated that he could not say that he told Mahlstedt that there would be any danger in using the plant if the carburetor was not covered.

Counsel for plaintiff in error earnestly contend that Busier was not in charge of the installation of the plant. Whiteside testified that Busier took entire charge, and at least one other witness and employee of Mahlstedt testified to the same effect, and most of the evidence admitted by the court tends strongly to support the same conclusion. It is true that Whiteside testified that Busier said to him that he had never helped install a machine before and that Whiteside admitted that he had assisted in installing two or three, but it is also true that Busier had been the active agent in selling this machine, and the evidence, as we have stated, tends strongly to support the conclusion that he was in charge of installing it. After the accident Mahlstedt asked a neighbor to telephone Busier to come and see about the [161] explosion. It is not shown in the record that Mahlstedt knew that Busier was not an expert in installing machines or that he heard

Busier state that he had never seen a machine installed before. There can be no question from the evidence that Busier himself started the plant Saturday night before he left and told Mrs. Mahlstedt that she could use it for cooking her supper.

Counsel for plaintiff in error argued in this connection that the testimony of George Whiteside should not be relied on as to whether plaintiff in error or Whiteside Bros. sold the lighting system to Mahlstedt. It appears from the record that there is a suit pending against Whiteside Bros. for the same injury, and it is contended that their interest in the event of this suit is such that they would want the liability to rest on plaintiff in error rather than upon themselves, and that that is a strong reason for disregarding his testimony; that Busier died before the trial, and that the agent who delivered the machine was disqualified because of his interests, and that all of this put plaintiff in error in a difficult position to prove facts. The jury seem to have been fully instructed by the court as to the weight to be given to interested witnesses. Whiteside was competent to testify, and his evidence cannot be disregarded merely because he might be interested or prejudiced. The weight of his testimony was for the jury, and we see no error as to any instructions on this point.

Counsel for plaintiff in error urgently insist that Mahlstedt, in not covering the carburetor, was guilty of such contributory negligence as to defeat recovery. It may be that the action of heat on gasoline is a matter of common knowledge, but the fact that the result of heating this gasoline in the carburetor located in the yard would be to force gasoline through the air-pipe into the cellar, or to cause gas to escape in the cellar, would not be known to a man not familiar with this lighting system. While the evidence in the record is not in entire harmony on this question, there [162] is no contradiction of Whiteside's statement that Busier said, in Mahlstedt's presence, that it would not make much difference whether the carburetor was covered before it was used on Sunday.

In this connection counsel for plaintiff in error also contend that Mahlstedt was guilty of contributory negligence in lighting a match in the cellar. The evidence of one of the neighbors is to the effect that after the accident Mahlstedt told him that he smelled gasoline before he went into the cellar. Counsel for defendant in error attempted to impeach this witness by producing other witnesses who testified to facts that tended strongly to show that the witness could not have talked to Mahlstedt at the time and on the occasion specified. There is evidence in the record, also, that tends to show that Mahlstedt did not know that there was any gas

in the cellar before he lit the match. It appears from the evidence that when Busier came, between ten and eleven o'clock the night of the accident, having been telephoned at Mahlstedt's request, he started to go into the cellar to look over things and apparently prepared to strike a match, but was told by one of the neighbors not to do that, as Mahlstedt had said no one must light a match in the cellar. Busier then procured a lantern and held it outside a cellar window and looked through to see if the jet was closed. While Mahlstedt had a relative who had a plant of this kind installed on his place and Mahlstedt had seen that plant working, there is nothing tending to show that Mahlstedt knew anything about the principles upon which the lighting system worked or that he had any reason to suppose that gas or gasoline would escape through the pipes into the cellar. On the contrary, we think he was led to believe that the lighting system worked so safely and easily that it could be used by anyone without danger. The question of contributory negligence is usually one of fact for the jury. It only becomes one of law for this court when the undisputed evidence is so conclusive that it is [163] clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precautions. (*Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086; *Mueller v. Phelps*, 252 Ill. 630, 97 N. E. 228.) Where reasonable men, acting within the limits prescribed by law, could reach different conclusions from the admitted or established facts, questions of contributory negligence are for the jury. (*Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, 56 N. E. 331; *Chicago City R. Co. v. Nelson*, 215 Ill. 436, 74 N. E. 458; *Chicago, etc. Electric R. Co. v. Wanic*, 230 Ill. 530, 82 N. E. 821, 15 L.R.A.(N.S.) 1167; *Heidenreich v. Bremner*, 260 Ill. 439, 103 N. E. 275.) On this record we do not think it can be held, as a matter of law, that Mahlstedt was guilty of contributory negligence in not covering the carburetor or in lighting a match in the cellar.

Counsel for the plaintiff in error insist that upon the question of its liability the court should have granted the motion directing a verdict in its favor on the ground that it was not liable either as a manufacturer or a retailer. With this contention we do not agree. In passing upon such a motion for a directed verdict this court only looks to the evidence supporting the claim of the party against whom the motion is directed, and that in the light most favorable to him. Contradictory evidence, however strong, cannot be considered. (*Balsewicz v. Chicago, etc. R. Co.* 240 Ill. 238, 88 N. E. 734.) All controverted questions of fact are settled by the verdict of the jury and the

judgment of the Appellate Court. We have repeatedly decided that on a motion to take a case from the jury, either at the close of plaintiff's evidence or at the close of all the evidence, the naked question is thereby raised in this court whether or not there is any evidence in the record fairly tending to support the plaintiff's cause of action. It is never a question of the weight of the testimony. *Chicago City R. Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017; *Illinois Steel Co. v. Saylor*, 226 Ill. 283, 80 N. E. 783; *Sturges, etc. Mfg. Co. v. Great Western Smelting, etc. Co.* 248 Ill. 285, 93 N. E. 740.

[164] Counsel for plaintiff in error further insist that the court erred in allowing Mrs. Mahlstedt to testify as to the amount of her husband's property, contending that in suits of this kind evidence as to the domestic relations or financial standing or circumstances of the parties is improper, citing 1 Elliot on Evidence, sec. 178, *Jones, etc. Co. v. George*, 227 Ill. 64, 10 Ann. Cas. 285, 81 N. E. 4, and other authorities, in support of this contention. Mrs. Mahlstedt was asked by counsel for defendant in error, over objection and exception, what property her husband had at the time of his death. She was permitted to answer that he had certain live stock and forty acres of land worth \$150 an acre. She was also permitted to answer that he provided for her in good shape and purchased her clothing and supplies. It is not competent to show what the pecuniary circumstances of the widow, family or next of kin are or have been since the death of the decedent, but it is competent to show that the wife, children or next of kin were dependent upon him for support before and at the time of his death. (*Pennsylvania Co. v. Keane*, 143 Ill. 172, 32 N. E. 260; *Pittsburg, etc. R. Co. v. Kinnare*, 203 Ill. 388, 67 N. E. 826.) The property, wealth, helplessness or dependence of the relatives of the deceased is immaterial on the question of the recovery of damages. That feature is not to be considered in measuring or estimating the loss sustained or in determining the liability where the death is caused by the wrongful act of the defendant (*Chicago, etc. R. Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701), but it is not error to allow questions concerning the earnings of the deceased and that they were used in support of his wife or children. (*Brennen v. Chicago, etc. Coal Co.* 241 Ill. 610, 89 N. E. 756.) Under these authorities there was no error in allowing the widow to testify that her husband supported her and in what manner. We do not see the purpose of allowing her to testify as to the amount of property he left. The record shows that he left a will but does not show its provisions or [165] what his indebtedness was, if any. The record shows that the deceased left no

children. It would be improper to show what property the wife received from the husband. There is nothing in this record, however, from which we can infer what property the wife was to receive. We cannot say, under the authorities heretofore cited, that the admission of this evidence as to the amount of property Mahlstedt left was prejudicial, on this record, to plaintiff in error.

On the trial of the case counsel for plaintiff in error called Mrs. Busier to the stand and showed by her that she accompanied her husband to the Mahlstedt farm on May 20, 1911, and remained with him there until after supper, in the evening. They offered to prove by her that Busier during that visit informed both Whiteside and Mahlstedt that he had come there out of curiosity, to see the installation of the machine and plant; that he had never yet seen one installed though he had sold a great number of them; that before leaving he told Mahlstedt not to use the plant until the carburetor, tank and pipes had been covered with earth. The trial court held this testimony incompetent under the proviso of section 5 of the statute on evidence, which reads: "Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife." (*Hurd's Stat.* 1913, p. 1235.) In *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756, this court had occasion to review the history of this statute and its amendments, and held (p. 41): "On grounds of public policy, and wholly independent of any question of interest or identity, neither husband nor wife could at common law testify to communications or conversations occurring between them during coverture; and this inability to testify continued, as to such communications and conversations, even after the marital relation was severed either by divorce [166] or by death.—1 Greenleaf on Evidence, secs. 254, 334, and following sections." The court then referred to the provisions of said section 5, and said that it was a recognition and re-enactment of the common law on the question just quoted, confining its operation, however, to suits or causes other than those between husband and wife. This same rule has been followed and approved by this court since that time. (*Joiner v. Duncan*, 174 Ill. 252, 51 N. E. 323; *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798; *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279; *Abrahams v. Woolley*, 243 Ill. 365, 90 N. E. 667; *Schreffler v. Chase*, 245 Ill. 395, 92 N. E. 272, 137 Am. St. Rep. 330.) Under these authorities, irrespective of the question of interest, the rule is that the wife is incom-

petent, under the common law as well as this statute, to testify to communications or conversations with her husband or between him and third persons, whether the evidence is offered during or after coverture. Necessarily, under this rule, Mrs. Busier was incompetent to testify as to any conversations her husband had in her presence with Whiteside or Mahlstedt or as to any statement that he made to them.

Counsel for plaintiff in error insist that the trial court erred, under the provisions of said section 5, in permitting Mrs. Mahlstedt to testify that no gasoline had been in the cellar of the farm house prior to the accident, nor any gasoline on the premises for a period of two years before this lot was brought there by her husband at the time he was installing the plant; that the court also erred in permitting her to identify the printed catalogue of plaintiff in error and to testify that it was left with Mahlstedt at the time Whiteside was there to see him, and also in admitting her testimony that she tried to light the burner on Sunday evening, just prior to the accident; that it made a blue flame and then went out but did not light; that she was the only one who had been in the cellar of the house that day before the accident to Mahlstedt. It will be seen that the testimony of Mrs. Mahlstedt that is objected to by plaintiff in error had no reference to any conversation of her husband [167] that she had overheard, but it is insisted that the knowledge of the facts about which she testified in the objected testimony came to her by virtue of the marital relation and therefore was incompetent. There is nothing in said section 5 that bears on this question. This court has more than once stated that at common law a husband or wife could not be a witness to testify to any fact or transaction, knowledge of which was obtained by means of the marriage relation. (Schreffler v. Chase, *supra*, and cases cited.) More than one of the Illinois decisions, in laying down this rule, have correctly cited section 337 of Greenleaf on Evidence in its support; but that author also in section 338 states that the wife may testify, after the death of the husband, to facts "coming to her knowledge from other sources and not by means of her situation as a wife, notwithstanding they related to the transactions of her husband." (1 Greenleaf on Evidence,—Lewis' ed.—sec. 338.) We shall refer to some of the authorities cited by this author in support of this rule.

In *Williams v. Baldwin*, 7 Vt. 503, the widow was held competent to prove the contents of a letter addressed to her husband and which she had seen. In *Wells v. Tucker*, 3 Binn. (Pa.) 366, the widow was permitted to testify as to the delivery to her of a bond

by her husband for the use of a third person. In *Ryan v. Follansbee*, 47 N. H. 100, the surviving wife was permitted to testify to matters in which her deceased husband was interested and in which she herself was an agent, on the ground that the knowledge of these facts came to her from sources other than her husband. In *Moore v. Wingate*, 53 Mo. 398, the widow was not permitted to testify as to facts which she could only have learned from her husband, the court holding that this sort of evidence was excluded on the ground of public policy and "to preserve the harmony of the marriage relation."

There are other authorities not cited by Greenleaf which bear on this question, to a few of which we will refer. In [168] *Dexter v. Booth*, 2 Allen (Mass.) 559, it was held in an action against an executor to recover the price of goods sold and delivered to the wife during her husband's lifetime, that she could not testify, after his death, to a private conversation with him, but as to other facts from other sources she was a competent witness. In *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135, it was held that letters from husband to wife, or from her to him, were not admissible, and the court stated that the common-law rule as to competency of witnesses, forbidding either husband or wife to testify in any case where either was interested, was grounded upon the principle that they should not be permitted to testify to those transactions or communications passing between them in the sacred confidence and trust that should exist between husband and wife. In *Saunders v. Hendrix*, 5 Ala. 224, a widow of the comaker of a promissory note was held to be a competent witness in a suit by a payee against the other joint maker to prove that a credit indorsed on the note was \$100 and not \$1000. In *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224, the court held that a widow, in a suit brought by her son against her husband's administrator, was competent to testify as to the execution of an agreement by her husband, and also as to his signing the name of the son and that of the subscribing witnesses, who were dead, and who signed by mark. In *White v. Perry*, 14 W. Va. 66, it was held that while the wife could not testify as to conversations of her husband, she was competent, after his death, to testify as to any facts coming to her knowledge from other sources than her husband, notwithstanding they related to his transactions. In *Hale v. Kearly*, 8 Baxt. (Tenn.) 49, was an action brought by an administrator for damages against the defendant for causing the death of the intestate. The widow was held competent to testify as to what she saw occurring between her husband and the defendant at the time the latter inflicted the fatal injuries

upon her husband. The court said in discussing this question (p. 52): "It is readily conceded [169] that on the grounds of public policy neither husband nor wife should be allowed to testify as to the conduct or conversation of either, made known in the frankness and freedom of a confidential intercourse, but can the rule apply, as in the present case, where the wife happens to witness a rencounter between her husband and a third party which results in the death of her husband? What reason of public policy forbids the wife to detail what she saw, in a suit for damages for the killing?" In the American and English Encyclopedia of Law (vol. 30, 2d ed. p. 950,) it is stated that the great weight of authority is to the effect that after the death of one of the parties to the marriage the other may testify in favor of the estate as to all facts not learned through the confidence of the marital relation, citing many authorities in support of this statement, including some of those to which we have referred.

Counsel for plaintiff in error rely especially in support of their contention upon the reasoning of this court in *Schreffler v. Chase*, supra, and cases cited in that decision. In that case we quoted with approval from *Griffeth v. Griffith*, 162 Ill. 368, 44 N. E. 820, where the court said, among other things (p. 373): "Whether the divorced wife's knowledge of her husband's conduct in the respect here referred to came to her as the result of his admissions to her or of her conversations with him, or as the result merely of her own observation, it was acquired in the confidence of the marriage relation, and therefore her evidence in regard to it should have been excluded upon principles of public policy. The protecting seal of the law is placed upon all confidential communications between the husband and the wife, except so far as our statute has changed the rule. It makes no difference that the marriage relation no longer exists between them. 'Whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards divulged in testimony, [170] even though the other party be no longer living.'—1 Greenleaf on Evidence, sec. 337."

It seems clear from this quotation and from the evidence objected to in that case, that the main point of that decision, as of other decisions in this State, was based on the rule laid down by Greenleaf, just quoted, that the facts or conversation came to the knowledge of the witness because of the confidential relation of husband and wife. Examination of the authorities cited in that case, we think, will disclose that the knowledge as to the facts in each of the cases came to the witness from the husband or from his actions because of the confidence of the marital relations. In

commenting on the *Schreffler* case in 137 Am. St. Rep. 330, where that case is given in full, the author states in the foot-note that the matter concerning which the law prohibits either the husband or the wife from testifying includes any information obtained during the marriage or by reason of its existence; that this rule "should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either, obtained by reason of the marriage relation, which but for the confidence growing out of it would not have been known." Manifestly, by the common-law rule, as shown by the authorities from other jurisdictions as well as in this State, Mrs. Mahlstedt was competent to testify as to any facts the knowledge of which she had obtained from sources other than her husband. She certainly obtained her knowledge as to there being no gasoline in the cellar of the farmhouse and as to the catalogue, and other objected testimony, from sources independent of her husband and not because of any confidential relation between them. The court did not err in its rulings as to her testimony on this question.

Counsel for plaintiff in error argue that the trial court committed error in permitting certain persons to testify as experts who were not qualified. The question of the qualification of an expert rests largely in the discretion of the [171] trial court. There can be no arbitrary or fixed test but necessarily only a relative one, depending somewhat on the subject and the particular witness. (*Bonato v. Peabody Coal Co.* 248 Ill. 422, 94 N. E. 69.) From the evidence in the record we think the expert witnesses were qualified to testify as to the subjects about which they were interrogated.

It is also urged that the court erred in permitting experts to testify how the gasoline which caused the explosion might have gotten into the cellar, as it was contended that was the ultimate question the jury were called upon to decide. With this we do not agree. It is an elementary rule that where the court or jury can make their own deductions they shall not be made by those who testify. (*Evans v. People*, 12 Mich. 27.) Expert evidence is admissible when the witnesses offered as experts have peculiar knowledge or experience not common to the world, which renders their opinions founded on such knowledge or experience an aid to the court or jury in determining the question at issue. Expert testimony is proper when the subject matter of the inquiry is of such a character that only persons of skill or experience in it are capable of forming a correct judgment as to any fact connected therewith. (*Farber v. Chicago, etc. R. Co.* 235 Ill. 589, 85 N. E. 928; *Taylor v. Monroe*, 43 Conn. 36; 1 Greenleaf on Evidence,—Lewis' ed.—sec. 280; *Peo-*

ple v. Jennings, supra.) Manifestly, it required peculiar skill and judgment by those who had experience in such matters to state how the gasoline might get into the cellar. We think the witnesses on this question were properly allowed to give their judgment as to how the gasoline got there.

Counsel for plaintiff in error further contend that the court erred in admitting in evidence a booklet or circular issued by plaintiff in error with reference to heating and lighting plants or systems similar to the one attempted to be installed in the Mahlstedt house. It is not denied that said company printed and issued such circular or booklet. [172] If, as we have held, the jury were justified in finding that plaintiff in error sold the lighting system to Mahlstedt, then we cannot see why this booklet was not properly admitted. The testimony shows that Mahlstedt was seen reading it; that it contained representations as to the machine's safety that may have misled him as to the safety or danger of the system, and especially as to the necessity of covering the carburetor before the machine was used. The declaration alleged that plaintiff in error represented that the system had been constructed and would be installed under the supervision of an expert and would be safe enough for a child to operate, but that, in fact, the system was dangerous, and that by reason of the fact the machine was not safely equipped the accident occurred. The statement in this booklet would tend to lead Mahlstedt to think that precautionary measures were unnecessary in the operation of the system. (1 Thompson on Negligence, secs. 827, 828; 29 Cyc. 479.)

Plaintiff in error further insists that the court erred in refusing one of its instructions, and, as we understand the argument, in modifying certain other instructions. If we are right in the conclusions already stated in this opinion it is clear that the court did not err in its rulings as to these instructions.

There are certain other questions raised in the briefs of counsel for plaintiff in error, but we do not think the trial court committed any error on those questions or that they are of sufficient importance to further extend this opinion.

We find no reversible error in the record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Cooke, J. dissenting.

NOTE.

Effect of Death of One Spouse on Competency of Other as Witness.

Generally, 216.

As to Transaction with or Communication by Spouse:

In General, 218.

Confidential Communication, 220.

Generally.

The rules of general application relating to the competency of witnesses, such as that excluding the testimony of interested parties or that forbidding testimony as to transactions with a decedent, apply of course to the testimony of a surviving spouse, but these are excluded from the present discussion. The rules peculiarly applicable to the competency of a husband or wife as such had their origin in a policy based on the intimacy of the marital relation, and on the dissolution of the relation by the death of one of the spouses there naturally arises the question to which this note is devoted, viz.: whether the incompetency of the other spouse is thereby terminated.

In a few cases it has been held that the rule forbidding one spouse to testify for or against the other is equally applicable to prevent testimony for or against the estate of a deceased spouse. *Aveson v. Kinnaird*, 6 East (Eng.) 188; *O'Connor v. Majoribanks*, 4 M. & G. 435, 43 S. C. L. 228; *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303; *William, etc. College v. Powell*, 12 Grat. (Va.) 372; *Marks v. Spencer*, 81 Va. 751; *Swann v. Housman*, 90 Va. 816, 20 S. E. 830. Compare *Beveridge v. Minter*, 1 C. & P. 364, 11 E. C. L. 421. In *O'Connor v. Majoribanks*, supra, it was said: "The text books generally give, as the reason for the rule as to excluding the testimony of husband or wife, the necessity of preserving the confidence of the conjugal relation; and that may be so. But it by no means follows that the rule is coextensive with the reason given in support of it; and indeed it would be very inconvenient if it were so; as the question would frequently be raised as to whether or not some particular communication or fact occurring between husband and wife was of a confidential character; which would give rise to endless embarrassment and distrust. A rule may be a very good rule, though the reason on which it is founded may not be applicable to every case which is governed by the rule. For instance, the statute of frauds (29 Car. 2, c. 3) was passed to prevent, amongst other things, the setting up of fraudulent agreements; but if it had laid down the rule that no instrument obtained by fraud should be valid,

it would have left the question in every case open to great difficulty as to whether there had been fraud or not. Instead of that, a clear and simple rule is established—that the agreement must be in writing, and signed by the party to be charged therewith. And so the policy of the law (in order to ensure conjugal confidence) has laid down a definite rule, that, in no case, shall husband and wife be allowed to give evidence for or against each other. That rule extends to this case; for, though the husband is dead, the reason for the rule applies as strongly as if he were alive. It would just as much embarrass married persons if they knew their communications might be divulged after the death of either party.” So in *William, etc. College v. Powell*, 12 Grat. (Va.) 372, the court said: “Now it is a pervading principle of the law of evidence, that a husband or wife cannot be a witness in a cause, civil or criminal, in which the other is a party; not for that other, because the law considers them as one person, and their interests as identical; nor against that other, on grounds of public policy, because of the mutual confidence subsisting between them, and for fear of sowing distrust and dissensions and of giving occasion to perjury. . . . Nor is it material that the relation of husband and wife no longer exists when the party is offered as a witness, for the incompetency still remains though the marriage have been dissolved by death or a divorce a vinculo matrimonii.” And see *Noble v. Withers*, 36 Ind. 193 (by statute).

In *Illinois* under early statutes a surviving spouse was apparently incompetent to testify for or against the interest of the estate of the deceased. *Reeves v. Herr*, 59 Ill. 81; *Powell v. Powell*, 114 Ill. 329, 2 N. E. 162. But subsequent statutes have abrogated the disability. *Lingreen v. Illinois Cent. R. Co.* 61 Ill. App. 174; *Gregory v. Gregory*, 129 Ill. App. 96; *Beat v. Jenks*, 123 Ill. 447, 15 N. E. 173. And see the reported case.

The great weight of authority is now to the effect that the rule excluding the testimony of husband or wife for or against each other rests on the fiction of their legal unity and on the desire to avoid domestic discord and that the rule is accordingly inapplicable after the death of a spouse.

Arkansas.—*Graves v. Graves*, 70 Ark. 541, 69 S. W. 544.

District of Columbia.—*Shea v. McMahon*, 16 App. Cas. 65.

Georgia.—*Jackson v. Jackson*, 40 Ga. 150; *McIntyre v. Meldrim*, 40 Ga. 490.

Iowa.—*Romans v. Hay*, 12 Ia. 270; *Pratt v. Delavan*, 17 Ia. 307; *Parcell v. McReynolds*, 71 Ia. 623, 33 N. W. 139.

Kentucky.—*Short v. Tinsley*, 1 Metc. 397, 71 Am. Dec. 482; *English v. Cropper*, 8 Bush 292.

Louisiana.—*Reilly v. Reilly*, 28 La. Ann. 669; *Lehman v. Levy*, 30 La. Ann. 745; *Ames' Succession*, 33 La. Ann. 1317.

Maine.—*Walker v. Sanborn*, 46 Me. 470.

Massachusetts.—*Coffin v. Jones*, 13 Pick. 441.

Mississippi.—*Stuhlmuller v. Ewing*, 39 Miss. 447.

Missouri.—*Scroggin v. Holland*, 16 Mo. 419; *Stein v. Weidman*, 20 Mo. 17; *Sherwood v. Hill*, 25 Mo. 391.

New Hampshire.—*Jackson v. Barron*, 37 N. H. 494.

New York.—*Babcock v. Booth*, 2 Hill 181, 38 Am. Dec. 578.

North Carolina.—*Hester v. Hester*, 15 N. C. 228; *Gaskill v. King*, 34 N. C. 211.

Pennsylvania.—*Chambers v. Spencer*, 5 Watts 404; *Robb's Appeal*, 98 Pa. St. 501; *Tucker's Estate*, 9 Pa. Co. Ct. 345.

South Carolina.—*Caldwell v. Stuart*, 2 Bailey L. 574; *Hay v. Hay*, 3 Rich. Eq. 384.

Tennessee.—*Patton v. Wilson*, 2 Lea 101.

Vermont.—*Edgell v. Bennett*, 7 Vt. 534; *Perry v. Whitney*, 30 Vt. 300; *Stowe v. Bishop*, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569; *In re Buckman*, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930; *Haskell v. Holt*, 75 Vt. 413, 56 Atl. 99. And see the cases cited throughout this note.

In *Reilly v. Reilly*, 28 La. Ann. 669, the court said: “A bill of exceptions was taken to the admission of Mrs. Widow Christopher Reilly, the testatrix, as a witness, on the ground that by law the husband and wife cannot testify for or against each other, this being a suit against the succession of her husband. This objection was properly overruled. At the decease of the husband, those feelings and influences supposed to exist during the conjugal state, tending in their character to render evidence given by one of the spouses to affect the other partial and unreliable, ceased. The policy of the law which forbids, during marriage, the husband or wife to testify for or against each other also ceased. *Cessante ratione cessat et ipsa lex.*”

So it was said in *Hester v. Hester*, 15 N. C. 228: “It is a rule, that the husband and wife cannot be witness for each other, for their interest is identical; nor against each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury; but the rule should not be extended to the exclusion of truth, beyond the limits within which the reason of the law calls for it. Now the identity of interest is destroyed, by the death of either the husband or wife: there is no longer any inducement to commit perjury; as for sowing discord, that cannot take place with one that is dead; and distrust will not be created by apprehension, of that being made known, which there was no wish to keep secret.”

In *Chambers v. Spencer*, 5 Watts (Pa.) 404, the court said: "Without entering into all the cases and the distinctions as to when a wife may be admitted or when she is to be rejected during the life of the husband, we are of opinion, that after the death of the husband, and when he is not and cannot be answerable, civilly nor criminally, the wife may be admitted to prove facts or contracts or transactions in which her husband was a party, where such proof is essential to the justice of the decisions of cases between other parties."

In *Caldwell v. Stuart*, 2 Bailey L. (S. C.) 574, it was said: "The rule, which excludes the wife from giving evidence for or against the husband, is founded, in some degree, upon the legal identity of the husband and wife. On the one hand, they will not be permitted to manufacture evidence for themselves; and on the other, the common law will not permit that they shall be compelled to give evidence against themselves. Domestic quiet and the harmony of families have suggested the propriety of excluding it where it would be volunteered; and in the case of *Monroe v. Twisleton* (reported in App. to Peake's Ev. p. 29), the rule is, I think with great propriety, extended to a wife who has been divorced a vinculo matrimonii. The sacredness of the confidence existing in the relation of husband and wife ought never to be violated, unless for the most imperious necessity. But neither the rule, nor any of the reasons upon which it proceeds, have any, the most remote, application here. The husband is no party; he has ceased to have any interest in temporal concerns. The defendant, the executor, represents the interests of the creditors, legatees, or distributees, as the case may be; and not the husband's. There is no danger of matrimonial discord, nor is there any violation of confidence. She has only disclosed what the husband intended should be known."

Of course if the matter to which the surviving spouse testifies does not partake of the nature of a confidential communication, (see *infra* the subdivision *Confidential Communication*) and the estate of the deceased spouse is in no manner interested in the matter at issue, the circumstance that the facts to which the survivor testifies were learned during the existence of the marital relation does not render the witness incompetent. *Johnson v. State*, 169 Ala. 10, 53 So. 769; *Goelz v. Goelz*, 157 Ill. 33, 41 N. E. 756; *Grindle v. Grindle*, 240 Ill. 143, 88 N. E. 473; *Jack v. Russey*, 8 Ind. 180; *Carpenter v. Dame*, 10 Ind. 125; *Haugh v. Blythe*, 20 Ind. 24; *Adams v. Adams*, 23 Ind. 50; *Shaffer v. Richardson*, 27 Ind. 122; *Dugger v. Dugger*, 84 Va. 130, 4 S. E. 171.

It has been held that a surviving spouse is not competent to testify to facts learned

during the existence of the marital relation which would tend to disgrace the deceased or bring his or her memory into disrepute. *Stein v. Bowman*, 13 Pet. 209, 10 U. S. (L. ed.) 129; *Keaton v. McGwier*, 24 Ga. 217; *White v. Perry*, 14 W. Va. 66; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. And see *Smith v. Potter*, 27 Vt. 304, 65 Am. Dec. 198. Compare *Short v. Tinsley*, 1 Metc. (Ky.) 397, 71 Am. Dec. 482. In *White v. Perry*, *supra*, it was said: "The wife even after his death could not testify that her husband told her that this allegation in the deed, that the consideration was paid, was either true or false; for such testimony reflects directly on his character as an honest man."

As to Transaction with or Communication by Spouse.

IN GENERAL.

In an early case it was said that on account of the difficulty in determining what conversations or communications between husband and wife were designed to be confidential, the survivor of them would not be permitted to testify to any transaction of or with the deceased. *O'Connor v. Majoribanks*, 4 M. & G. 435, 43 E. C. L. 228. In *Scroggin v. Holland*, 16 Mo. 419, after referring to that decision, the court said: "We concur in the views above expressed, and see the difficulty of distinguishing between communications which are confidential and those which are not so. It is obvious, too, that if husband and wife were conscious that information derived from other sources than those of trust and confidence could be evidence against each other, means would be resorted to with a view to prevent, in many instances, information from being so acquired, which would be a source of endless broils and difficulties. The husband would not be willing that the wife should be in a situation to acquire this information. He might use means to prevent her obtaining it, and thus impose restraints which would fill her with mistrust and anxiety." See also *State v. McAuley*, 4 Heisk. (Tenn.) 424.

But except in the foregoing isolated instances the courts while protecting confidential communications between husband and wife (see the following subdivision) hold that the survivor is competent to testify to acts and declarations of the deceased except in so far as the giving of such testimony involves the disclosure of communications directly between the spouses. *Johnson v. State*, 169 Ala. 10, 53 So. 769 (circumstances under which husband was killed); *Spivey v. Platon*, 29 Ark. 603 (business transactions between husband and third persons); *Griffin v. Smith*, 45 Ind. 366 (transaction with third

person); *Denbo v. Wright*, 53 Ind. 226 (transaction with third person); *Floyd v. Miller*, 61 Ind. 224 (transaction with third person); *Pratt v. Delaware*, 17 Ia. 307 (transaction with third person); *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224 (public acts); *Short v. Tinsley*, 1 Metc. (Ky.) 397, 71 Am. Dec. 482 (that conveyance was fraudulent); *New York Fidelity, etc. Co. v. Cooper*, 137 Ky. 544, 126 S. W. 111 (suffering and physical condition); *Bankers' Fraternal Union v. Donahue* (Ky.) 109 S. W. 878 (physical condition); *Reilly v. Reilly*, 28 La. Ann. 669 (employment of third person by deceased); *Walker v. Sanborn*, 46 Me. 470 (contract with third person); *Robinson v. Talmadge*, 97 Mass. 171 (habit of carrying papers in pocket); *Stuhlmuller v. Ewing*, 30 Miss. 447 (transaction with third person); *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075 (signature); *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480 (adoption of child); *Cannon v. Moore*, 17 Mo. App. 92 (making of contract); *Short v. Thomas*, 178 Mo. App. 400, 163 S. W. 252 (transaction with third person); *Ryan v. Follensbee*, 47 N. H. 100 (transaction with third person); *Babcock v. Booth*, 2 Hill 181, 38 Am. Dec. 578; *Hester v. Hester*, 15 N. C. 228 (declarations as to factum of will); *Gaskill v. King*, 34 N. C. 211 (execution of deed); *Tucker's Estate*, 9 Pa. Co. Ct. 345 (ownership of household furniture); *Strause v. Braunreuter*, 4 Pa. Super. Ct. 263 (circumstances of signing of note); *Hood v. Prudential Ins. Co. of America*, 22 Pa. Super. Ct. 244 (suffering from disease); *Wells v. Tucker*, 3 Bin. (Pa.) 366 (making of gift causa mortis); *Caldwell v. Stuart*, 2 Bailey L. (S. C.) 574 (making of gift); *Hay v. Hay*, 3 Rich. Eq. (S. C.) 384 (that ostensible gift was loan); *Patton v. Wilson*, 2 Lea (Tenn.) 101; *Hale v. Kearly*, 8 Baxt. (Tenn.) 49 (circumstances of death); *Williams v. Baldwin*, 7 Vt. 503 (making of payment). And see the reported case.

In *Robb's Appeal*, 98 Pa. St. 501, the court said: "It is contended that, on grounds of public policy, the widow of the decedent was incompetent to testify to the contract on which appellee's claim for wages is based; that the disqualification incident to coverture continued after the death of her husband, and is not limited to what occurred in their confidential intercourse, but extends to all facts and transactions which came to her knowledge during their marital relations. While the principle, thus broadly stated, has sometimes been recognized, the better and more generally received opinion is that the disqualification is restricted to communications of a confidential nature, and does not embrace ordinary business transactions and conversations in which others have participated. This appears to be the principle recognized

in our own cases: *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Peiffer v. Lytle*, 58 Pa. St. 386. The Orphans' Court, adhering to this view of the law, permitted the widow to testify to conversations between her husband, herself and the appellee, which resulted in a contract of hiring, in pursuance of which the latter entered the service of Mr. Robb in October, 1869, and continued therein until his death on September 10th, 1877. These conversations, as shown by the testimony, are not, in any proper sense of the terms, confidential communications, and there was therefore no error in permitting the witness to testify."

In *Walker v. Sanborn*, 46 Me. 470, it was said: "There seems to be a distinction between the testimony of a wife and a widow, based on the different relations that exist. The fundamental reason for the rejection of the wife's testimony is the promotion of domestic harmony and the danger that it may be disturbed between husband and wife, if they are allowed to testify. This reason ceases on the death of one of the parties. But there is another reason, which the law recognizes, and it arises from the intimate and confidential relations subsisting between the parties. It treats all confidential communications, and whatever has come to the knowledge of either by means of the confidence which the relation inspires, as sacred, and not to be divulged in testimony even after death. It regards such disclosures and such facts as sacred, and like communications from client to counsel, which cannot be divulged but by express consent of the other party. The exclusion, on this latter ground, rests not upon the nature of the evidence, but upon the source or mode in which the knowledge is obtained by the husband or wife. If obtained from any other sources, and not by reason of the existing relation, or from confidential communications, then this reason also ceases; and, after the death of the husband, the wife may testify as to the knowledge of facts thus acquired. The test is to be applied to the manner of acquiring information, rather than to the nature of the facts disclosed by the witness. *Coffin v. Jones*, 13 Pick. (Mass.) 445; *Williams v. Baldwin*, 7 Vt. 506. The fact testified to by the witness in this case is, that the defendant and her husband were together in her presence, and made an arrangement, or agreement, as to the disposition of certain checks; which agreement she stated in her testimony. This fact did not come to her knowledge through any communication by her husband to her, confidential or otherwise. It did not come to her knowledge by reason of her relation as a wife. She happened to be present, as any other person might have been, but the fact testified to was equally

in the knowledge of the other party, who could contradict it if it was not true. We think it was rightly admitted on this ground."

In *Stober v. McCarter*, 4 Ohio St. 513, it was said: "Whatever may be the true doctrine in respect to divorced witnesses, there would seem to be no reasonable doubt, at this day, that a widow, if not a competent witness to prove conversations with her husband, is competent to prove other independent facts that occurred during that coverture, the statement of which by her violates no confidence, nor is in anywise prejudicial to his reputation. Whether her competency, by the common law, goes beyond this and extends to conversations not confidential, it is unnecessary for us to say, for that question is not before us. Catharine Stober testified to no conversations at all, nor to anything the knowledge of which was derived through conjugal confidence, nor to anything prejudicial to the reputation of her deceased husband. The acts proved by her were not the acts of her husband, but of the plaintiff, McCarter; they were not private or confidential doings, but were open and public; not things of which she alone could have a knowledge, but facts open to the observation of every one. We think that she was a competent witness to prove them, and that her testimony was properly admitted; and in thus holding we do not mean to question, much less to overturn, the authority of *Cook v. Grange*."

In *White v. Perry*, 14 W. Va. 66, the court said: "The law will not permit, even after the death of the husband, any disclosure by the wife, which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and affect injuriously the interests of society dependent on it. But where there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be afterwards public, there is no interest of the marriage relation, or of society, which in the absence of all interest of the husband or wife requires the latter to be precluded from testifying between other parties, such act or declaration not affecting the character or person of her husband."

In *Metropolitan L. Ins. Co. v. Thomas* (Ky.) 106 S. W. 1175, holding that the widow of an insured could testify to his mental condition shortly before his death, which was alleged to have been caused by suicide, the court said: "The wife was a competent witness to testify to the circumstances surrounding her husband at his death. Facts of this sort, which did not come to her from the marital relation, she could testify to as any other witness."

In *Louisville, etc. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120, an action for death by wrongful act, it was said: "The widow of the intestate was permitted to testify, but, as all that is material in her testimony relates to matters subsequent to her husband's death, or else to matters which were open to the knowledge of all persons who knew the parties, no error was committed even if it were conceded that she was not competent to testify generally as to matters that occurred prior to his death. *Lamb v. Lamb*, 105 Ind. 456; *Floyd v. Miller*, 61 Ind. 224, 235."

In *St. Louis, etc. R. Co. v. Goode*, 42 Okla. 784, 142 Pac. 1185, L.R.A. 1915E 1141, the court said: "The next point urged in the brief is that the court erred in admitting the testimony of the widow of deceased. This point is without merit. The testimony of the witness, after the termination of the marital relation, was as to facts within her knowledge, not to confidential communications from her husband. She testified as to his actual condition after his injury; as to the necessity for attention and nursing; that she took him to Illinois, where he died; how long he lingered there; and that he was able to walk on crutches, etc. This evidence was competent. *Adkins v. Wright*, 37 Okla. 771, 131 Pac. 686."

In a prosecution for homicide a dying declaration may be proved by the widow of the deceased. *Hilbert v. Com.* (Ky.) 51 S. W. 817; *Arnett v. Com.* 114 Ky. 593, 71 S. W. 635; *Bright v. Com.* 120 Ky. 298, 86 S. W. 527, 117 Am. St. Rep. 590. In the case first cited it was said: "On grounds of public policy, the wife cannot testify against the husband as to what came to her from him confidentially or by reason of the marriage relation, but this rule does not apply to a dying communication made by the husband to the wife on a trial of the one who killed him. The declaration of deceased made in extremis in such cases is the thing to be proved, and this proof may be made by any competent witness who heard the statement. The wife may testify for the state, in cases of this character, as to any other fact known to her."

With respect to the competency of one spouse to testify as to the testamentary capacity of the other, see the note to *Whitehead v. Kirk*, Ann. Cas. 1916A 1051.

CONFIDENTIAL COMMUNICATION.

There is some conflict of authority as to what communications between husband and wife are confidential. That question is not discussed in this note since it is in no manner affected by the death of one of the spouses. But if a communication is confi-

dential so that one spouse is incompetent to testify thereto in the lifetime of the other, the death of the spouse making the communication does not destroy its inviolability and the survivor is not competent to testify thereto.

England.—Doker v. Hasler, R. & M. 198, 21 E. C. L. 416.

United States.—Hopkins v. Grimshaw, 165 U. S. 342, 17 S. Ct. 401, 41 U. S. (L. ed.) 739.

Delaware.—Gray v. Cole, 5 Har. 418.

District of Columbia.—Brooks v. Francis, 3 MacArthur 109.

Florida.—Mercer v. State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

Georgia.—Lingo v. State, 29 Ga. 470; Jackson v. Jackson, 40 Ga. 150; McIntyre v. Meldrim, 40 Ga. 490.

Illinois.—Goelz v. Goelz, 157 Ill. 33, 41 N. E. 756; Joiner v. Duncan, 174 Ill. 252, 51 N. E. 323; Abrahams v. Woolley, 243 Ill. 365, 90 N. E. 667; Schreffler v. Chase, 245 Ill. 395, 92 N. E. 272, 137 Am. St. Rep. 330; Monaghan v. Green, 265 Ill. 233, 106 N. E. 792; Gedney v. Gedney, 61 Ill. App. 511; Yokem v. Hicks, 93 Ill. App. 667; State Bank v. Reardon, 130 Ill. App. 383; Clark v. O'Gara Coal Co. 140 Ill. App. 207; Clover v. Modern Woodmen of America, 142 Ill. App. 276. And see the reported case.

Indiana.—Haugh v. Blythe, 20 Ind. 24; Turner v. Cook, 36 Ind. 129; Noble v. Withers, 36 Ind. 193; Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213.

Iowa.—Shuman v. Supreme Lodge, etc. 110 Ia. 480, 81 N. W. 717; Hertrich v. Hertrich, 114 Ia. 643, 87 N. W. 689, 89 Am. St. Rep. 389; Sutcliffe v. Iowa State Traveling Men's Assoc. 119 Ia. 220, 93 N. W. 90, 97 Am. St. Rep. 298.

Kansas.—Compare Schaffner v. Schaffner, 92 Kan. 570, 141 Pac. 251 (under statute making spouses incompetent as to confidential communication only "for or against each other").

Kentucky.—Short v. Tinsley, 1 Metc. 397, 71 Am. Dec. 482; McGuire v. Maloney, 1 B. Mon. 224; Manhattan L. Ins. Co. v. Beard, 112 Ky. 455, 66 S. W. 35; New York L. Ins. Co. v. Johnson, 72 S. W. 762; Buckel v. Smith, 82 S. W. 235.

Maine.—Walker v. Sanborn, 46 Me. 470.

Massachusetts.—Dexter v. Booth, 2 Allen 559; Hyde v. Gannett, 175 Mass. 177, 55 N. E. 991.

Michigan.—People v. Bowen, 165 Mich. 231, 130 N. W. 706.

Minnesota.—Beckett v. Northwestern Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923.

Missouri.—Spradling v. Conway, 51 Mo. 51; Moore v. Wingate, 53 Mo. 398; Willis v. Gam-mill, 67 Mo. 730; Hoyt v. Davis, 30 Mo. App. 309; Herndon v. Triple Alliance, 45 Mo. App.

426; Lyons v. Lyons, 101 Mo. App. 494, 74 S. W. 467.

Nebraska.—Metzger v. Royal Neighbors of America, 86 Neb. 61, 124 N. W. 913.

New York.—Babcock v. Booth, 2 Hill 181, 38 Am. Dec. 578; Osterhout v. Shoemaker, 3 Hill 513; Keator v. Dimmick, 46 Barb. 158.

Tennessee.—Pillow v. Thomas, 1 Baxt. 120; German v. German, 7 Cold. 180; Patton v. Wilson, 2 Lea 101.

Texas.—Gant v. State, 55 Tex. Crim. 284, 116 S. W. 801; Pace v. State, 61 Tex. Crim. 436, 135 S. W. 379.

Vermont.—Edgell v. Bennett, 7 Vt. 534.

Virginia.—Lurty v. Lurty, 107 Va. 466, 59 S. E. 405.

In Lingo v. State, 29 Ga. 470, wherein the testimony of the wife of the deceased was offered as to the making of threats against the defendant, the court said: "This evidence was to be drawn from an illegal source, the wife, who was such when the declarations were made to her. The husband was dead, and so it is true that the relation had ceased when the testimony was offered: but communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets. And the protection which the law holds over the dead, is the very source of greatest security to all the living."

In Donnan v. Donnan, 236 Ill. 341, 86 N. E. 279, the court said: "Irrespective of the question of interest, however, the incompetency of the wife, under the common law, to testify to communications and conversations with her husband or between him and third persons, whether the evidence was offered either during or after the coverture, was based on grounds of public policy. This was recognized by section 5 of the act on evidence and depositions, which provided that no husband or wife should, by virtue of section 1 of the act, be rendered competent to testify for or against the other as to any conversation of the other occurring during the marriage, whether called as a witness during the existence of the marriage or after its dissolution except in certain cases. The portion of section 5 which precedes the proviso, as it now appears, was originally enacted in 1867 and re-enacted in 1872. In 1874 the proviso was added, and that proviso reads as follows: 'Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife.' In Goelz v. Goelz, 157 Ill. 33, it was said of the proviso that it was

a recognition and a re-enactment of the rule of the common law based on public policy but confining its operations to cases other than suits between husband and wife. If this proviso be a recognition of the common law and a re-enactment thereof, it is apparent from the entire section that the wife is not competent, either during or after coverture, to testify to any conversation between herself and her husband or to any admission made by him to her or to any conversation between him and a third person, or to any admission made by him to a third person, except in suits or causes between the husband and wife. The only cases in this state to which our attention has been called that seem inconsistent with this conclusion are *Deniston v. Hoagland*, 67 Ill. 265, and *Galbraith v. McLain*, 84 Ill. 379, and they lack controlling force for the reasons stated in the *Goelz* case. This witness' statement that in her judgment the testator was not capable of transacting ordinary business was based largely on conversations between herself and the testator or between the testator and others, and was incompetent."

In *Maynard v. Vinton*, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276, it was said: "The testimony was plainly incompetent, and the court should not have permitted it to be given. The statute is explicit, that neither the husband or wife shall, during the marriage or afterwards, without the consent of both, be examined as to any communication made by the one to the other, during the marriage. How. Stat. sec. 7546. This, according to the statement of the witness, was a communication of the most confidential nature made by his wife to him during the marriage, and under circumstances which brought it within the prohibition of the statute. It was one which, after her death, he could never be permitted to testify to, because it could not then be done with the consent of both. In this respect it stands on the same plane as those communications which are made to a person's confidential adviser—an attorney, priest, or physician—who, after the death of the party, is not permitted to disclose such communications. The privilege is the privilege of the person making the communication, and can only be waived by him personally; and the personal representative has no right to waive it, even in the interest of the estate. *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56. This statute rests upon public policy, and the seal which the law has fixed upon communications between husband and wife during marriage remains forever, unless removed by the consent of both. The death of one cannot remove the seal of secrecy. If it could, the policy of the law would be defeated. After the husband or wife has gone to the grave the survivor can-

not be permitted to blacken the good name and bring disgrace upon the memory of the departed by dragging to light communications made in confidence of the marital relation, and to protect which the statute was enacted."

In *Murphy v. Murphy* (Ky.) 65 S. W. 165, it was held that the statute relating to confidential communications had no application to a will contest. But in *Floore v. Green* (Ky.) 83 S. W. 133, the contrary was apparently held without reference to the earlier decision.

PEOPLE EX REL. LAWTON

v.

SNELL.

New York Court of Appeals—January 4, 1916.

216 N. Y. 527; 111 N. E. 50.

Bastardy — Liability of Father for Support.

The common law did not make the father of a bastard liable for the support of the child or its mother, and the father's liability exists solely by virtue of the statutes.

[See 3 R. C. L. tit. *Bastards*, p. 750.]

Procedure to Fix Liability — Necessity of Compliance with Statute.

The proceedings by which the liability of the father of a bastard is determined and fixed are defined and controlled exclusively by statute, which must be in their substance strictly and fully complied with.

Criminal Law — Jurisdiction — Person Illegally Brought within Jurisdiction.

Code Cr. Proc. § 843, provides, relative to bastardy proceedings, that, if the defendant reside in a county other than that in which the warrant is issued, the magistrate issuing it must direct the sum in which defendant shall give security, and the officer must present it to a magistrate in the city or town in which defendant resides, who must indorse a direction thereon that it be served in that county. Section 844 provides that, when the defendant is arrested in another county, he must be taken before the magistrate indorsing the warrant, or another magistrate of the same city or county, who may take from him an undertaking that he will indemnify the county and the town or city, and every other county, town, or city against any expense, and pay the costs, or that the sureties will pay the sum indorsed on the warrant, or that he will appear and answer the charge at the next county court of the county where the warrant was issued. Section 845 provides that, when either of such

undertakings is given, defendant must be discharged, and the warrant with the undertaking must be returned to the magistrate granting the warrant. Section 846 provides that if defendant does not give security he must be taken before the magistrate issuing the warrant. Section 848 provides for a hearing by such magistrate, and section 850 for an order of filiation, and section 851 provides that defendant must pay the costs and enter into an undertaking for the child's support, and to indemnify the county and the town or city, etc., or that he will appear at the next term of the county court to answer the charge, or that the sureties will pay full indemnity. Section 852 provides for the commitment of the defendant to jail if section 851 is not complied with. Sections 854 and 855 provide for a hearing and an order of filiation when security is taken out of the county. It is held that, where defendant was arrested in another county and taken before the magistrate issuing the warrant without being taken before the magistrate indorsing it, the magistrate had no power to commit defendant to jail for noncompliance with section 851, as the statute is imperative and mandatory, and it is only when defendant has been taken before the magistrate indorsing the warrant, and fails to give the required undertaking, that the magistrate issuing the warrant has jurisdiction to commit.

[See note at end of this case.]

Bastardy — Jurisdiction of Proceedings — Conditions Precedent.

An order of filiation in a bastardy proceeding is void unless all the material requirements of the statute are substantially complied with, since the power of a judicial tribunal to try or inquire and adjudge in a proceeding purely statutory is limited and confined by the statute, and the invalidity of the determination or adjudication will result from action in disobedience to, or contravention of, the statutory requirements, as well as from a lack of jurisdiction of the subject-matter, or of the person.

Same.

Compliance with the commands of a mandatory statute is a condition precedent to the validity of an act or determination under it, and the prescribed mode of doing the act or reaching the determination must be strictly pursued.

Same.

Code Cr. Proc. § 684, provides that neither a departure from the form or mode prescribed by the Code in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid unless it actually prejudices defendant or tends to his prejudice in respect to a substantial right. Section 861 provides, relative to bastardy proceedings, that a person deeming himself aggrieved may appeal to the county court, except that a person executing an undertaking to obey an order of filiation and indemnify the public as provided in section 851 cannot appeal from any other part of the order than that which fixes the weekly

or other allowance to be paid. It is held that the defendant in such a proceeding arrested in a county other than that in which the warrant was issued was prejudiced in a substantial right, where he was taken before the magistrate issuing the warrant without being first taken before the magistrate of the county in which he was arrested, who indorsed the warrant, as he was thereby deprived of the right to give an undertaking in the county of his residence and secure his discharge, and was subjected to the provisions of sections 851 and 852, which would not have been applicable if he had given an undertaking, and was denied the right to a full rehearing on an appeal to the county court.

Habeas Corpus — Grounds for Relief — Invalidity of Order in Bastardy Proceeding.

As an order of the magistrate issuing a warrant in a bastardy proceeding, committing to jail a defendant arrested in another county, and not taken before the magistrate of that county indorsing the warrant, because of his failure to give an undertaking, was void, the invalidity of the order could be asserted by a writ of habeas corpus.

[See 87 Am. St. Rep. 179.]

People ex rel. Lawton v. Snell, 168 N. Y. App. Div. 410, reversed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Habeas corpus proceeding. Leon Lawton, relator, and Henry W. Snell, defendant. Writ dismissed by County Court, Rensselaer County. Judgment affirmed by Appellate Division of Supreme Court. Relator appeals. The facts are stated in the opinion. **REVERSED.**

Wallace H. Sidney for appellant.

John P. Taylor and *Charles I. Webster* for respondent.

[529] COLLIN, J.—The relator is in the custody of and detained by the defendant by virtue of a commitment issued under section 852 of the Code of Criminal Procedure. Upon the return of the writ of habeas corpus issued [530] by the county judge of Rensselaer county it was dismissed and the relator remanded to custody by an order which the appellate division affirmed.

The proceeding was instituted in the court of the police justice of the city of Troy in Rensselaer county, a city of the second class. It was governed by the provisions of title V, chapter 1 of the Code of Criminal Procedure, except the police justice, instead of two magistrates (Code of Crim. Pro. § 848), conducted it. (Second Class Cities Law [Cons. Laws, ch. 53] § 185.) The relator, whose arrest as the father of the bastard the war-

rant issued by the police justice directed (Code of Crim. Pro. § 841), resided and under the warrant and the indorsements of it duly made (§ 843) was arrested in Schoharie county. Section 844 provided:

"When the defendant is arrested in another county, he must be taken before the magistrate who indorsed the warrant, or before another magistrate of the same city or county, who may take from the defendant an undertaking, with sufficient sureties, to the effect:

"1. That he will indemnify the county, and town or city, where the bastard was or is likely to be born, and every other county, town or city, against any expense for the support of the bastard, or of its mother during her confinement and recovery, and to pay the costs of arresting the defendant, and of any order of filiation that may be made, or that the sureties will pay the sum indorsed on the warrant; or,

"2. That the defendant will appear and answer the charge at the next county court of the county where the warrant was issued, and obey its order thereon."

The relator was not taken before the magistrate of Schoharie county who indorsed the warrant, or any other magistrate of that county, but was taken before the police justice of Troy, who entered upon the inquiry in respect to the charge against the relator as provided in [531] section 848. The relator by his counsel objected to the jurisdiction of the police justice to so proceed, upon the ground, among others, that section 844 had not been complied with. The objection was overruled, the inquiry conducted and the order of filiation, certifying the reasonable costs of arresting the relator and the sums to be paid by him for the support of the child and mother, made. (§ 850.)

Section 851 provides:

"If the defendant be adjudged to be the father, he must immediately pay the amount certified for the costs of the arrest and of the order of filiation, and enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect,

"1. That he will pay weekly or otherwise, as may have been ordered, the sum directed for the support of the child, and of the mother during her confinement and recovery, or which may be ordered by the county court of the county; and that he will indemnify the county, and town or city where the bastard was or may be born (as the case may be), and every other county, town or city, which may have been or may be put to expense for the support of the bastard, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum

mentioned in the undertaking, and which must be fixed by the magistrate; or,

"2. That he will appear at the next term of the county court of the county, to answer the charge and obey its order thereon, or that the sureties will pay a sum equal to a full indemnity for supporting the bastard and its mother, as provided in the first subdivision of section 844."

Because the relator did not comply with the provisions of this section, he was committed to the county jail. (§ 852.)

[532] The police justice did not have the power, under the facts presented, to subject the relator to the provisions of section 851. The common law did not make the father of a bastard liable for the support of either the mother or the child, and the liability of the relator exists solely by virtue of the statutes. (*Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20, 2 Kent's Com. [13th ed.] p. 215.) The proceedings by which the liability shall be determined and fixed are defined and controlled exclusively by the statutes which must be in their substance strictly and fully complied with. (*Hutton v. Bretsch*, 216 N. Y. 23, 109 N. E. 858.)

In the present case the power of the police justice to proceed beyond the issuance and indorsement of the warrant (§§ 842, 843) depended upon either of the two sets of facts or conditions, that (a) the officer arresting the relator in Schoharie county had taken him before the magistrate of that county, who indorsed the warrant (§§ 843, 844), and the relator did not give an undertaking as provided in section 844 and had been taken before the police justice (§§ 846, 848), or (b) the officer had taken him before the Schoharie county magistrate and the relator gave an undertaking as provided in section 844, had been discharged from arrest (§ 845) and the warrant, indorsed with the certificate of the Schoharie county magistrate of the discharge of the relator, and the undertaking delivered to the police justice. (§§ 845, 854.) The police justice had not the power to commit the relator to the county jail unless the first of such sets of facts or conditions existed. (§ 852.) Unless such facts or condition existed, an order of filiation did not subject the relator to the provisions of section 851. Those conclusions are produced and compelled by the mandatory and imperative commands of the statute. The officer "must" take the defendant before the magistrate of the county of defendant's residence in order that he may take the undertaking (§ 844) and, the undertaking being [533] given, he "must" discharge the defendant (§ 845), and thereupon the officer "must" deliver the warrant indorsed with a certificate of the discharge, and the under-

taking to the magistrate issuing the warrant. If the defendant do not give the undertaking the officer "must" take him before the last-named magistrate, who then and in that event "must" proceed as provided in sections 848-850. When the defendant gives the undertaking, and when it and the warrant indorsed with the certificate of defendant's discharge are delivered to the magistrate who issued the warrant, then and in that event the magistrate "must" proceed as prescribed in section 854, but an order of filiation made while so proceeding does not subject the defendant to the provisions of section 851, and, therefore, does not subject him to any commitment. While the word "must," when used in statutes, is not universally and necessarily mandatory (*Jenkins v. Putnam*, 106 N. Y. 272, 12 N. E. 613; *In re Thurber*, 162 N. Y. 244, 252, 56 N. E. 631), here, indubitably, the directions of the sections are mandatory and imperative. The validity of the order of filiation and the commitment depended upon a strict compliance with the substance of them. Such conclusion rests upon either of two rules which, while akin, are not identical. The one, the jurisdiction or, in other words, the power of a judicial tribunal to try or inquire and adjudge in a proceeding purely statutory, in which the subject-matter and the remedy are purely the creatures of the statutes, is delimited and confined by the provisions of those statutes. An invalidity of its determination or adjudication in the proceeding will result from its action in disobedience to or contravention of the statutory requirements, as well as from its lack of power to take cognizance of the claim or accusation—want of jurisdiction of the subject-matter—or to secure the constructive or actual appearance of the defendant or accused—want of jurisdiction of the person. The order of filiation was void unless all the material requirements [534] of the statute were substantially complied with. (*People v. Higgins*, 151 N. Y. 570, 45 N. E. 1033; *Hutton v. Bretsch*, 216 N. Y. 23, 109 N. E. 858; *Sprague v. Eccleston*, 1 *Lans.* (N. Y.) 74; *People v. Crispi*, 106 App. Div. 176, 94 N. Y. S. 372; *Brahmstead v. Ward*, 44 *Wis.* 591; *State v. Wakefield*, 60 *Vt.* 618, 15 *Atl.* 181.) The other, compliance with the commands of a mandatory statute, is a condition precedent to the validity of an act or determination under it. The mode or way in which the act shall be done or the determination reached prescribed by it must be strictly pursued, otherwise the act or the determination will be void. (2 *Lewis' Sutherland Statutory Const.* [2d ed.] § 627; *State v. Perkins*, 58 *Vt.* 722, 5 *Atl.* 894; *In re Norwegian St.* 81 *Pa. St.* 349.)

From the facts and the references to the Code sections already stated it is clear and *Ann. Cas.* 1917D—15.

certain that the police justice did not obey in matters of substance, or proceed in conformity with the statutory requirements. His power, from the commencement of the proceeding to its termination came to him through and as given in those mandatory and imperative provisions and a step or act in the proceeding in disobedience of or in conflict with them was *coram non judice*. For the reasons stated the order of filiation was void and the relator did not become subject to the provisions of section 852.

This conclusion does not conflict with the directions of section 684 of the Code of Criminal Procedure to the effect that a departure from the prescribed form or mode of pleadings or proceedings not prejudicing a substantial right of the defendant does not render a judgment or proceeding invalid. The procedure of the officer and the police justice was prejudicial to the relator in three respects: (1) It deprived him of the right to give an undertaking under section 844 in the county of his residence and thereby secure his discharge from arrest. (2) It subjected him to the provisions of sections 851, 852, whereas if he had given an undertaking under section [535] 844 those sections would have been inapplicable. (3) He could give an undertaking under either subdivision of section 844 and have, upon an appeal to the county court from an order of filiation, a full rehearing, that is, he could appeal from the entire order. He could not give an undertaking under subdivision 1 of section 851 and appeal from the entire order; his appeal in that case would be limited to the part of the order fixing the weekly or other allowances to be paid. (§§ 861, 862, 864, 865, 867.)

The reasons for reversal are not opposed, at any point, to those for the decision in *People v. Eberspacher*, 79 *Hun* 410, 29 N. Y. S. 796. The mere illegality of the act of the officer in refusing to take the relator before the magistrate of Schoharie county, or in taking him directly before the police justice is not the basis for our conclusion. The basis for it is that the taking of the relator before the Schoharie county magistrate was a condition precedent, by virtue of the statutory requirements, to the making of the inquiry and the order of filiation, and was not fulfilled. This feature was lacking in the *Eberspacher* case. The relator did not waive the nonfulfillment (*Jones v. Jones*, 108 N. Y. 415, 425, 15 N. E. 707, 2 *Am. St. Rep.* 447; *Baird v. Helfer*, 12 *App. Div.* 23, 42 N. Y. S. 484) and was not bound to appeal from the order of filiation in order that he might escape its effect. Inasmuch as it was void, because the police justice transgressed his power, the relator might assert its invalidity through the writ of habeas corpus. I

concur in the opinion of my brother Chief Judge Bartlett.

The order of the appellate division and county court should be reversed and the relator discharged.

WILLARD BARTLETT, Ch. J.—I concur in the opinion of our brother Collin for reversal and the discharge of the relator. I would add a few words as to the proposition that the police justice in Troy had jurisdiction irrespective of the unlawful methods by which the relator [536] was brought before him. Under the statute, if the relator had been arrested in the county where the warrant was issued, the police justice would undoubtedly have had jurisdiction of the offense; but when the defendant is arrested in another county, as was the case here, he must be afforded an opportunity before a magistrate of that county to give the undertaking prescribed in section 844 of the Code of Criminal Procedure. If he gives it he can be tried only in the county court of the county in which the warrant was issued,—not by the magistrate who issued the warrant. It is only in default of his giving the requisite undertaking that the magistrate issuing the warrant has power to try the case. (Code Crim. Proc. §§ 846, 848.) As the relator was deprived of the opportunity of giving such undertaking he was not chargeable with any default in that respect.

The argument of the respondent necessarily rests upon the proposition that the Troy police justice had jurisdiction to try bastardy proceedings generally, irrespective of the circumstances attendant upon the arrest of the defendant. This proposition is erroneous. Under the Code of Criminal Procedure as applicable to second class cities (Second Class Cities Law [Cons. Laws, ch. 53] § 185) the police justice had jurisdiction to try bastardy proceedings only where the defendant was arrested in the county of the police justice, or where, having been arrested in another county and having been afforded an opportunity to give the security prescribed by law, he has failed to give it. Neither of these conditions existed in the present case.

SEABURY, J. (*dissenting*).—I am unable to agree with the judgment about to be rendered in this case and desire to state the reasons for my dissent.

On July 28th, 1914, the overseer of the poor of the city of Troy made application to the police justice of that city pursuant to section 840 of the Code of Criminal Procedure, [537] to inquire into the charge that one Agnes Muckle, a resident of said city, was pregnant of a bastard child likely to be born and to become chargeable to the city of Troy. The police justice examined Agnes

Muckle under oath and ascertained from such examination that she charged that the relator was the father of the child of which she was pregnant. The police justice thereupon issued a warrant for the arrest of the relator and caused the same to be delivered to a police officer of the city of Troy. An indorsement made upon the warrant by the police justice of the city of Troy directed that any bond that might be taken of the relator should be in the sum of \$500. By an indorsement made on said warrant by one Wells, a justice of the peace of the county of Schoharie, the arrest of the relator was authorized to be made under said warrant in the county of Schoharie. On August 8th, 1914, at Howe's Cave, in the county of Schoharie, the relator was arrested. Up to this point it is not claimed that any irregularity in procedure occurred. The course which should then have been followed is defined in section 844 of the Code of Criminal Procedure. That section provides as follows: "When the defendant is arrested in another county, he must be taken before the magistrate who indorsed the warrant, or before another magistrate of the same city or county, who may take from the defendant an undertaking, with sufficient sureties, to the effect: 1. That he will indemnify the county, and town or city, where the bastard was or is likely to be born, and every other county, town or city, against any expense for the support of the bastard, or of its mother during her confinement and recovery, and to pay the costs of arresting the defendant, and of any order of filiation that may be made, or that the sureties will pay the sum indorsed on the warrant; or, 2. That the defendant will appear and answer the charge at the next county court of the county where the warrant was issued, and obey its order thereon." Instead of taking the [538] relator before a magistrate of Schoharie county in the manner provided in section 844 of the Code of Criminal Procedure, the officer making the arrest took the relator directly before the police justice of the city of Troy who issued the original warrant. The relator objected to the jurisdiction of the police justice to proceed with the inquiry then pending before him on the ground that section 844 of the Code of Criminal Procedure had not been complied with. The police justice overruled the objection, and proceeded with the inquiry in the regular way and entered an order of filiation certifying the sum to be paid by the relator for the support of the child and mother and reasonable costs incident to arresting the relator. Upon the failure or refusal of the relator to comply with the provision of this order he was committed to the county jail. The relator then sued out a writ of habeas corpus. Whether in such a case the writ

should be sustained is the question to be determined upon this appeal. Proceedings under the statute in a bastardy case while partaking of the nature of both a criminal prosecution and a civil suit are quasi-criminal. The proceedings taken under the statute must be in conformity to its provisions. (*Hutton v. Bretsch*, 216 N. Y. 23, 109 N. E. 858.) The police justice of the city of Troy had jurisdiction to hear and determine bastardy proceedings. The proceeding against the relator was such a proceeding. The police justice of the city of Troy, therefore, had jurisdiction of the subject-matter. The defendant was actually arraigned before the police justice of the city of Troy, and was present during the whole proceeding. The police justice had jurisdiction of the person of the relator, unless the irregularity existing in the method by which the relator was brought from Schoharie county to Rensselaer county served to deprive him of that jurisdiction. It is now settled that where one is held by a final judgment or decree of a court which had jurisdiction of the subject-matter and person, habeas corpus will not lie, and the writ cannot be made to perform [539] the functions of a writ of error. (*People v. Kaiser*, 206 N. Y. 46, 52, 99 N. E. 197; *People v. Frost*, 198 N. Y. 110, 91 N. E. 376, 139 Am. St. Rep. 801; *McNamara v. Henkel*, 226 U. S. 520, 33 S. Ct. 146, 57 U. S. (L. ed.) 330; *In re Gregory*, 219 U. S. 210, 31 S. Ct. 143, 55 U. S. (L. ed.) 184.)

In section 2016 of the Code of Civil Procedure it is provided that a writ of habeas corpus cannot issue when the relator is held "by virtue of the final judgment or decree, of a competent tribunal of civil or criminal jurisdiction." The order of filiation finally determining the bastardy proceeding was a "final judgment or decree" within the meaning of section 2016 of the Code of Civil Procedure. In *People v. Kaiser* (supra) Judge Gray said: "The summary remedy of a writ of habeas corpus, which is open to every person detained in custody, that the legality of his detention may be inquired into, cannot perform the functions of an appeal from the judgment of conviction. The court, before which a prisoner is brought under the writ, will inquire into the question of jurisdiction and if it appears that the power existed to pronounce the judgment, the writ must be dismissed." In the case under review the police justice of the city of Troy clearly had jurisdiction of the subject-matter, and, as already pointed out, he had jurisdiction of the person of the relator, unless the irregularity existing in the method by which the relator was brought from Schoharie county to Rensselaer county deprived him of that jurisdiction. Whether that irregularity served to deprive the police jus-

tice of jurisdiction of the person of the relator is, as I view this case, the only question which is presented for determination. It is a settled principle of law that the jurisdiction of a court in which one is charged with an offense is not impaired by the manner in which the person charged is brought before it. (*Mahon v. Justice*, 127 U. S. 700, 712, 8 S. Ct. 1204, 32 U. S. (L. ed.) 283; *Kerr v. Illinois*, 119 U. S. 436, 437, 7 S. Ct. 225, 30 U. S. (L. ed.) 421; *State v. Smith*, 1 Bailey L. (S. C.) 283, 19 Am. Dec. 679; *State v. Brewster*, 7 Vt. 118; *State v. Ross*, 21 Ia. 467; *U. S. v. Lawrence*, 13 Blatchf. [540] 295, 26 Fed. Cas. No. 15,573; *U. S. v. Caldwell*, 8 Blatchf. 131, 25 Fed. Cas. No. 14,707; *People v. Rowe*, 4 Park. Crim. (N. Y.) 253.) It is said that this principle, now firmly fixed in our jurisprudence, was first clearly enunciated by Lord Tenterden in *Ex p. Scott*, 9 B. & C. 446, 17 E. C. L. 416. In that case a rule nisi had been obtained for a habeas corpus. It appeared that an indictment for perjury had been found against the relator and a warrant for her arrest had been issued. The police officer to whom the warrant was directed apprehended the relator at Brussels and brought her to England. In determining the question raised by the objection of the relator Lord Tenterden, Ch. J., said: "The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of a foreign country that country might have vindicated its own law. If it gave her a right of action, she may sue upon it." The doctrine thus declared by Lord Tenterden seems never to have been departed from. In *Mahon v. Justice* (supra) Mr. Justice Field after reviewing the authorities said: "There is indeed an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another state, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offense charged. They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another state. *It would indeed be a strange conclusion, if a party charged with a criminal offense could be excused from answering to the government* [541] *whose laws he had violated because other parties had done violence to him, and also committed an offense*

against the laws of another state." In *People v. Eberspacher*, 79 Hun 410, 411, 29 N. Y. S. 796, a complaint was made out and a warrant issued by a court having jurisdiction of the offense charged. The defendant was arrested in another county, the warrant not being properly indorsed, and was denied his request to be taken before a magistrate of that county to enable him to give bail. On being arraigned the defendant asked his discharge on the ground of the illegality of his arrest and the denial of his privilege to give bail before a magistrate in the county of his arrest. Mr. Justice Cullen in that case said: "We think that the point as to the defendant's arrest does not affect the validity of his trial and conviction. The complaint was made and a warrant properly issued, and the court had jurisdiction of the offense charged. It was, therefore, authorized to try and determine the complaint against the defendant whenever he might be brought before the court. The general rule is that it is no defense to a criminal prosecution that the defendant was illegally or forcibly brought within the jurisdiction of the court." Such is, I believe, the general rule applicable to a case where one is accused of crime and is brought improperly or by some unlawful method within the jurisdiction of the court in which the charge is pending against him. I can see no valid distinction, either in principle or based on the statutes applicable to this particular proceeding, which calls for the application of a different rule to this case. If the relator was unlawfully brought from Schoharie county to Rensselaer county those who committed the wrong may be held responsible, but that fact is not a reason why the tribunal in which the charge is pending should refuse to try the accused or for discharging him from custody. The wrongful method by which the relator was brought to Rensselaer county is not condoned. It is ignored. In such cases the law applies the [542] same principle that it does in the reception upon a trial of competent evidence which was obtained by deception or unlawful means. In such cases the court does not sanction the deception practiced or the unlawful means employed, but it does not on that account exclude the evidence. As remarked by Chief Judge Bartlett, in a recent case: "This is very far from approval." (*People v. Buffom*, 214 N. Y. 53, 56, Ann. Cas. 1916D 962, 108 N. E. 184.) The application of a different rule would seriously embarrass the proper administration of justice. (*U. S. v. Lawrence*, *supra*, 306.)

It is suggested that the illegal act of the police officer in taking the relator to Rensselaer county and refusing to take him before a magistrate of Schoharie is not the reason

for the conclusion that the police justice of the city of Troy was without jurisdiction and it is urged that the police justice was without jurisdiction because the taking of the relator before a magistrate of Schoharie county was a condition precedent by virtue of statutory requirements, to conducting the proceedings and making the order of filiation. The fact that the method by which one charged in a bastardy proceeding is to be brought to the county where the charge is pending is prescribed by statute does not seem to me to distinguish this case from any other where the accused is brought in an illegal manner before the court where the accusation against him is pending. In that case, as in others, the law prescribes a lawful manner by which one who is charged with an offense may be brought within the jurisdiction where the charge is pending. But if the person accused is brought before the tribunal in which the charge is pending in an unlawful manner, the jurisdiction of the court is not thereby impaired and that jurisdiction cannot be defeated by the plea that compliance with the lawful method of bringing the accused within the jurisdiction is a condition precedent to the exercise by the court of its jurisdiction over him. The jurisdiction of the police justice of the city of Troy over the person [543] of the relator was not impaired by the manner in which the relator was brought before him, and as that magistrate had jurisdiction of the subject-matter of the proceeding, the commitment issued pursuant to the order of filiation cannot properly be reviewed under a writ of habeas corpus.

It follows that the order appealed from dismissing the writ should be affirmed, with costs.

POUND, J.—I think that the officer exceeded his powers when he brought relator before the police justice of the city of Troy, but I am unable to reach the conclusion that the Troy magistrate thereby lost jurisdiction.

It has often been held that it is no defense to a criminal prosecution that the defendant was illegally brought within the jurisdiction. (*People v. Eberspacher*, 79 Hun 410, 29 N. Y. S. 796; *People v. Iverson*, 46 App. Div. 301, 61 N. Y. S. 220; *Kerr v. Illinois*, 119 U. S. 436, 7 S. Ct. 225, 30 U. S. (L. ed.) 421.)

The Code of Criminal Procedure (§ 165) reads as follows: "The defendant *must* in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

The magistrate does not lose jurisdiction by reason of unnecessary delay on the part of the officer. Habeas corpus may grant relief during the period of unlawful detention,

but not for that reason after the prisoner is brought before the magistrate.

The Code of Criminal Procedure (§ 173) provides: "The defendant *must* be informed by the officer that he acts under the authority of the warrant, and he must also show the warrant, if required."

The magistrate should not discharge defendant because the officer had not stated his authority and shown his warrant.

The Code of Criminal Procedure (§ 180) provides: "When arresting a person without a warrant the officer *must* inform him of the authority of the officer and the [544] cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape."

The magistrate would have jurisdiction, although the arrest was illegally made.

These provisions and others of like nature are directions to the officer or person making an arrest, which he disregards at his peril, but they have no bearing on the question of jurisdiction.

The Code of Criminal Procedure (§ 844) has to do with the duty of the officer to permit defendant to give an undertaking without being brought before the magistrate who issued the warrant. The magistrate may, if such an undertaking is given, then proceed in the absence of the defendant (Code Crim. Pro. § 855) in the same manner as if the arrest had been made in his county (Code Crim. Pro. § 854).

It was the duty of the magistrate, if defendant was brought before him, to inquire into the charge, and not into the question of how defendant was brought there. (Code Crim. Pro. § 848.)

The orders should be affirmed.

Chase and Hogan, JJ., concur with Collin, J., and Willard Bartlett, Ch. J.; Seabury, J., reads dissenting opinion, and Cuddeback and Pound, JJ., in memorandum, concur.

Orders reversed, etc.

NOTE.

Jurisdiction to Try Prisoner Forcibly or Unlawfully Brought within Jurisdiction.

A substantially unbroken line of earlier decisions supports the holding in *Ex p. Davis*, 51 Tex. Crim. 608, 14 Ann. Cas. 522, that the jurisdiction of a criminal court is not affected by the fact that the accused is brought from a foreign jurisdiction by forcible or unlawful means. To the same effect are several more recent decisions: *People v. Eberspacher*, 79 Hun 410, 29 N. Y. S. 796; *People v. Jeratino*, 62 Misc. 587, 116 N. Y. S. 1121; *People v. Cuatt*, 70 Misc. 453, 126 N. Y. S. 1114; *People v. Harmer*, 75 Misc. 399,

135 N. Y. S. 529; *Matter of Dows*, 1 Phila. (Pa.) 234, 8 Leg. Int. 138. Thus in *People v. Eberspacher*, supra, which was followed in the other New York cases cited, the court said: "The general rule is that it is no defense to a criminal prosecution that the defendant was illegally or forcibly brought within the jurisdiction of the court." In *Matter of Dows*, supra, the contention that the rights of the jurisdiction whence the defendant was wrongfully brought should be protected was discussed as follows: "It may be that, in the proceeding, the territory of Michigan has been unlawfully invaded; but the prisoner, even though he be a citizen of Michigan, cannot raise the question, because his rights are not involved in it. His violation of our law made it his duty for him to be here and stand his trial. His rights are not invaded by the enforcement of duty. The modes of enforcing it—the forms of arrest—are not for his sake, but for the order of society, and he acquires no right of complaint when they are not adhered to. If the order of the state of Michigan has been offended, the state will know how to redress the wrong. It will be little better than judicial quixotism, if I should undertake to defend the dignity of Michigan, when she has not discovered that it is injured. I have no right to do so at the instance of the prisoner."

In *Kansas* it seems that a distinction is drawn between a case where the accused is taken wrongfully from another state and one where he is illegally arrested in another county of the same state. In *State v. Simmons*, 39 Kan. 262, 18 Pac. 177, wherein it appeared that a Kansas sheriff arrested the accused in Nebraska and brought him by force into the jurisdiction, the court, in discharging the accused from custody, said: "It would not be proper for the courts of this state to favor, or even to tolerate, breaches of the peace committed by their own officers in a sister state, by sustaining a service of judicial process procured only by such a breach of the peace." But in *State v. May*, 57 Kan. 428, 46 Pac. 709, it was held to be no objection to the jurisdiction that the accused was illegally brought from another county, *State v. Simmons*, supra, not being referred to in the decision. The court said: "The district court of Harvey county had jurisdiction to try the defendant notwithstanding the irregularity or the illegality of his original arrest in Sumner county. No other sovereignty was invaded. A warrant might have been properly served upon the defendant in any county of the state, whose sovereignty is coextensive with its external boundaries, and the jurisdiction of whose courts for the apprehension of alleged offenders upon proper process is not affected by

county lines. His original arrest was irregular, but this does not affect the jurisdiction of the court into which he was afterward brought by regular process of law."

In the reported case the court holds that a failure to comply with a statute providing that a person arrested in one county in filiation proceedings brought in another shall be taken before a magistrate in the county where he is arrested and afforded an opportunity to give security, deprives the court where the proceedings are pending of jurisdiction to try the accused. The decision is rested wholly on the ground that the statute by mandatory language makes the prescribed procedure a condition precedent to the trial, and the court expressly states that its holding does not overturn the rule laid down in *People v. Eberspacher*, supra.

The decision in the recent case of *People v. Turney*, 273 Ill. 546, 113 N. E. 105, is also apparently consistent with the earlier decisions in that jurisdiction that the manner in which the accused is brought within the jurisdiction will not be considered. In that case it was held that a convict brought into court on a writ of habeas corpus ad testificandum could not be tried on a criminal charge. The court said: "It was the duty of the superintendent [of the reformatory] to produce Letukas in response to the writ of habeas corpus ad testificandum but it was also his duty to retain custody of him, and the court had no power to take him out of the custody of that officer."

SCHMITT

v.

FRANKE ET AL.

Wisconsin Supreme Court—March 23, 1915.

160 Wis. 347; 151 N. W. 793.

Contracts — Validity — Agreement to Prevent Bidding at Judicial Sale.

Plaintiff and three others were joint owners of certain corporate stock subject to a mortgage for the purchase price thereof. On foreclosure of the mortgage, plaintiff was preparing to bid on the stock, when he was told by two of the other owners that the mortgagee had agreed to bid in the stock for the amount of the debt and transfer it to the three owners on payment of the purchase price, thereby eliminating the interest of the fourth owner. Plaintiff thereupon ceased his efforts to raise the money with which to compete in the bidding, and, after the sale, discovered that the real agreement between

the purchaser and the other two owners was, that the stock should be transferred to them, so that plaintiff was also eliminated as an owner. It is held that the agreement between the purchaser, plaintiff, and the two owners to prevent competition in the bidding was a fraud upon the fourth owner, and therefore could not be specifically enforced in equity.

[See note at end of this case.]

Appeal from Circuit Court, Milwaukee county: LUDWIG, Judge.

Action by Conrad Schmitt, plaintiff, against E. C. Franke et al., defendants. Judgment for defendants. Plaintiff appeals. **AFFIRMED.**

[347] This is an action in equity to enforce specific performance of an alleged oral agreement to transfer to plaintiff an undivided one-third interest in 701 shares of corporate stock of the Schmitt Brothers Tobacco Works and to impress a trust in the plaintiff's favor upon 501 shares thereof now in the hands of the defendants. The relief was denied on the ground that a part of the oral contract for the transfer of the stock was [348] an arrangement to restrict public bidding at a judicial sale of said stock, and that the plaintiff was barred of relief in equity by having become a party to said last named arrangement.

The facts found by the court were in substance as follows: Prior to June, 1907, the plaintiff and his brothers, C. M. Schmitt (one of the respondents here) and Mathias F. Schmitt, were minority stockholders in the Hansen-Schmitt Company, a tobacco manufacturing corporation at Milwaukee, the said C. M. and Mathias being actively engaged in the business. On account of business differences C. M. and Mathias were forced out of active participation in the business and they, with the defendant C. W. Walter, organized a new corporation for the manufacture of tobacco, called the Schmitt Brothers Tobacco Works, which became a competitor of the Hansen-Schmitt Company. Both companies were financially embarrassed in June, 1907, and the defendants C. M. Schmitt and Walter and said Mathias Schmitt, desiring to make some arrangement which would end the ruinous competition, either by disposing of the Schmitt Brothers' business or acquiring control of the Hansen-Schmitt business, consulted the plaintiff, as a result of which consultation plaintiff went to New York to effect a sale of the Schmitt Brothers' business to the American Tobacco Company, if possible. He did not succeed, but subsequently, pursuant to his advice, an option on 701 shares of the Hansen-Schmitt stock (being a controlling interest) was obtained running to

plaintiff and Mathias, which they transferred to the defendant Franke, and at the same time arrangements were made for the purchase of the business and assets of the Hansen-Schmitt Company by the Schmitt Brothers Company which were afterwards carried out. About June 25, 1907, Franke made a written agreement with plaintiff and Mathias (which was known and consented to by C. M. Schmitt and Walter) by which he agreed to sell and convey to them said 701 shares of stock (which had then become stock of the Schmitt Brothers Company) for [349] \$30,300, payable in certain instalments, for which the plaintiff, Mathias Schmitt, C. M. Schmitt, and Walter gave their notes, it being further agreed that all dividends declared on the stock should be immediately applied on the purchase price of the stock and that Franke should be employed to purchase tobacco for the company in any market in which he might have a representative. The first note becoming due and not being paid, Franke, by virtue of a provision in the contract, declared the whole sum due and brought action to foreclose and bar Conrad, Mathias, and C. M. Schmitt, and Walter from all rights in the stock, which action went to judgment, under which the stock was sold and bid in by Franke himself, February 10, 1910, for \$31,552.65, which was the exact amount of the debt. After the commencement of the foreclosure action but before the sale C. M. Schmitt and Walter represented to the plaintiff that if he would permit Franke to bid in the stock on the sale without opposition bidding he (Franke) would purchase the same for the benefit of the plaintiff, C. M. Schmitt, and Walter (less a certain number of shares to be retained by Franke) under an agreement that the shares should be paid for out of dividends on the stock similar to the former agreement. They further represented to the plaintiff that one of the real objects of the foreclosure action was to cut off Mathias Schmitt's interest in the stock on account of differences which had arisen between him and them. At and before this time plaintiff had been negotiating to raise money to buy the stock at the sale with prospects of success, but on being informed of the arrangement last aforesaid and relying thereon he ceased to make any further efforts, allowed the defendant Franke to bid in the stock, and ratified by his conduct and his silence the scheme to cut off by the sale the interest of Mathias. Franke knew of the understanding between plaintiff, C. M. Schmitt, and Walter and the reason why the plaintiff allowed him to bid in the stock without opposition. Before the sale of stock took place, however, Franke, [350] C. M. Schmitt, and Walter had secretly agreed that Franke should convey 501 shares of the stock to

C. M. Schmitt and Walter, the same to be paid for out of the dividends of the business, which agreement was reduced to writing in October, 1910, after a part of the purchase price had been paid, and the plaintiff first learned thereof in March, 1911, when he demanded an interest in the same but was denied any interest by C. M. Schmitt and Walter. From the beginning of the plaintiff's active connection with the affairs of Schmitt Brothers it was understood by the plaintiff, C. M. Schmitt and Mathias Schmitt, and by Walter that the plaintiff was to receive some interest in the 701 shares of stock, but the amount was not fixed until the agreement of June 25, 1907, which was understood by all to assure to the plaintiff a one-quarter interest therein. Franke knew that plaintiff had some financial interest in the stock and that plaintiff did not sign the notes of June 25, 1907, simply because he had a brotherly feeling for Mathias and C. M. Schmitt. The plaintiff performed most valuable services for the Schmitt Brothers Company when it was on the verge of bankruptcy and materially aided in bringing about the results obtained, he and Franke being the only parties having a financial standing, and his services were worth \$1,000. Upon these facts the court concluded that the plaintiff was barred by his conduct from claiming any share in the stock, but that the ends of justice required that he should recover from C. M. Schmitt and Carl Walter \$1,000 for his services, and the complaint was ordered amended accordingly, and judgment rendered for that sum with interest, but without costs. It was further adjudged that as to Franke the complaint be dismissed without costs. Plaintiff appeals from those parts of the judgment denying relief in equity against C. M. Schmitt and Walter and dismissing the complaint as to Franke.

McCabe & Dahlman for appellant.

Lawrence A. Olivell and *Thomas A. Barker* for respondents.

[351] WINSLOW, C. J.—There was sufficient evidence to sustain the findings of fact made by the trial court, and the only question which we find it necessary to consider is the question whether the proper legal conclusion was drawn therefrom.

The essential facts are these: Franke agreed to sell the 701 shares of stock to plaintiff and Mathias, joint notes being given therefor by plaintiff, Mathias and C. M. Schmitt, and Walter. The notes not being paid Franke foreclosed the agreement. Before the foreclosure action was begun C. M. Schmitt, Walter, and Franke agreed between themselves that Franke should bid in the stock without opposition and thereafter give

a new contract to the other two men, thus barring out both the plaintiff and Mathias Schmitt. Before the foreclosure sale C. M. Schmitt and Walter told plaintiff that the arrangement was that Franke should bid in the stock for the benefit of themselves and the plaintiff jointly, thus depriving Mathias (who was not financially able to bid) of his interest, and plaintiff tacitly consented to the plan and on the faith thereof ceased to prosecute the efforts he had begun to get funds with which to bid. The sale took place; the scheme was carried out, Franke obtained the stock on his own bid without competition, Mathias was barred out, and then plaintiff discovered that by secret agreement between Franke, C. M. Schmitt, and Walter he too was barred of the interest which he had been assured would be preserved to him notwithstanding the foreclosure sale.

On these facts it must be held that the judgment was correct. Contracts to prevent competitive bidding at judicial sales whereby a fraud on any third person is worked are invalid because against public policy. The plaintiff here must base his right upon an arrangement to which he consented [352] which involved as an essential part his refraining from bidding at the sale in order to force Mathias Schmitt out of the business. While there are doubtless cases where agreements between bidders are valid because no third person is injured thereby, this is not one of them. Mathias was entitled to a fair sale of the stock, and as he was not financially able to make a bid himself it is very apparent that the stifling of competition was a fraud upon him. 1 Page, Contracts, § 405; Herndon v. Gibson, 38 S. C. 357, 17 S. E. 145, 37 Am. St. Rep. 765, 20 L.R.A. 545 and cases cited in note.

A cause of action does not arise out of a contract which violates public morals or public policy. Milwaukee Masons', etc. Assoc. v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 60 Am. St. Rep. 97, 37 L.R.A. 127. This principle is well established and demonstrates the correctness of the judgment.

By THE COURT.—Judgment affirmed.

NOTE.

Validity of Contract to Prevent Bidding at Judicial Sale.

General Rule, 232.

Qualification of Rule, 233.

General Rule.

It is the policy of the law to protect judicial sales from all influences whereby

full and free competition is prevented, it being the purpose of the sale to secure the best price that can fairly be had for the property sold. See 16 R. C. L. tit. *Judicial Sales*, page 68. Consequently a sheriff's sale will be set aside if it appears that by any contract or combination competition among the possible bidders was prevented. See the note to Brady v. Carteret Realty Co. 3 Ann. Cas. 421. So in a number of cases involving the validity of a judicial sale as affected by such a contract it has been said that the contract was fraudulent and void. Garrett v. Moss, 20 Ill. 549; Barnes v. Mays, 88 Ga. 696; Lloyd v. Malone, 23 Ill. 41, 74 Am. Dec. 179; Devine v. Harkness, 117 Ill. 145, 7 N. E. 52; Ingalls v. Howell, 149 Ill. 163, 36 N. E. 1016; Haggerty v. Haggerty, 268 Ill. 295, 109 N. E. 34; Fleming v. Hutchinson, 36 Ia. 519; Grant v. Lloyd, 12 Smedes & M. (Miss.) 191; Swofford v. Garmon, 51 Miss. 348; Hawley v. Cramer, 4 Cow. N. Y. 717; Phelps v. Benson, 161 Pa. St. 418, 29 Atl. 86; Rodgers v. Rodgers, 13 Grant Ch. U. C. 143.

Thus in Garrett v. Moss, supra, the court said: "It is a well-established doctrine, that any corrupt agreement among bidders, which prevents competition at a public sale, is a fraud upon the owner, for which a sale should be set aside." In Ingalls v. Rowell, 149 Ill. 163, 36 N. E. 1016, it appeared that one Stevens was present at the sale and a bidder for the farm; that while the sale was in progress Ingalls entered into an agreement with Stevens to the effect that whichever of the two had the farm struck off to him, the other should have the option to take it off his hands, by paying him a bonus of \$200; that the land was finally struck off to Stevens, and that, in pursuance of the agreement, Ingalls paid Stevens \$200, and by direction of Stevens, the conveyance was made by the administrator to Ingalls. That such an agreement was entered into during the sale and afterwards carried out was not denied. The court said: "It is a well-recognized rule that, where a person, desirous of purchasing property at auction, prevents others, by his improper conduct, from bidding against him, and thus succeeds in purchasing the property at less than its fair market value, the sale will be set aside. So, agreements not to bid at a public auction are in general void as against public policy, and tending to fraud, and such agreements, at least when brought about or participated in by the purchaser, will vitiate the sale."

In a number of cases wherein a party to an agreement designed to prevent or limit the bidding at a judicial sale has attempted to assert a right based on that agreement

it has been held that such a contract is void as against public policy.

California.—Packard v. Bird, 40 Cal. 378.

Georgia.—Graham v. Theis, 47 Ga. 479.

Indiana.—Goldman v. Oppenheim, 118 Ind. 95, 20 N. E. 635; Shaw v. Elijah, 54 Ind. App. 234, 102 N. E. 885.

Maine.—Gardiner v. Morse, 25 Me. 140.

Massachusetts.—Phippen v. Stickney, 3 Metc. 384.

Michigan.—Fisher v. Hampton Transp. Co. 136 Mich. 218, 98 N. W. 1012, 112 Am. St. Rep. 358, 10 Detroit Leg. N. 1028. See also Spitzley v. Rivard, 152 Mich. 670, 116 N. W. 547, 15 Detroit Leg. N. 391.

Missouri.—Hook v. Turner, 22 Mo. 333.

Nebraska.—McClelland v. Citizens' Bank, 60 Neb. 90, 82 N. W. 319.

New York.—Wheeler v. Wheeler, 5 Lans. 355; Herrick v. Grow, 5 Wend. 579; Brackett v. Wyman, 48 N. Y. 667; Meech v. Bennett, Lalor's Supp. 191; Munson v. Magee, 22 App. Div. 333, 47 N. Y. S. 942, affirmed 161 N. Y. 182, 55 N. E. 916.

North Carolina.—Ingram v. Ingram, 49 N. C. 188; Whitaker v. Bond, 63 N. C. 290; Owens v. Wright, 161 N. C. 127, Ann. Cas. 1914D 1021, 76 S. E. 735.

Pennsylvania.—Barton v. Benson, 126 Pa. St. 431, 17 Atl. 642, 12 Am. St. Rep. 883.

South Carolina.—Dudley v. Odom, 5 S. C. 131, 22 Am. Rep. 6.

Tennessee.—See McMinn v. Phipps, 3 Sneed 196.

Virginia.—London Nitro-Phosphate Syndicate v. Johnson, 100 Va. 774, 42 S. E. 995; Bolling v. Mullins, 111 Va. 250, 68 S. E. 982.

West Virginia.—Ralphsnyder v. Shaw, 45 W. Va. 680, 31 S. E. 953.

Wisconsin.—See the reported case.

See also the note to Coal, etc. R. Co. v. Marple, Ann. Cas. 1913D 959, wherein the validity of a combination among the bidders at a tax sale is discussed.

Thus in Gardiner v. Morse, 25 Me. 140, it appeared that one Perry held a note against the plaintiff for a much larger amount than the demand sued for. Perry became bankrupt, and his effects were about to be sold at auction for the benefit of his creditors. Among those effects was the note against the plaintiff. The plaintiff, wishing to purchase his note at as low a rate as possible, agreed with the defendant that if the latter would not buy it, or bid for it at the auction, the plaintiff would "give up and discharge in full" the demand sued for. The plaintiff contended that his promise so made was nugatory; that it was an agreement to do that which tended to the injury of the creditors of Perry, by lessening the competition among the bidders at the auction, and thereby preventing the note from bringing

as much as it might otherwise have sold for. It was held that the agreement was void. The court said: "To allow bidders to buy off each other, which is but a species of bribery, and so to combine to prevent a fair competition as that a sale may be rendered iniquitously fruitless, cannot be admissible." Likewise in Goldman v. Oppenheim, 118 Ind. 95, 20 N. E. 635, it appeared that just before an administrator's sale the appellee and one Thurmauer entered into an agreement by which the appellee gave him his check for \$300 in consideration for which Thurmauer agreed to and did withdraw a bid which he had made. It was held that this agreement was made for no other purpose, and could have no other effect, than to prevent competition in bidding on the property offered for sale and was unlawful and that the check could not be collected.

Qualification of Rule.

An agreement entered into by two or more persons to buy property at a judicial sale jointly for the reason that they are unable to buy it separately, or for the purpose of protecting the rights of all, or for some other honest purpose, is not invalid as a contract preventing bidding. Kearney v. Taylor, 15 How. 520, 14 U. S. (L. ed.) 797; Starkweather v. Jenner, 216 U. S. 524, 17 Ann. Cas. 1167, 30 S. Ct. 382, 54 U. S. (L. ed.) 602; Fidelity Ins. etc. Co. v. Roanoke St. R. Co. 98 Fed. 475; Venner v. Denver Union Water Co. 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036; Jolly v. Mutual L. Ins. Co. 65 S. W. 440, 23 Ky. L. Rep. 1508; Phippen v. Stickney, 3 Metc. (Mass.) 384; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; National Bank v. Sprague, 20 N. J. Eq. 159; Hopkins v. Ensign, 122 N. Y. 144, 25 N. E. 306, 9 L.R.A. 731; Colton v. Kennedy, 74 Misc. 217, 131 N. Y. S. 483; Delisi v. Ficarrota, 76 Misc. 488, 135 N. Y. S. 653; Holmes v. Holmes, 3 Rich. Eq. (S. C.) 61; McMinn v. Phipps, 3 Sneed (Tenn.) 196; Henderson v. Henrie, 61 W. Va. 183, 11 Ann. Cas. 741, 56 S. E. 369. See also Shaw v. Elijah, 54 Ind. App. 234, 102 N. E. 885; Neely v. McClure (Pa.) 1 Atl. 719. Thus in Delisi v. Ficarrota, supra, the court said: "The early rule of law condemned without discrimination all agreements between persons not to bid at judicial or public sales. This rule has, however, been modified, and it is now well settled in this state that, where such agreements are made for an honest purpose, and designed to protect existing interests, they are valid."

In Venner v. Denver Water Co. 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036,

it appeared that certain bondholders were interested in the property in question by virtue of the indebtedness held by them and secured thereon. The most feasible plan for the bondholders to protect themselves was to enter into an arrangement whereby the property might be purchased at the sale for their benefit, if that became necessary. Such an arrangement operated as an inducement to, and enabled the persons entering into it to participate in, the bidding, and, to raise the bids against all competitors up to the amount of that indebtedness, if the value of the property justified it. By the agreement the bondholders did not agree not to bid against each other, but agreed to make a purchase for their common benefit. The arrangement did not prevent any other person or corporation from becoming a purchaser or bidder at the sale. The court said: "The test to apply in determining the validity of a combination of the kind under consideration is the end intended to be thereby accomplished. If it is to depress the price of the property to be sold, and prevent competitive bidding at the sale, it is illegal; but if its purpose is to raise the means of payment by contribution, or to divide the property for the accommodation of the purchasers, it is valid. The fact that an agreement to make a joint purchase may indirectly operate to prevent the parties thereto from bidding is not enough to render the transaction unlawful. To have that effect it must appear that the object of the agreement was to avoid competition."

So in *Phippen v. Stickney*, 3 Metc. (Mass.) 384, the court said that where an arrangement is entered into for no fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such an agreement is valid and binding.

Likewise in *National Bank v. Sprague*, 20 N. J. Eq. 159, it appeared that objection was made to the effect that the creditors who purchased at an auction sale, by combining to bid together and to purchase for their joint account, contravened thereby the policy of the law, which holds any contract to prevent competition at auction sales to be illegal, and as such to avoid all purchases made under it. The court saying that it did not appear that any one of the creditors who agreed to purchase for their common benefit would have been willing or was able to purchase on his own account and the transaction was therefore not unlawful, stated the rule as follows: "There is no doubt that it is illegal for two purchasers, or in-

tended purchasers at an auction sale, to combine not to bid against each other, and to divide in any way the profits of purchases made under such an agreement. But all the authorities and decisions in this matter which have been brought to my notice are confined to cases in which there is an agreement between the parties not to bid or enter into competition to bid against each other, and where this agreement is the foundation of the combination to purchase for their common benefit. And the principle upon which the rule is based would apply only to such cases, and not to cases where parties joined to make a purchase for their common benefit without an agreement not to compete, although the effect of such joint purchase might be to prevent competition. The members of a firm may unquestionably agree, that in a purchase to be made at auction for the firm, only one shall bid, and the others shall abstain, though present at the sale. So if two country merchants, in the same village, should agree that one should attend the auction sale of flour in a distant city, and should purchase two hundred barrels to be divided between them, it would not be illegal, though the effect might be that instead of each bidding in competition with the other for one hundred barrels, the purchase would be made with less competition and at a lower price. Or if at an auction sale of sugars by the hogshead, two persons, neither of whom wanted to purchase or would purchase a whole cask, were to agree that one should purchase for the common benefit, such arrangement is not against public policy, for, instead of preventing competition, it brings in a bidder who would not otherwise be one. To make such agreement illegal, it is necessary that there should be an agreement not to compete, and that the object of making the agreement should be to avoid competition; it is not sufficient that such is the effect of the agreement."

In *Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L.R.A. 731, the court said: "It is now settled that agreements between two or more persons that all but one shall refrain from bidding, and permitting that one to become the purchaser, are not necessarily and under all circumstances void. They may be entered into for a lawful purpose and from honest motives, and in such cases will be upheld, and they will not vitiate the purchase or necessarily destroy the completed contracts to which they refer and in respect to which they are made."

So in *Starkweather v. Jenner*, 216 U. S. 524, 17 Ann. Cas. 1167, 30 S. Ct. 382, 54 U. S. (L. ed.) 602, the court said that two or more persons had a right to unite their fortunes in order to buy at the best price

obtainable at a judicial sale, if they could buy at all, provided they resorted to no artifice to deter others from bidding.

Likewise in *Colton v. Kennedy*, 74 Misc. 217, 131 N. Y. S. 483, the court said: "The agreement of the plaintiff that he would abstain from bidding at the foreclosure sale was not void as against public policy. It was not an agreement to suppress competition. Its primary purpose was not to enable the defendant to secure the property at less than its fair value, but rather for the purpose of enabling defendant to pay plaintiff's claim out of the property. The agreement to abstain from bidding was a sufficient consideration to uphold defendant's agreement."

In *Fairy v. Kennedy*, 68 S. C. 250, 47 S. E. 138, it appeared that a demurrer was based on the proposition that an agreement intended to chill bidding at a judicial sale was under all the circumstances regarded as such a legal wrong that no rights could be claimed under it. The court holding that the agreement did not vitiate the sale said: "Where all parties interested unite in the contract or subsequently sanction it in the promotion of their interests, the rule has no application, for the obvious reason that there is nobody left to be defrauded."

In *Mallon v. Buster*, 121 Ky. 379, 89 S. W. 257, 28 Ky. L. Rep. 318, it appeared that at a judicial sale two lots were offered separately, and then as a whole, the understanding being that the bid producing the most money was to be accepted. One of these lots adjoined the property of the defendant Mallon, the other that of the plaintiffs Buster and Allin. When offered separately, each of the parties purchased the lot adjoining his or their own property; one lot bringing \$200, and the other \$240. When the property was offered as a whole, the parties litigant became bidders, and between them raised the price to \$516. Some little time before this bid was reached the opposing bids had been going up about a dollar at a time. At this period in the sale Mr. Allin, who had been doing the bidding for Buster and Allin, said to Mallon, substantially: "You want only one of these lots, and we want one. Why not quit bidding against each other and buy them together, paying for them equally and sharing them equally? You take the one next to you, and we the one next our mill property." To which Mallon responded: "All right; why did you not say so sooner?" The lot was knocked down to Mallon, who afterwards procured the sale to him to be confirmed by the court and executed a bond for the purchase money, but refused to divide with the plaintiffs, except at a price in excess of that which he had paid at the judicial sale. Whereupon Buster and Allin instituted an action for the specific

performance of the contract. On final hearing the court adjudged that the verbal contract with reference to the lot was made substantially as alleged by Buster and Allin, and that they were entitled to the half lying next to their property. Affirming the judgment the appellate court said: "There is no principle of law that requires parties so situated to unnecessarily injure themselves in order to promote the interest of the beneficiaries of a judicial sale; and a contract between bidders, made for the purpose of protecting themselves against what might be called opportunism growing out of the facts existing at the time of the sale, is not opposed to public policy. All that the beneficiaries of a public sale can require is that their right shall not be trespassed upon by an unlawful conspiracy which has the effect, or tends to have the effect, of acquiring the property below its market value. In the case at bar, demonstrably the contract in question was only made after this point was reached, and when it was impossible that its effect should have been to acquire the property below its real worth. This being true, the contention of appellant that the contract was void as opposed to public policy is untenable."

In *Lay v. Brown*, 106 Ark. 1, 151 S. W. 1001, it appeared that the appellant agreed to refrain from any further proceeding against an estate so far as the land in question was concerned, if the appellee would refrain from bidding at the sale of the interest in the lands ordered sold for the satisfaction of the appellant's judgment against the estate. At the sale the appellee did not bid, and the half interest was purchased by the appellant. The court said: "The primary purpose of this agreement was not to prevent competition at the sale nor to stifle the bidding, but to protect the rights of the parties, so far as the evidence shows, and it was not an agreement against public policy and void on that account."

In *Satterfield v. Kindley*, 144 N. C. 455, 12 Ann. Cas. 1098, 57 S. E. 145, 15 L.R.A. (N.S.) 399, it was held that a certain contract was not void as an agreement to suppress bidding. The court said: "There is no evidence here that the purpose of the parties was to 'chill the sale' and to purchase the property at less than its market value. On the contrary, the agreement was evidently made without design to commit a fraud but to make the property bring its full value and to enable the defendants to more conveniently acquire the title. An agreement with such purpose in view is valid."

In *Citizens' Bank v. Ober*, 1 Woods 80, 13 Nat. Bankr. Reg. 328, 5 Fed. Cas. No. 2,781, it was held that a person intending to bid at a bankrupt's sale might agree to sell the

property to another who had no intention of bidding at a price determined on and that the agreement would not render the sale fraudulent or against public policy as suppressing bidding.

In *Evans v. Carter* (Tex.) 178 S. W. 749, it appeared that at the time of or prior to a judicial sale the defendant Carter and one Boulware had an understanding or agreement to the effect that Carter should purchase the property and then resell to Boulware at an agreed price in excess of the amount. The court said that such an agreement would not necessarily render the sale illegal unless it was entered into for the purpose of stifling bids or for a fraudulent reason. See to the same effect *Ellerd v. Ellison* (Tex.) 165 S. W. 876. Compare *Ralphsnyder v. Shaw*, 45 W. Va. 680, 31 S. E. 953.

LEE

v.

STATE.

Florida Supreme Court—February 24, 1915.

69 Fla. 255; 67 So. 883.

Criminal Law — Evidence — Comparison of Footprints — Shoe Furnished by Accused.

Where one under arrest hands his shoe to the officer in charge, who places the shoe in a track near the scene of the homicide, the latter may testify that the shoe fitted the track exactly, even though he did not warn the former against incriminating evidence.

[See note at end of this case.]

Instructions — Exception to Refusal — Sufficiency of Single Exception.

A single exception to three refused instructions will not avail, where one of the instructions is argumentative and the others covered by the general charge.

Homicide — Evidence — Sufficiency.

In a prosecution for homicide the evidence is held to sustain the verdict.

Error to Circuit Court, Nassau county:
GIBBS, Judge.

Criminal action. James Lee, Sr., convicted of murder in first degree and brings error. The facts are stated in the opinion. **AFFIRMED.**

Marion & Waybright for plaintiff in error.
T. F. West and *C. O. Andrews* for defendant in error.

[256] *COCKRELL, J.*—The plaintiff in error was convicted of murder in the first degree,

and there being a recommendation to mercy, he was sentenced to life imprisonment.

We might refuse to entertain any of the assignments of error, by reason of the very great irregularity in the settlement of the bill of exceptions upon which all the assignments of error are based, but the State has declined to take advantage of the irregularity, and the bill was actually signed by the Circuit Judge who tried the case.

A few hours after the homicide, this accused was taken to the scene. The officer in charge testified to the similarity of the tracks made by Lee, with those plainly marked in soft sand going from the scene. The accused at the officer's suggestion took off a shoe, and the officer [257] testified that it fitted the track exactly. This testimony was objected to upon the sole ground that he could not testify as to how that track is compared with Jim Lee's, which was merely repeating that he objected. No objection was then urged as to the officer not warning the defendant as to his right to decline incriminating evidence, and it would appear to have been entirely voluntary. After the whole matter had been thoroughly thrashed out there was a motion interposed to strike all the evidence in regard to placing the shoes in the tracks on the ground of compulsion. We think the motion was properly refused as being not timely made, and further that even though the act of handing over the shoe be considered as constructively compulsion, yet the evidence was competent. See *Dickens v. State*, 50 Fla. 17, 38 So. 909; *Moss v. State*, 146 Ala. 686 mem. 40 So. 340; *State v. Fuller*, 34 Mont. 12, 9 Ann. Cas. 648, 85 Pac. 369, 8 L.R.A.(N.S.) 762; *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *State v. Arthur*, 129 Ia. 235, 105 N. W. 422; *Krens v. State*, 75 Neb. 294, 106 N. W. 27; *People v. Van Wormer*, 175 N. Y. 188; 87 N. E. 299; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493; *State v. Sanders*, 75 S. C. 409, 56 S. E. 35; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Thornton v. State*, 117 Wis. 338, 93 N. W. 1107, 98 Am. St. Rep. 924; 4 Wigmore on Ev. Section 2265; 2 Wharton's Crim. Ev. Section 965. This is not a case where an inference is sought to be drawn from a refusal to permit the use of a shoe, or to make a track.

There was a single exception to the refusal to give three instructions requested by the accused. Error is assigned as to two of them only, a tacit admission that one was properly refused. One of them is clearly argumentative, [258] and the others sufficiently covered by the court's general charge.

Great stress is laid upon the alleged insufficiency of the evidence to identify the accused with the commission of the homicide. We think, however, that the State made out a plain case, while the jury was amply justi-

fled in declining to accept the defense of an alibi.

Judgment affirmed.

Taylor, C. J., and Shackleford, Whitfield and Ellis, JJ., concur.

NOTE.

Admissibility in Criminal Case of Evidence Obtained by Requiring Defendant to Furnish Shoe to Compare with Footprint.

Introductory, 237.

Act of Defendant Voluntary, 237.

Act of Defendant Involuntary, 238.

Introductory.

The purpose of this note is to discuss the recent cases dealing with the subject of the admissibility in a criminal case of evidence obtained by requiring the defendant to furnish his shoe to compare with a footprint. The earlier cases are collated in the notes to *State v. Fuller*, 9 Ann. Cas. 648, and *State v. Height*, 94 Am. St. Rep. 323.

Act of Defendant Voluntary.

The general rule seems to be that where a person accused of a crime submits voluntarily to having his shoe placed in a footprint while on his foot or voluntarily removes it for the purpose of comparison, testimony may be given as to the result of the comparison without violating the provision found in the federal and nearly all of the state constitutions, that "no person shall be compelled to testify against himself in a criminal proceeding." *Webb v. State*, 11 Ala. App. 123, 65 So. 845; *State v. Arthur*, 129 Ia. 235, 105 N. W. 422; *State v. Graham*, 116 La. 779, 41 So. 90; *Underwood v. State*, 108 Miss. 34, 66 So. 285; *State v. Thompson*, 161 N. C. 238, 76 S. E. 249; *State v. Sirmay*, 40 Utah 525, 122 Pac. 748. See also *Elder v. State*, 143 Ga. 363, 85 S. E. 97; *State v. Williams*, 120 La. 175, 45 So. 94. And see the reported case.

In *State v. Sirmay*, supra, it was held to be admissible to introduce testimony to the effect that the defendant had placed his foot in tracks for comparison with footprints found on the scene of a murder if it was done of his own free will and without solicitation of the sheriff. The court said: "It is generally held, and as stated in 12 Cyc. 402, that although evidence, including documents and other articles, may have been obtained in a criminal case by unfair or illegal methods, it is nevertheless, as a general rule, admissible if relevant, provided the accused

is not thereby compelled to do any act which incriminates him, and the confession or incriminating admission is not extorted from him; and by the weight of authority it is held to be error to compel the accused to submit to a comparison of footprints and to permit a witness who was present when the accused was forcibly compelled to place his foot in footprints or to surrender his shoes for the purpose of making a comparison, to testify as to the result; but where the accused voluntarily places his foot in the tracks, or surrenders his shoes to the sheriff, he cannot object to evidence that they seemed to fit."

In *State v. Arthur*, 129 Ia. 235, 105 N. W. 422, it was held to be admissible for a witness to testify that the accused after being placed in prison voluntarily gave up to the officers his shoes on being supplied with another pair, and that the shoes, having been fitted into certain tracks close to the scene of crime, had corresponded to them. The court said: "It does not appear that defendant made any objection to surrendering his shoes, but, on the contrary, it seems that he surrendered them voluntarily and without compulsion. It is not enough to say that defendant had reason to believe that his shoes would be taken from him by force if he did not voluntarily surrender them. His right not to furnish evidence against himself was one which could be waived, and must be deemed to have been waived if not insisted upon. It is too well settled to require the citation of authorities that comparisons of this character may be testified to as against defendant, where the means of making such comparisons have been procured without violation of any right or privilege of the defendant insisted on by him."

In *State v. Graham*, 116 La. 779, 41 So. 90, the sheriff testified that he took the accused under the window through which the shot causing the death of the deceased was fired, and placed the defendant's foot in a footprint found there without using force and the prisoner not objecting. This was held to be admissible. The court said: "The tendency of the modern case is to restrict the constitutional privilege against compulsory self-incrimination to confessions, and admissions proceeding from the accused, and to open the door to the reception of all kinds of 'real evidence,' or proof of physical facts, which speak for themselves." See also *State v. Williams*, 120 La. 175, 45 So. 94, wherein the court permitted a witness to testify that he had compared certain tracks by having the accused place his shoe in a footprint.

In *Underwood v. State*, 108 Miss. 34, 66 So. 285, the court allowed a witness to testify that he had measured the shoes of the defendant while he was under arrest, it appear-

ing that the defendant submitted voluntarily to the experiment.

In *State v. Thompson*, 161 N. C. 238, 76 S. E. 249, it was held to be admissible for a constable to testify that he took the defendant under a window where the fatal shot was fired and ordered him to stand with his shoes in tracks found there, the defendant doing so unwillingly but no actual force being used. The court said: "It has been frequently held proper, and has become a common practice, to compare tracks found at a place where a crime has been committed with the shoes worn by a suspected person or one under arrest. That was done in this case, and evidence was admitted of the conclusions of the witnesses. Such evidence is not considered as making a person furnish evidence against himself. It is dependent upon physical facts and conditions, and does not depend upon confessions, admissions, or statements of the prisoner."

Act of Defendant Involuntary.

It has been held in several recent cases that testimony as to the result of a comparison of the shoes of the defendant with footprints found at or near the scene of the crime is admissible though the shoes were taken from the accused against his will for the purpose of making the comparison. *State v. Jeffries*, 210 Mo. 302, 14 Ann. Cas. 524, 109 S. W. 614; *Younger v. State*, 80 Neb. 201, 114 N. W. 170, *State v. McIntosh*, 94 S. C. 439, 78 S. E. 327. Compare *State v. Arthur*, 129 Ia. 235, 105 N. W. 422. In *State v. Jeffries*, 210 Mo. 302, 14 Ann. Cas. 524, 109 S. W. 614, the court held it to be admissible for a witness to testify that tracks were found in the mud leading to the alleged scene of crime, and that these tracks corresponded to the defendant's shoes, where it was shown that one of them had several peculiar nails on the heel and the other a homemade patch. The shoes themselves were permitted to be introduced in court without explaining how they were procured. The court said: "Moreover, in this case, we have been unable to find any evidence that these shoes were taken from the defendant, but, in our opinion, it is immaterial how they were obtained, because the authorities all hold that it was competent to introduce them." In *Younger v. State*, 80 Neb. 201, 114 N. W. 170, it was held to be admissible to produce the defendant's shoes in court, and to testify that they had fitted prints found in the snow. The court said: "Objection is made to the intro-

duction of the defendant's shoes in evidence, upon the ground that they were taken from him by force, and that it is compelling him to furnish testimony against himself. A like question has been before this court a number of times, and it has been held that, where matters are offered in evidence on the trial of the cause which are pertinent to the issue, they should be admitted, and the court will not take notice how they were obtained." In *People v. Breen* (Mich.) 158 N. W. 142, it was held to be admissible in a prosecution for larceny for an officer to testify that he took the defendant's shoes for the purpose of comparison with certain tracks and that they fitted exactly. The court permitted this evidence even though there was no one present to represent the accused.

It has been held recently that the constitutional rights of an accused person are not violated by compelling him to make footprints for comparison with those found at the scene of the crime or to put his foot into those prints so that the result of the comparison may be shown at the trial. *Pitts v. State*, 60 Tex. Crim. 527, 132 S. W. 801; *Hahn v. State*, 73 Tex. Crim. 409, 165 S. W. 218. See also *State v. Thompson*, 161 N. C. 238, 76 S. E. 249. And see the reported case. Other recent cases hold to the contrary. *Elder v. State*, 143 Ga. 363, 85 S. E. 97; *Bridges v. State*, 86 Miss. 377, 38 So. 679. See also *State v. Sirmay*, 40 Utah 525, 122 Pac. 748. In *Elder v. State*, *supra*, it was held that where a prisoner, handcuffed, surrounded by the sheriff and other persons, and badly frightened, was ordered to put his shoe into a footprint, this amounted to coercion, even though the accused seemed to act willingly and was not forced to do so or even persuaded; and that this testimony should be excluded on the theory that "no person shall be compelled to testify against himself." The court said: "If the accused in this case had been assured by the officer having him in charge or by some member of the posse that he was in no danger, and had been asked if he was willing to put his foot in the track, and then, under this assurance that no harm was threatening him, he had consented and voluntarily placed his foot in the tracks, the conformability of the foot to the tracks might have been testified to on the trial; but in the interest of justice, we think that the evidence gotten by the means and under the circumstances shown to exist at the time should have been excluded."

STATE
v.
GARDNER.

STATE
v.
DEVINNEY.

Iowa Supreme Court—March 14, 1916.

174 Iowa 748; 156 N. W. 747.

Prostitution — Definition — As Including Act of Man.

Though "prostitution," in its broadest sense, means the setting one's self to sale, or devoting to infamous purposes what is in one's power, in its restricted sense, as used in Code, § 4943, making it a crime to resort to a house of ill fame for the purpose of prostitution, it means the practice of a female offering herself in indiscriminate intercourse with men, and is not applicable to the conduct of men.

[See note at end of this case.]

Same.

Code, § 4943, making it a crime to resort to a house of ill fame for the purpose of prostitution or lewdness, does not, by associating the two purposes, extend the application of the section as to the former to men.

[See note at end of this case.]

Same.

That Code, § 4943, makes it a crime for "any person" to resort to a house of ill fame for the purpose of prostitution, does not extend the application of the section as to prostitution to men.

[See note at end of this case.]

Same.

It being settled at the time of adoption of Code, § 4943, making it a crime to resort to a house of ill fame for the purpose of prostitution, that men could not be guilty of prostitution, that section must be strictly construed.

[See note at end of this case.]

Statutes — Construction — Ejusdem Generis.

Under the rule ejusdem generis, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to the persons or things of the same general nature or class as those enumerated.

Masculine Words as Extending to Females — Rule Inapplicable.

Code, § 48, par. 3, providing that words importing masculine gender only may be extended to females, does not operate where its application violates reason and nullifies the intent of the legislature.

Prostitution — Frequenting House of Ill Fame — Purpose — Error Held Prejudicial.

In a prosecution for resorting to a house of ill fame for the purpose of prostitution or lewdness, forbidden by Code, § 4943, the error in holding that the statute punishes men for resorting to a house of ill fame for the purpose of prostitution necessitates a reversal.

Witnesses — Cross-examination — As to Changes in Testimony.

A witness who testifies that she stated at a former trial that she had had improper relations with one man only, and repeats the statement at the instant trial, but says that at another trial she testified that she had such relations with forty different men at a certain house, may properly be cross-examined as to why she changed her testimony, and whether some one had told her to change it.

Appeal and Error — Questions Reviewed — Sufficiency of Indictment — Necessity of Demurrer on Motion.

Under Code, § 5328, authorizing demurrer to the indictment for insufficiency to state facts constituting an offense, authorizing motion in arrest of judgment on the same ground, the supreme court will not review the sufficiency of the indictment in the absence of either of these proceedings, in passing on a requested instruction that it states no offense.

Requesting Instruction as to Indictment — Effect of Raising Question for Review.

A motion in arrest of judgment and for new trial on the ground of error in the refusal of instructions does not present the question of the sufficiency of the indictment, though one of the requested instructions was that the indictment did not state an offense, since such instruction was properly refused in any event.

Prostitution — Visiting House of Ill Fame — Purpose.

While on a charge of lewd and lascivious "conduct," that is, customary behavior, or of leading a life of lewdness, there may not be a conviction merely because there was an unlawful indulgence of the animal desires, where the charge is resorting for the purpose of lewdness, it is sufficient that the place was visited for the purpose of committing an act of lewdness, as the term is understood in the accepted usage of the language, that is, a lustful or lascivious act.

Same.

The refusal of an instruction in a prosecution for resorting to a house of ill fame for the purpose of prostitution or lewdness that defendant might go to a house of ill fame if his purpose was that of friendly visiting was not error, where the court charged that defendant could not be convicted unless he resorted to the house for the purpose of prostitution or lewdness.

Instructions — Refusal of Request — Inapplicability to Evidence.

Where the evidence showed that, if defendant resorted to a house of ill fame for

the purpose of lewdness at all, he did so many times, it was proper to refuse an instruction that an occasional visit for such purpose will not support a conviction.

[See 14 R. C. L. tit. *Instructions*, p. 786.]

Same.

In a prosecution for resorting to a house of ill fame for the purpose of lewdness, it was not error to refuse an instruction that it would not constitute the house one of ill fame if one woman alone therein had sexual intercourse with various men, where there was no evidence that no other woman practiced such illicit commerce in the house.

Prostitution — Instructions — Definition of House of Ill Fame.

The refusal of an instruction defining a house of ill fame as a place inhabited by more than one woman actually engaged in prostitution, and the giving of an instruction defining it as a house visited by persons of both sexes for the purpose of having unlawful, indiscriminate sexual intercourse, is not error.

Proof of Character of House — General Reputation.

While evidence of general reputation of a house as one of ill fame is admissible, there can be no conviction of resorting to such a house without other evidence that the house was kept and used as a house of ill fame.

[See 12 Ann. Cas. 273.]

Instructions — Refusal of Request — Matters Covered by General Charge.

The refusal of an instruction that, while evidence of general reputation of a house of ill fame is admissible, there can be no conviction unless there is other evidence that the house was used for that purpose, is not error, where the court gave equivalent instructions.

[See 14 R. C. L. tit. *Instructions*, p. 750.]

Appeal from District Court, Plymouth county: BOIES, Judge.

Criminal action. James Gardner convicted of resorting to house of ill fame for purpose of prostitution and lewdness, and appeals. The facts are stated in the opinion. **REVERSED.**

T. M. Zink for appellant.

George Cosson and *Wiley S. Rankin* for appellee.

K. E. Sallman and *Miles & Steele*, amici curiae.

[751] **SALINGER, J.** —I. The statute, Code Sec. 4943, makes it a crime to resort to a house of ill fame "for the purpose of prostitution." We have to determine whether the trial court erred in holding that both men and women are within this statute.

While in a broad sense, "prostitution" means "the setting one's self to sale or of devoting to infamous purposes what is in one's power," it will not be questioned that

the word is in this statute used in a narrower sense, and is the equivalent of sexual prostitution. Such prostitution is the conduct of a prostitute as such.

"An allegation in an indictment that a female was enticed away with the intent of rendering her a prostitute is equivalent to an allegation that it was done for the purpose of prostitution." *Nichols v. State*, 127 Ind. 406, 26 N. E. 839.

A prostitute is "a woman who practices illicit intercourse with men for hire" (*Worcester's Dictionary*; *Zimmerman v. McMakin*, 22 S. C. 372, 53 Am. Rep. at 722; *Sheehy v. Cokley*, 43 Ia. 185, 22 Am. Rep. 236); one "who prostitutes her body for hire" (*Peterson v. Murray*, 13 Ind. App. 420, 41 N. E. 837); a "female" given to indiscriminate lewdness or promiscuous sexual intercourse for gain (*Carpenter v. People*, 8 Barb. [N. Y.] 603, 611; *State v. Stoyell*, 54 Me. 24, 89 Am. Dec. 716; *Davis v. Sladden*, 17 Ore. 259, 21 Pac. 140, 142). Prostitution, in its more restricted sense, is the practice of a female offering her body to an indiscriminate intercourse with men. *State v. Stoyell*, 54 Me. 24, 89 Am. Dec. 716; *Haygood v. State*, 98 Ala. 61, 13 So. 325; *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899, 901; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372; *Osborn v. State*, 52 Ind. 526, 528; *Miller v. State*, 121 Ind. 294, 23 N. E. 94, 95; *State v. Brow*, 64 N. H. 577, 15 Atl. 216, 217; *Carpenter v. People*, 8 Barb. (N. Y.) 603, 610; *State v. Toombs*, 79 Ia. 741, 45 N. W. 300; *State v. Ruhl*, 8 Ia. 447, 453; *Com. v. Cook*, 12 Metc. (Mass.) 93, 97; *People v. Demouset*, 71 Cal. 611, 12 Pac. 788, 789. It is the act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common [752] lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire—and it is said that same is considered a heinous offense, "for which the woman may be punished." 2 *Bouvier's Dictionary* (Rawle) p. 785. And see *State v. Gibson*, 111 Mo. 92, 19 S. W. at 981; *Bunfill v. People*, 154 Ill. 640, 39 N. E. 566; and *Century Dictionary*. While cases hold that there may be prostitution though there be no desire for gain (*State v. Clark*, 78 Ia. 492, 43 N. W. 273; *State v. Rice*, 56 Ia. 431, 9 N. W. 343; *State v. Thuna*, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768, 140 Am. St. Rep. 902), all that speak on the point agree that it is the practice of a woman only.

It follows that both "prostitute" and "prostitution" have such a fixed meaning in the approved usage of the language and such peculiar and appropriate meaning in law as that, if we give effect to such meaning, the statute in question does not contemplate that a man can be a prostitute or can prac-

tice prostitution, and does not intend to punish him for what he cannot do. For one cannot purpose to do what he knows is impossible. If a man cannot commit prostitution, he cannot go to a place for the purpose of prostitution. The words having acquired such meaning, and we having ascertained "what is the appropriate and well authorized meaning of the term," we should hold that "in this sense the legislature is supposed to have used it." *State v. Ruhl*, 8 Ia. at 453. The terms "prostitution" and "lewdness," as used in the statutes, are, by a general rule of construction, to be construed according to their most usual and best understood signification. *Bunfill v. People*, 154 Ill. 640, 39 N. E. at 566; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. at 376. And see also *Com. v. Cook*, 12 Metc. (Mass.) at 97.

2.

Since the statute does not, in terms, include men, we need not and do not pass upon whether the legislature could effectively [753] declare that men can be guilty of "prostitution." We may, for the purposes of the argument, assume that such power exists. Thus we reach the question whether, though it was well understood that prostitution was the act of a woman, the legislature intended Section 4943 to include men. The trial court charged that such was the intention. It said that though, "when we use the word 'prostitute,' we mean a woman, and (though) prostitution is legally defined as the act or practice of offering the body to indiscriminate intercourse with men," yet this section of the Code does "include men as well as women," because it uses the words "prostitution or lewdness." The position of appellee is that the statute includes men because it makes it a crime "for any person" to resort to a house of ill fame for the purpose of prostitution. The view expressed by the trial judge simply begs the question. It is a declaration that, though the legislature, which imposes a punishment for resorting for the purpose of prostitution, knew that prostitution is the conduct of none but women, and though the punishment provided can have effect as to women, the very use of the word "prostitution" proves that the punishment was intended to apply to men.

As to the position of appellee, while it is true that ordinarily the words "any person" include both men and women, this is not always so. As in all other cases, the rule of reason controls as to the interpretation of these words.

Section 4756, Code 1897, punishes rape upon a female committed by "any person." Literally construed, these words would authorize a woman, or the husband of a woman

assaulted, to be punished for rape, as principals. And so of Code Section 4758, which prohibits "any person" to have carnal knowledge of "any female" imbecile or rendered insensible; and since a four-year-old child is a "person,"—*Sutton v. State*, 122 Ga. 158, 50 S. E. at 61,—such child could, on the [754] theory of appellee, be guilty of rape, or of carnal knowledge of an imbecile, or of a woman by it rendered insensible. No court would so interpret "any person." If it were claimed that a statute like Code Section 4762, which makes it a crime for "any person" to seduce and debauch a female, contemplated a seduction and debauchment by a female, it would be held that "any person" should not be so construed, because it must be assumed that the legislature believed a woman could not commit the offense. If the claim were that the words included all who entered a dwelling in the nighttime by means of any breaking, it would be held that they did not include the owner of such dwelling, not because the owner could not thus enter, but because the legislature could not in reason have intended to include him. But whether the words are held not to include some person because the legislature knew he could not commit what is forbidden, or because it is clear for some other reason that it could not have been intended to include him in the general words, the rule of construction to be deduced from either or both cases is to exclude him, if it be clear for any reason that it was not intended to include him. We think the point within this rule. The legislature knew that "prostitution" was generally understood to be something that men could not and women could be guilty of; and that this interpretation was settled in law. It used the word in the settled sense, and "any person," to avoid repetition. The statute forbids: (1) Resort to a house of ill fame for the purpose of prostitution; (2) resort thereto for the purpose of lewdness; (3) using such house for prostitution; (4) occupying such house with such purpose; (5) inhabiting such house for such purpose; (6) using such house for the purpose of lewdness; (7) occupying same for such purpose; (8) inhabiting same for such purpose. The legislature knew that it was a matter of common knowledge that some of these can be committed by both men and women, and some by women only. It therefore refrained from labeling four of these as applying to women only. In the light of this, it is plain that [755] "any person" was intended to mean "any person who can be guilty of any of these;" that the purpose was to save words regarded as needless, rather than to enlarge a class of offenders. In effect, the statute is within the reasoning of cases like *State v. Cooster*, 10 Ia. 453, and *State v.*

Brandt, 41 Ia. 593. It is its purpose to enable the state to indict in the alternative—to charge an offense that can be committed by men and women or by men or women or by women alone—not to permit men to be punished for what all understood they could not do. It is against reason, so long as any other explanation can be found, to suppose that a legislature which knew that all persons believed prostitution could not be practiced by a man, intended to declare that it could, and omitted to put so radical an innovation into unmistakable language. No statute that imposes a five-year imprisonment in the penitentiary should be construed to work such a change unless its words compel such interpretation. When Section 4943 was enacted, it was settled that men could not be guilty of prostitution. Hence, they did not become punishable for prostitution unless this was effected by enacting that statute. We said in *Caster v. McClellan*, 132 Ia. at 505, 109 N. W. 1020:

"The general rule is, however, that words must be construed according to their natural meaning; and in the case of a statute which imposes a liability which, but therefor, would have no existence, a strict construction must be given, not only to the particular words employed, but to the act generally."

Where a statute provided that all persons should be denied the right to form or be in any manner interested, either directly or indirectly, in any trust as defined by the act, it was held, against the argument that the law was unconstitutional because it prohibited two or more farmers from agreeing not to sell their wheat to a neighboring mill for less than so much a bushel, that the general language of statutes will be limited to such persons and subjects as it is reasonable to presume the legislature intended it should apply to. *State [756] v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L.R.A. 903. In *Rohlf v. Kasemeier*, 140 Ia. 182, 17 Ann. Cas. 750, 118 N. W. 276, 132 Am. St. Rep. 261, 23 L.R.A. (N.S.) 1284, a case cited by the appellee, there was under consideration the construction of a statute making it unlawful for any persons to combine to fix the price of any article of merchandise or commodity. We held that the practice of medicine and surgery was labor, and did not come within the purview of the act, and we said:

"Moreover, it is well settled that in construing any statute all the language shall be considered, and such interpretation placed upon any word appearing therein as was within the manifest intent of the body which enacted the law. Much, of necessity, depends upon the context and upon the usual and ordinary consequence of the language used."

We believe both reason and authority justify us in refusing to give said general words the effect the State claims for them.

The rule *ejusdem generis* is an avoidance of giving to general words a strict construction inconsistent with the general scope of what they are found in. It is that, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 36 Cyc. 1119; *State v. Campbell*, 76 Ia. 122, 40 N. W. 100; *State v. Eno*, 131 Ia. 619, 9 Ann. Cas. 856, 109 N. W. 119; *Brown v. J. H. Bell Co.* 146 Ia. 89, Ann. Cas. 1912B 852, 123 N. W. 231, 124 N. W. 901, 27 L.R.A. (N.S.) 407; *State v. Wignall*, 150 Ia. 650, 128 N. W. 935, 34 L.R.A. (N.S.) 507; *Denn v. Goldtrap*, 1 N. J. L. 272, 274, 275; *State v. Fry*, 186 Mo. 198, 85 S. W. 328.

In *Dowell v. Vicksburg, etc. R. Co.* 61 Miss. 529, is held that the words "any person," in a statute declaring that a railroad shall be liable for any damages or injury which may be sustained by any person from a locomotive or cars, do not embrace employees of the road. In *Carle v. Bangor, etc. Canal, etc. Co.* 43 Me. 271, a statute making a railroad corporation liable for damages sustained by "any person" by the neglect of its servants is held to be limited to such persons as were not the servants of the corporation, and who sustained [757] damages without any contributory fault. See *Sala v. Chicago, etc. R. Co.* 85 Ia. at 683, 52 N. W. 664. In *Miller v. Coffin*, 19 R. I. 164, 36 Atl. at 8; *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 113, 10 S. W. at 854; *Atchison, etc. R. Co. v. Farrow*, 6 Colo. at 505; *Lutz v. Atlantic, etc. R. Co.* 6 N. M. 496, 16 L.R.A. 819, 30 Pac. at 913; *Proctor v. Hannibal, etc. R. Co.* 64 Mo. 122, and *Connor v. Chicago, etc. R. Co.* 59 Mo. at 292, in a statute permitting the representatives of "any person" who shall die from any injury resulting from or occasioned by the negligence of any person or employee while running a train of cars, the words "any persons" are held not to include a servant whose death was occasioned by the negligence of a fellow servant.

In *Dixon v. Western Union Tel. Co.* 68 Fed. 631, it is held that a statute providing that every corporation shall be liable in damages for personal injuries suffered "by any employee while in its service, where such injury resulted from the act or omission of any person," etc., does not impose liability upon the employer for injuries resulting from the act or omission of the person injured. It is said that, while the language employed is capable of a construction as broad as is contended for, it will not be given such construction if to do so would lead to absurd or unjust consequences, and that the natural import of the words of a statute, according to the common use of them, when applied to the subject-matter, is to be regarded as expressing

the intention of the legislature, unless it is repugnant to the acknowledged principles of justice and sound public policy, in which case the words ought to be enlarged or restrained so as to comport with those principles, unless the intention of the legislature is clearly and manifestly repugnant to them, and that, therefore, it is required that the words "any person" be limited so as not to include the person injured. And see *Jewell v. Summer* Tp. 113 Ia. 49, 84 N.W. 973.

The words "any person" in a statute providing for the taking of affidavits of any person for the purposes of a motion [758] when required by his adversary, are applicable only to those persons who may by existing laws be subjected to this species of examination; wherefore, it is held that a party to an action cannot be compelled by the adverse party to make the affidavit for the purposes of a motion. *Hodgkin v. Atlantic, etc. R. Co.* 5 Abb. Prac. N. S. (N. Y.) at 74.

A statute requiring county officers to permit examination of documents by any person is to be limited to persons who have an interest of some sort, great or small, to be subserved by such examination. *Boylan v. Warren*, 39 Kan. 301, 18 Pac. at 176, 7 Am. St. Rep. 551. The right of any person to contest the validity of a will is to be limited to any person having an interest in the subject-matter of the contest. *Campbell v. Fichter*, 168 Ind. 645, 11 Ann. Cas. 1089, 81 N. E. at 662; *Crawfordsville v. Ramsey*, 178 Ind. 258, 98 N. E. at 180.

A statute giving a lien to every laborer or miner who shall perform labor in opening, developing or operating any coal mine upon all the property of the person, firm or corporation owning or operating such mine, and used in the construction or operation thereof, does not give such lien upon the property of the owner to miners employed by an operating lessee of the mine. *Caster v. McClellan*, 132 Ia. 502, 109 N. W. 1020. In *Powers v. Hocking Val. etc. Ry.* 31 Ohio Cir. Ct. Rep. 488, a statute relating to the lease of railroads, and making the lessor and lessee jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, is held to cover obligations of the lessor and lessee to the public, and hence not to apply to an action for negligence by an employee of the lessee against the lessor and lessee.

A corporate charter, providing that of "any person" chosen to be warden shall refuse to accept the office, he shall suffer a forfeiture, means, considering the direct provision of the same charter, only such persons as are by the terms of the charter eligible to such office. *Tobacco Pipe Makers Co. v. Woodroffe*, 7 B. & C. 838, 14 E. C. L. 139. And in *U. S. v. Palmer*, 3 Wheat. at 631, 4 U. S. (L. ed.) 477,

it is said that the words "any person or persons," [759] as used in the Constitution, relating to those who commit misprision of treason or felony, are necessarily confined to any person or persons owing allegiance to the United States, though the words in themselves are broad enough to comprehend every human being.

In *State v. Brown*, 38 Kan. 390, 16 Pac. at 260, there was construed a statute punishing any person who was drunk in any highway, public place, or in his own house, etc., and it was held that "any person" should be construed to mean only such persons as act voluntarily in the performance of the interdicted act that hence it does not include idiots, insane persons and children under seven years of age, babes, and persons who have been made drunk by force or fraud and carried into a public place, and that, therefore, one who innocently drinks of liquor which intoxicates him, without an idea that it would make him drunk, is to be held not guilty of the offense prescribed by the statute, though it in terms is made applicable to any person.

In *State v. Olson*, 108 Ia. a case cited by appellee, we said, on page 668, 77 N. W. 332:

"The words 'unmarried person' in the indictment, taken alone, do not show whether that unmarried person was man or woman; but it is not in this narrow sense that we are to construe this indictment. The law has never recognized that the crime of seduction can be committed by any other than male persons, nor upon any other than female persons."

And see *Davis v. State*, 95 Ark. 555, 129 S. W. 530.

Though the briefs have not called it to our attention, we do not overlook our statute rule that "words importing the masculine gender only may be extended to females." Code Sec. 48 Par. 3. It does not operate where its application violates reason and nullifies the intent of the legislature.

On the meaning to be given the words "any person," the citations for the State, [760] *Crane v. People*, 168 Ill. 395, 48 N. E. 54, and *Hill v. State*, 137 Ala. 66, 34 So. 406, are irrelevant. So is *Williams v. Poor*, 65 Ia. at 413, 21 N. W. 753, cited by appellant. We are unable to see how *Com. v. Lavonsair*, 132 Mass. 1, and *State v. Phillips*, 26 N. D. 206, Ann. Cas. 1916A 320, 144 N. W. 94, 49 L.R.A. (N.S.) 470, cited by appellant, or *U. S. v. Cannon*, 4 Utah 122, 7 Pac. 369, and *Purdy v. People*, 4 Hill (N. Y.) 384, cited by appellant, bear upon anything in this appeal; and *State v. Myers*, 10 Ia. 448, *State v. Smith*, 46 Ia. 670, and *State v. Shaw*, 125 Ia. 422, 423, 101 N. W. 109, presented by appellant, and *Com. v. Goodall*, 165 Mass. 588, 43 N. E. 520, and *State v. Burns*, 145 Ia. 588, 124 N. W. 600, cited by

appellee, have very remote, if any, bearing; and whatever is said in the last as to resorting is said as to a woman defendant. The substance of the decision is as to the admissibility of evidence on reputation. *State v. Toombs*, 79 Ia. 741, 45 N. W. 300, upon which the state puts some reliance, was the case of a woman charged with keeping a house of ill fame, and does not touch the point now in consideration. The following citations on part of appellant are relevant to nothing involved in this appeal: *State v. Moore*, 78 Ia. 494, 43 N. W. 273; *State v. Hasty*, 121 Ia. 507, 96 N. W. 1115; *Wright v. Paige*, 36 Barb. (N. Y.) 438; *Cannon v. U. S.* 116 U. S. 55, 6 S. Ct. 278, 29 U. S. (L. ed.) 561; *Com. v. Sliney*, 126 Mass. 49, and *Sweeney v. State*, 59 Neb. 269, 80 N. W. 815.

The indictment charges that defendant feloniously resorted to a house of ill fame "for the purpose of prostitution and lewdness." The jury was directed to give time and energy which should have been expended on the consideration of a real case to considering whether defendant was guilty of something not prohibited by the statute under which he was indicted. At the least, it was made possible for the jury to find that defendant resorted for the purpose of lewdness because the jury thought he went to the house for the purpose of prostitution. To create such a situation is error. *O'Brien v. People*, 28 Mich. at 214. This might not [761] have been error, had the jury disregarded prostitution by its verdict. But it appears by the verdict that it was or may have been a basis for the verdict. And the court, by instructions overruling a motion in arrest of judgment, and entering sentence equally upon either finding, affirmatively put the element of prostitution into the case as a co-ordinate factor.

In all the steps which work a holding that Section 4943 punishes men for resorting to a house of ill fame for the purpose of prostitution, the trial court was in error. For this, we are constrained to order a reversal, notwithstanding the argument of the representatives of the State that "this is a crime which affects the very foundation of society;" that no sense of justice and no theory of fairness permits the holding a man to be innocent and a woman guilty; and that "this defendant is so plainly guilty that he should not have complained of any kind of treatment in the lower court, and is so flagrantly guilty that the finding of the lower court should be sustained." This court does not pass upon the guilt or innocence of this defendant, *de novo*. Both as to those who may be guilty and those who may be innocent, it is our duty to give to statutes which impose degrading imprisonment a construction which avoids the punishing accused where the

statute proceeded under imposes no punishment. *Fahnestock v. State*, 102 Ind. 156, 1 N. E. at 377; *Bunfill v. People*, 154 Ill. 640, 39 N. E. at 567. In the last named case, it is said that prosecutions for even such offenses as this "can only be conducted under and in accordance with the statutes," and that errors entitle the defendant to a new trial because "the law warrants it and the court doth give it." We do not administer lynch law, which at times executes men because it is believed they are guilty of something and felt that they should be hung, on general principles.

II. The witness Laura Heigner testified that she had been a witness in *State v. Devinney*; that on that trial, she [762] testified that she had had improper relations with Devinney and him only; and she repeated the statement on the instant trial. She testified also that she had been a witness in the case of *State v. Lawrence*, and as such witness had said that she had such relations with 40 different men in Mrs. Lawrence's house, and that the Brose girl was present. She testified that both statements are true, in her opinion. Thereupon, she was asked to say why she testified thus differently as to this matter on different trials; to say why she had changed her testimony since a witness in *State v. Devinney*; to say when she first made up her mind to testify differently in the instant case; to say why she changed her testimony upon the trial of these various cases; and to say whether anyone told her to change her testimony for the instant case. To this, objections were sustained, that it is immaterial, irrelevant, unfair because there is no evidence that some of the alleged contradictory statements were made, and that it is improper cross-examination.

We think the examination was neither irrelevant nor immaterial; and that, for the purpose of cross-examination at least, it appeared sufficiently that the witness had changed her testimony substantially as the questions indicate; and that, therefore, the examination was not unfair. (See Ab. 91 to 99.) See *State v. Cater*, 100 Ia. at 505, 69 N. W. 880.

Was it improper cross-examination? *State v. Caron*, 118 La. 349, 42 So. 960, 963, approves the text in *Roscoe* that cross-examination may go to any subject, however remote if it bear upon testing the character or credibility of the witness. Inquiries into the feelings or disposition of the witness to conceal or pervert the truth are not to be excluded as being collateral. *Alward v. Oakes*, 63 Minn. 190, 65 N. W. 270. To say the least, it is proper, where a witness admits the existence of a variance between his testimony and his statements on other occa-

sions, to examine him as to the motives inducing the variance. 7 Encyc. Ev. 69. In *State v. Pulley*, 63 N. C. [763] 8, a witness admitted that he had, on a former occasion, denied the truth of a statement he was then making, and it is held to be admissible thereupon to ask him why he had thus formerly made denial. The accused in a criminal case should be given very large liberty in proving the motives which induced a change in the testimony of a witness from favorable to disfavorable to the State. *People v. Dillwood* (Cal.) 39 Pac. 438; *Galveston, etc. R. Co. v. Porfert*, 1 Tex. Civ. App. 716, 20 S. W. 870.

Where a party changes his testimony after a reversal by the Supreme Court and admits having read the opinion, he may be asked on cross-examination if he did not change his statement because he had seen the ground on which the case was reversed. *Galveston, etc. R. Co. v. Porfert*, 1 Tex. Civ. App. 716, 20 S. W. 870. Where prosecutrix changes her testimony as to the time when intercourse occurred, and admits her former testimony to have been false, it is error to sustain an objection to the question why she had given such former false testimony. *People v. Payne*, 131 Mich. 474, 91 N. W. 739.

It is our opinion that the objections should have been overruled.

III. Defendant asked the court to direct the jury to acquit on the ground that the indictment fails to charge the crime of lewdness. The offer asserts, *inter alia*, that the indictment fails to state any facts; that it sets out no acts constituting lewdness, nor states with whom committed. In effect, the offered instruction attempts to operate as a demurrer to the indictment. It is not required that we pass upon whether the indictment is well criticised. The statute permits the points raised by the offer to be raised by demurrer (Code Sec. 5328) or by motion in arrest of judgment (Code Sec. 5426). Either method of attack being sustained, it is often possible to cure the defect by a new accusation. We think it fairly appears to be the legislative intent that such an attack upon the indictment [764] shall not be made at a time when to sustain it must result in a final acquittal; that the defendant may not decline to use his right to demur nor anticipate his right to proceed by motion in arrest, and substitute for both an offered instruction which, if given, works an acquittal, thus obtaining a result which the employment of neither of the other methods would yield. Why provide for a demurrer, with power of resubmission, if same be sustained? Why provide for a second opportunity to demur by means of a motion in arrest if, at the pleasure of the defendant, neither may be used, and an acquittal be obtainable by at-

tacking the indictment by means of an offered instruction? Who would ever use demurrer or motion in arrest if this be permissible? We can see no justification for the defendant's waiting until all the evidence has been taken on both sides to so present a demurrer to the indictment; no reason why he should not present it before the trial is actually begun; why, having passed this point, he should be allowed to anticipate the time, if ever it shall come, when he need present a motion in arrest of judgment. To make him proceed either at the one time or the other, rather than between the two, is not only orderly procedure, but absolutely fair to both the State and the defendant. It takes nothing justly due from defendant, and, as said, avoids the making said two statutes idle.

The nearest that the motion in arrest of judgment and for new trial comes to attacking the indictment is a statement that the court erred in not giving each and every paragraph of the instructions asked by the defendant. Waiving the question of definiteness in assignment, it remains the fact that this is merely a repetition of the exception taken to the refusal to give said offered instruction. As we hold that it was right to refuse the instruction, it was also right to overrule that part of the motion in arrest of judgment which complains of the refusal to give such instruction.

We must decline to review the sufficiency of the indictment with reference to charging facts, because no attack [765] recognized by law was below made upon the indictment. This disposition of the attack upon the indictment, and also that almost all of them are irrelevant on such attack, make the following citations of appellant ineffective: *State v. Wasson*, 126 Ia. 320, 101 N. W. 1125; *State v. Chicago, etc. R. Co.* 63 Ia. 508, 19 N. W. 299; *State v. Potter*, 28 Ia. 554; *State v. McKinney*, 130 Ia. 370, 106 N. W. 931; *State v. Brandt*, 41 Ia. at 607, 608; *State v. Martin*, 125 Ia. 715, 101 N. W. 637; *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790; *State v. Bauguess*, 106 Ia. 107, 76 N. W. 508; *State v. Ashpole*, 127 Ia. 680, 104 N. W. 281; *Cosgrove v. State*, 37 Tex. Crim. 249, 39 S. W. 367, 66 Am. St. Rep. 802; and so are *Webb v. State*, 106 Ala. 52, 18 So. 491; *Com. v. Wardell*, 128 Mass. 52, 35 Am. Rep. 357, cited by the State.

IV. The court charged that lewdness is the unlawful indulgence of the animal desires, and is also legally defined to be lustful and licentious behaving, such as unchastity, sensuality and debauchery. It is urged that this does not define lewdness clearly, nor with sufficient fullness. The definitions presented by the defendant through offered instructions were: (1) That lewdness, within the mean-

ing of the statute, is the living or dwelling together of a man and woman who are not married to each other, as if they were; (2) living with and having illicit sexual intercourse with but one woman to whom defendant is not married, and with whom he dwells as if he were married to her; (3) habitually living or dwelling with some woman as his wife and habitually having illicit sexual intercourse with her without being married to her.

The authorities cited to sustain the claim that it was error to reject these, indicate that appellant labors under the misconception that he is charged with a course of incontinent living, or with habitual illicit relationships, or with offending by creating public scandal. He is accused of none of these. He is not charged with open adultery or leading a life of lewdness, but of resorting to a house of ill fame to commit lewdness, i. e., to do lewd acts. That is one reason why the citations are irrelevant. It is not relevant that resort on a single [766] occasion for a lewd purpose fails to prove leading a life of lewdness. *State v. McDavitt*, 140 Ia. 342, 118 N. W. 370, 132 Am. St. Rep. 275. That merely decides that "one swallow does not make a summer." And so of the fact that a single act of lewdness is not the "lewd and lascivious conduct" punished as such by statute. *State v. Marvin*, 12 Ia. 499. Such statutes use "conduct" in the sense of customary behavior. It is self-evident, but not material, that a single act of illicit intercourse will not sustain a conviction for living in open adultery. *Bird v. State*, 27 Tex. App. 635, 11 S. W. 641, 11 Am. St. Rep. 214; *Bodiford v. State*, 86 Ala. 67, 5 So. 559, 11 Am. St. Rep. 20; *People v. Salmon*, 148 Cal. 303, 83 Pac. 42, 113 Am. St. Rep. 268, 2 L.R.A. (N.S.) 1186. And see too *Wright v. State*, 42 Miss. 334, 97 Am. 941; *Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465; *Richey v. State*, 172 Ind. 134, 19 Ann. Cas. 654, 87 N. E. 1032, 139 Am. St. Rep. 362. Equally manifest, that such an act does not justify conviction for open and notorious cohabitation and adultery. *People v. Salmon*, 148 Cal. 303, 83 Pac. 42, 113 Am. St. Rep. 268, 2 L.R.A. (N.S.) 1186. It is, of course, true, and, equally of course, irrelevant, that resorting for an isolated act of intercourse does not warrant conviction for lewd and vicious association and cohabitation, or for open and gross lewdness, and that clandestine intercourse does not violate a statute forbidding lewdly and lasciviously abiding and cohabiting. *State v. Chandler*, 132 Mo. 155, 33 S. W. 797, 53 Am. St. Rep. 483. Such statutes inhibit the unlawful living together as only man and wife may lawfully live. Of course, no isolated act of illicit intercourse is that. See *State v. Poyner*, 57 Wash. 489, 107 Pac. 181. Nor are

holdings material that some acts of lewdness do not constitute the one who practices them a prostitute, nor her conduct prostitution. *Bunfill v. People*, 154 Ill. 640, 39 N. E. 585; *State v. Brow*, 64 N. H. 577, 15 Atl. 216.

In *State v. Mitchell*, 149 Ia. 362, 128 N. W. 378, Mr. Justice Ladd makes this distinction clear. The case involves the charge of conspiracy to induce two females to commit the crimes of adultery and lewdness, and to become prostitutes. An instruction which defines lewdness to be "the unlawful indulgence of the animal desires" is held to be inadequate and misleading, because the essence of the indictment is an attempt [767] to induce the women to lead an incontinent life, and the instruction compels conviction if the conspiracy was no more than to procure their willing presence for the purpose of committing a single act of incontinence—an act which would constitute neither lewdness nor prostitution. It is said that the case differs from keeping a house of ill fame, resorted to for the purpose of prostitution and lewdness, in that on indictment for the last, the term lewdness is employed in the ordinary sense as meaning a lustful, lecherous, lascivious or libidinous act. In other words, while, on the charge of leading a life of lewdness, or inducing others to lead such or to become prostitutes, there may not be a conviction merely because there was an unlawful indulgence of the animal desires, or lustful and licentious behaving, such as unchastity, sensuality and debauchery, where the charge is resorting for the purpose of lewdness, it is sufficient that the place was visited for the purpose of committing an act of lewdness, as the term is understood in the accepted usage of the language.

V. There is evidence from which the jury might have believed that some of the visits of the defendant to the house occupied by Richard and Lillie Lawrence were visits of friendship. Defendant complains of the refusal of instructions that he might lawfully go to a house of ill fame if his purpose was that of friendly visiting, and the failure to give an equivalent direction. We think there was not such failure. The court once, if not oftener, instructed that the jury could not find defendant guilty unless convinced beyond reasonable doubt that he resorted to or used the said house "for the purpose of prostitution or lewdness." This is, of necessity, a charge that defendant could not be convicted for visiting said house for the purpose of friendly visiting. One who goes to the dwelling of his friend for the purpose of visiting as a friend does not resort to it for the purpose of prostitution. A direction, then, that it is only a visit [768] with the last named purpose that can convict is fairly equivalent to an instruction that visits for

any other purpose are not covered by the indictment.

2.

There is a line of cases which hold, in effect, that private incontinence and resort to a place for a single night for the purpose of lewdness do not come within the statute provision against leading a life of lewdness; and that incontinence by a householder with a servant in his household is not within the statute. See *State v. McDavitt*, 140 Ia. at 344, 118 N. W. 370, 132 Am. St. Rep. 275; *State v. Irvin*, 117 Ia. 439, 91 N. W. 760, and *People v. Pinkerton*, 79 Mich. 110, 44 N. W. 180. Complaint is made of refusal of an instruction in effect that there could be no conviction unless it was found that defendant frequently resorted to the house of the Lawrences for the purpose charged in the indictment, and that one or an occasional visit to an alleged house of ill fame for such purpose will not warrant a conviction. We have to say that, if the jury was warranted to find that the defendant resorted to said house for said purpose at all, it was also warranted in finding that he so resorted many times. If, then, we were to concede the rule invoked by defendant, it would still be proper to refuse said instruction; because, while the jury might find that there was no resorting for the purpose charged in the indictment, there is no theory of the evidence upon which it could find that the resorting done, if any, was occasional merely, or that defendant resorted there but once. We are, however, disinclined to affirm such a rule. *O'Brien v. People*, 28 Mich. 213, 214, does not hold that the offense of resorting is not made out unless the visits are frequent. The exact decision is that "to hold that, when such persons resort to such places, no criminal purposes can be inferred would be absurd." [769] While, as said, it does not sustain the contention of the defendant, it does meet his claim, also made, that the court should have charged that defendant's visits to this house should be presumed to be for an innocent purpose. In *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454, this very question was determined. It was there argued that to resort to such places is not to go merely once, but to go and go again—to make a practice of going. The court said that, while the etymology of the word lends some support to this argument, yet "the definitions given in the lexicons show that, whatever may have been its original meaning, it no longer means anything more in the connection in which it is employed in the statute than to go once."

VI. There is no merit in the contention that it was error to refuse a charge, in effect, that it would not constitute the house one of ill fame because Lillie Lawrence alone

therein had sexual intercourse with various men named in the indictment, and that, to constitute it such house, it must further be found that other women were kept or made their habitation there for the purpose of indiscriminate intercourse. While it is true that such acts of illicit commerce by the proprietor are not ordinarily sufficient to give the house this character (9 Am. & Eng. Enc. of Law (2d ed.) 520; *State v. Lee*, 80 Ia. 75, 45 N. W. 545, 20 Am. St. Rep. 401), even this is not always so. *State v. Young*, 96 Ia. 262, 65 N. W. 160, 59 Am. St. Rep. 371; *State v. Gill*, 140 Ia. 210, 129 N. W. 821. Be that as it may, no theory of the evidence made the instructions asked relevant. We may assume, for the sake of argument, that the jury might have found that no woman resorted to the Lawrence house for illicit sexual commerce; but there was no evidence whereupon it might find that no one but Lillie Lawrence practiced such commerce in that house. Moreover, the court defined a house of ill fame to be one "visited by persons of both sexes for the purpose of having unlawful, indiscriminate sexual intercourse," and thus clearly negated the thought that the acts of Lillie Lawrence alone could give the house that character.

2.

[770] Defendant asked instructions defining a house of ill fame, the essence of which is that it is a place of resort inhabited by more than one woman actually engaged in prostitution. The court charged, instead, that it is a house visited by persons of both sexes for the purpose of having unlawful, indiscriminate sexual intercourse; and defendant complains of both acts. We are of opinion that *State v. Wilson*, 124 Ia. 264, 99 N. W. 1060, and *People v. Hampton*, 4 Utah 258, 9 Pac. 508, sustain the action of the trial court, and that *State v. Clark*, 78 Ia. at 493, 43 N. W. 273, does so in effect. While *King v. People*, 83 N. Y. 587, and *Beard v. State*, 71 Md. 275, 17 Atl. 1044, 17 Am. St. Rep. 536, 4 L.R.A. 675, are rightly decided, they do not hold that the definition given by the trial court is incorrect. *State v. Mullen*, 35 Ia. 199, 207; *State v. Toombs*, 79 Ia. 741, 45 N. W. 300; *State v. Calley*, 104 N. C. 858, 10 S. E. 455, 17 Am. St. Rep. 704; *State v. Chauvet*, 111 Ia. 687, 689, 83 N. W. 717, 82 Am. St. Rep. 539, 51 L.R.A. 630; *Boswell v. State*, 48 Tex. Crim. 47, 85 S. W. 1076, 122 Am. St. Rep. 731; *State v. Irvin*, 117 Ia. 469, 91 N. W. 760, and *State v. Lee*, 80 Ia. 75, 45 N. W. 545, 20 Am. St. Rep. 401, cited by appellant, are not relevant to the point now in consideration. Neither are *State v. Beebe*, 115 Ia. 128, 88 N. W. 358; *People v. Mallette*, 79 Mich. 600, 44 N. W. at 963; *Johnson v. State*, 32 Tex. Crim. 504, 24 S. W. 411; *Graeter v. State*,

105 Ind. 271, 4 N. E. 461; *State v. Schaffer*, 74 Ia. 704, 39 N. W. 89; *State v. Steen*, 125 Ia. 307, 101 N. W. 96, and *State v. Wells*, 46 Ia. 662, cited by appellee. All but one of these last deal with what evidence will make it a jury question whether the proprietor of a house of ill fame knew the house was of that character and consented to what was being done therein.

3.

The defendant asked the court to charge that, while evidence of the general reputation of the Lawrence house is admissible, there may be no conviction on that alone, and there must be some other evidence showing that such house was actually kept and used as a house of ill fame. No doubt this is the law. *State [771] v. Hendricks*, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666; *State v. Steen*, 125 Ia. 307, 101 N. W. 96; *Botts v. U. S.* 155 Fed. 50, 12 Ann. Cas. 271, 272, 83 C. C. A. 646. And see *State v. Porter*, 130 Ia. 690, 107 N. W. 923. But the refusal of the request to charge is not error, because the court seems to have fully adopted this theory in its own instructions. In Paragraph 5, the jury is told that they should carefully consider testimony received regarding the general reputation of the house and the like; also to consider the things that were said and done in and about the same, the coming and going of people to and from it, and all the facts and circumstances shown in evidence, and from these to determine the real character of the house, which seems to be an instruction that the reputation is to be dealt with as merely one item in the proof. In Instruction 10, the jury was further charged that, while evidence of general reputation of the house is admissible, the defendant cannot be convicted on that alone, and that there must be some other evidence tending to show that the house was of the character charged; and that, in considering this question, the jury should consider all the facts and circumstances shown upon the trial, including the testimony with regard to the general reputation of the house.

VII. Instructions offered, and one ground of the motion in arrest of judgment, assert that there was no evidence to sustain the verdict. We are of opinion that these instructions were rightly refused, and this ground of the motion in arrest rightly overruled. See *State v. Gill*, 150 Ia. 210, 129 N. W. 821; *State v. Rayburn*, 170 Ia. 514, 153 N. W. 59, L.R.A. 1915F 640, fully supports

several holdings herein announced, and is in no respect in conflict with this opinion.

For what is pointed out in the first and second divisions of this opinion, the cause must be remanded for a new trial.

Reversed and remanded.

By stipulation, this is the order in *State v. James Devinney*, Appellant.

Evans, C. J., Ladd and Gaynor, JJ., concur.

NOTE.

Whether Man Can Be "Prostitute," or Guilty of Resorting to House of Ill Fame for Purpose of Prostitution.

In the reported case the court says that while in a broad sense "prostitution" means the "setting one's self to sale or of devoting to infamous purposes what is in one's power," the word is used in a narrower sense in the statute which makes it a crime to resort to a house of ill fame "for the purpose of prostitution," and that a man cannot commit the offense of resorting to such a house for that purpose. In a case decided in the same jurisdiction but a short time previous to the reported case, *State v. Rayburn*, 170 Ia. 514, 153 N. W. 59, L.R.A.1915F 640, the court, discussing whether "prostitution" and "lewdness" as used in a statute were synonymous, said: "If 'prostitution' and 'lewdness' are synonymous, it would have been unnecessary to have used but one of the words. There was presumably some reason for using both. The statute reads that, if 'any person,' for the purpose of prostitution or lewdness, resorts, etc. If a man and woman go together to or resort to a house of ill fame for the purpose of having sexual intercourse, her purpose would be for prostitution, his for lewdness."

In *Rex v. Knowles*, 6 Alberta L. Rep. 219, 25 West. L. Rep. 294, 21 Can. Crim. Cas. 321, 12 Dominion L. Rep. 639, the defendant, a man, was convicted of being an inmate of a bawdy house. The question was raised on a writ of habeas corpus whether a man could be so convicted. Beck, J., remarking that he had been referred to no decisions in point in Canada or elsewhere, held that the meaning to be attached to the word inmate, looking at all the associated provisions of the code, was an inmate for the purposes of prostitution and therefore the term applied only to a female, cases of unnatural offenses being dealt with elsewhere in the code.

ADAM

v.

WARD.

England—House of Lords—March 22, 1917.

[1917] A. C. 309.

Libel and Slander — Privilege — Matter of Public Interest.

A report of the Army Council vindicating an army officer from charges made publicly against him is of such public interest that a privilege attaches to its general publication by the council.

[See note at end of this case.]

[310] Appeal from an order of the Court of Appeal (Buckley, L. J., Pickford, L. J., and Bankes, L. J.) reversing a judgment of Darling, J. in an action for libel brought by the appellant against the respondent, in respect of a letter, dated August 5, 1910, written by the respondent, as secretary to the Army Council and by their direction, and issued by him to the Press by order of the Council. The sole defence relied on by the respondent was that the letter was published on a privileged occasion.

The following statement is taken from the judgment of the Lord Chancellor:—

"The facts, so far as they are material, lie in very short compass.

"Major Adam, the plaintiff and appellant, was an officer in the 5th Lancers, in 1906, stationed at Aldershot. The commanding officer of his regiment was Colonel Graham, who in the autumn of 1906 made a confidential report with regard to Major Adam. This report was submitted to Major-General Scobell, and was by him transmitted, together with notes of his own upon it, to General Sir John French, who was General Officer Commanding-in-Chief at Aldershot. This report, with the notes upon it, is in the evidence called the 'combined report.' It was not shown to Major Adam before being sent in, as it ought to have been by the King's Regulations, but it was shown to him some weeks later—about December 6, 1906. On November 3, 1906, Sir John French sent in a confidential report of his own with regard to Major Adam. Neither of these reports was produced at the trial, as the Secretary of State stated that it was contrary to the public interest that they should be put in evidence.

"A letter dated December 1, 1906, was sent from the Army Council to Sir John French, stating, with reference to a letter of his of November 3, reporting the unsuitability of Major Adam as a cavalry leader in the field, that after full consideration of the circum-

stances of the case it had been decided that he should be called upon to forward an application to retire from the Service, failing which it [311] would be necessary to submit for His Majesty's approval his removal from the Army, and that Sir John French was requested to communicate this decision to Major Adam. Major Adam wrote begging for a reconsideration of this decision, or failing that, for the longest possible grace before sending in his papers, in order that he might get something to do, and in the result, owing to the good offices of Major-General Scobell, Major Adam was given a post in the office of the Chief of the General Staff. He remained at this post until January, 1910. On October 18, 1907, it was announced that he and four other officers were to be placed on half-pay and on November 30 of the same year a communiqué appeared stating that this action was not due to any cause detrimental to the character of these officers, and that, though they were not considered suitable to retain their positions as officers in the 5th Lancers, their services could be, and in three cases were being, utilized in other appointments, and that the regiment was not inefficient to take the field.

"In October, 1909, Major Adam asked that the circumstances under which he was placed on half-pay should be reconsidered with a view to his reinstatement on full pay, but he was informed by a letter of November 3 that his case had been carefully considered and that the Army Council saw no reason to reopen the question.

"In January, 1910, Major Adam was returned as member of the House of Commons for Woolwich, and vacated his staff appointment.

"On June 27, 1910, he made a speech in the House of Commons in which he referred to the case of Captain Bryce-Wilson, one of the five officers who had been placed on half-pay, and read out in the House the following statement: 'That Major General H. J. Scobell, Royal Irish Lancers, did render to superior authority a confidential report or confidential reports on an officer or officers under his command, which report or reports contained wilful and deliberate misstatements of fact, thereby deceiving those in authority to whom the report or reports were rendered, and causing injustice to be done to one of the regiments under his command.'

"Major Adam then went on to say, according to the report in 'Hansard,' which was in evidence: 'Major-General Scobell is on his way home at the present time from South Africa. He arrives in England at the end of this week, and I hope when he sees the report [312] of this in the paper as I intend he shall do, he will appreciate the meaning of the words, "wilful and deliberate misstate-

ment of facts." I have tried to make it clear, and I hope he will turn up that paragraph in the King's Regulations which compels an officer in a case like this to refer the matter to his superior authority, the superior authority in this case being the Army Council. I hope sincerely that the Army Council will see that justice is done to Captain Wilson and that penalties are meted out to those officers who deserve it."

In reference to this speech the Lord Chancellor said: "This speech must have conveyed to every one who heard it or read the report the impression that Major-General Scobell was charged with conduct unworthy of an officer and a gentleman within the meaning of the King's Regulations. It is impossible to suppose that Major Adam did not intend to convey this impression. At the trial, however, he stated that he did not impute such unworthy conduct to Major-General Scobell, and that he said what he did merely in order that Major-General Scobell might demand an inquiry to clear himself, in the course of which Major Adam believed information might be obtained with regard to the attack upon him which he believed to be contained in the combined report.

"I abstain from comment upon Major Adam's conduct in making, for such an indirect purpose, an unfounded attack upon General Scobell, who had rendered Major Adam great service at the time of his removal."

His Lordship then continued: "Major-General Scobell brought the matter before the Army Council, who, after investigating it, issued through the Press the letter which is complained of as a libel upon Major Adam, and which forms the subject of this action. It was addressed to Major-General Scobell, and is as follows:—

"In reply to your letter of July 8th, 1910, asking that an enquiry should be instituted in regard to a statement made by Major W. A. Adam, M.P., in the House of Commons on June 27th to the effect that while in command of the 1st Cavalry Brigade you rendered confidential reports on certain officers which reports contained wilful and deliberate misstatements of facts, I am commanded by the Army Council to inform you that a thorough investigation has been made of the reports made by you at that time on certain officers of the 5th Lancers, who were afterwards removed from the regiment [313] and to whom it is believed that Major Adam's statement bore reference. Major Adam is himself one of these officers. The Council also thought it proper to address a letter to Major Adam on the 23rd ultimo, inquiring whether he desired to forward for their consideration any statement in amplification of substantiation of his charge against you. On the 29th idem a reply was received from Major Adam to the effect that he had written to the Secretary of

State for War on the subject, but his letter of the same date to the Secretary of State is found to contain nothing pertinent to the present investigation. The Council are satisfied that not only did your reports contain the unbiassed and conscientious opinion you had formed on the officers in question, but that the conclusions at which you arrived were correct, as they were afterwards borne out not only by the opinion of your successor in command of the 1st Cavalry Brigade, but also by a special report on the 5th Lancers made by H.R.H. the then Inspector-General of the Forces, and confirmed by the General Officer then Commanding-in-Chief the Aldershot Command. Further, as showing the absence of hostile bias, the Army Council note that in the case of Major Adam, who in 1906 was called upon to retire from the service in consequence of adverse reports, which were duly communicated to him, you intervened on his behalf and urged the Council to give him another chance in an extra regimental appointment. In the result it was decided to give Major Adam this chance. I am to add that the Council are of opinion that the charge brought against you by Major Adam is without foundation."

"The action was brought on November 14, 1912, against Sir E. Ward, by whom, as secretary to the Army Council, the letter complained of had been signed and issued to the Press in obedience to the order of the Army Council. The defendant did not dispute that the letter was defamatory of the plaintiff but pleaded privilege.

"The case was tried before Darling, J., and a special jury. Four questions were left by the learned judge to the jury. These questions, with the answers of the jury, are as follows:—

"1. Was the publication a matter of a public nature?—A.: No.

"2. Was the publication made by the defendant in discharge of his duty as secretary to the Army Council and for the purpose of affording information to the public?—Answer to both branches [314] of this question: Yes. 3. Was the subject-matter of such publication by the defendant matter about which it was proper for the public to know?—A.: No. 4. Was the matter contained in the letter appropriate for the public to know?—A.: No. And the jury assessed the damages at 2000*l*.

"Application being made for judgment, the learned judge said: 'On these findings I hold that the publication was not a privileged publication, nor a publication on a privileged occasion, and therefore I shall enter judgment for the plaintiff.'

"The defendant appealed to the court of appeal, which held that the occasion was privileged, and that there was no evidence of malice, and directed judgment to be entered

for defendant. The plaintiff, Major Adam, appealed from this judgment to your Lordships' House and asked that judgment should be entered for him, or, alternatively, that the case should be sent down for a new trial."

Sir Hugh Fraser for appellant.

Sir John Simon, K.C., Sir Frederick Smith, A.-G., and G. A. H. Branson for respondent.

J. D. Langton & Passmore, solicitors for appellant.

The Treasury Solicitor, solicitor for respondent.

[318] LORD FINLAY, L.C.—My Lords, this is an action for libel, and the questions that arise in this appeal are whether the occasion was privileged, and, if so, whether there was evidence of express malice. [His Lordship stated the facts and continued:] The law of privilege is well settled.

Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication was on what is called a privileged occasion. If the communication was made in pursuance of a duty or on a matter in which there was a common interest on the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury. It is further for the judge to decide whether there is any evidence of express malice fit to be left to the jury—that is, whether there is any evidence on which a reasonable man could find malice. Such malice may be inferred either from the terms of the communication itself, as if the language be unnecessarily strong, or from any facts which show that the defendant in publishing the libel was actuated by spite or some indirect motive. The privilege extends only to a communication upon the subject with respect to which privilege exists, and it does not extend to a communication upon any other extraneous matter which the defendant may have made at the same time. The introduction of such extraneous matter may afford evidence of malice which will take away protection on the subject to which privilege attaches, and the communication on the extraneous matter is not made upon a privileged occasion at all, inasmuch as the existence of privilege on one matter gives no protection to irrelevant libels introduced into the same communication.

[319] That the occasion of this letter was privileged seems to me to be clear beyond all controversy. Major Adam had made a

violent attack upon the character of Major-General Scobell, who appealed to the Army Council for inquiry. It was the duty of the Army Council to inquire into the truth of this charge and to make the result of that inquiry known as widely as possible. It is said that there was unnecessary publicity given to their findings, but it must be remembered that Major Adam's speech in the House of Commons had been extensively reported, as he obviously intended it should be when he made his attack upon Major-General Scobell, and the Army Council did no more than their duty in giving a wide publicity to their finding that the charge was unfounded.

It has been said that their observations as to the plaintiff, Major Adam, were not relevant to their vindication of Major-General Scobell, and that privilege does not extend to this portion of the letter. These observations appear to me to be directly relevant. The plaintiff did not mention in his speech in the House of Commons that he was himself interested in the matter, and anyone who heard or read his speech would have been left under the impression that he was a perfectly disinterested person who had taken up the case of a brother officer. The vindication by the Army Council of Major-General Scobell would have been incomplete if the true relation of Major Adam to these proceedings had been left out. The two passages especially impugned were, first, the statement that the plaintiff was one of the officers who had been removed from the regiment, and, second, the following sentences: "Further, as showing the absence of hostile bias, the Army Council note that in the case of Major Adam, who in 1906 was called upon to retire from the Service in consequence of adverse reports which were duly communicated to him, you intervened on his behalf and urged the Council to give him another chance in an extra regimental appointment. In the result it was decided to give Major Adam another chance."

So far from being alien to the investigation of the charge made by the plaintiff against Major-General Scobell both these passages appear to me to be directly relevant to it. It was essential to show that Major-General Scobell had been actuated by a friendly feeling towards the plaintiff, and it was as incidental to this that the [320] fact that the plaintiff had been called on to retire should be introduced.

The privilege extended to the whole letter, and there is nothing either in the letter itself or in the surrounding circumstances to supply any evidence of express malice.

I agree with the Court of Appeal in thinking that the judge ought to have ruled that the occasion was privileged.

The learned judge ruled that there was no evidence of malice against the defendant personally, as he had acted for the Army

Council and under their orders. The question was really not one of personal malice on the part of the defendant. He was the agent and servant of the Army Council, and must stand or fall with them. If the letter was published on a privileged occasion as regards the Army Council and without malice on their part, their secretary, through whom the communication was made by them, has the benefit of the privilege which attached to the Council itself. If, on the other hand, the occasion had not been privileged, or there was express malice, their secretary would be liable, although he personally had no ill-will towards the plaintiff.

In my opinion this appeal should be dismissed with costs.

EARL LOREBURN.—My Lords, Sir Hugh Fraser has put all that could possibly be urged on behalf of the appellant with a fairness which added to the weight of his argument. But he has failed to show that there is any evidence of malice either in the defendant or in the Army Council. The document charged as a libel admittedly contains matter which admits of a defamatory sense, and the defendant's counsel did not dispute that it in fact had a defamatory meaning. Accordingly that issue was not left to the jury. There is no plea of justification, and therefore the one remaining question is that raised by the plea of privilege.

I understand the law to be as follows: It is for the judge alone to rule whether or not there is an occasion of privilege, and the rule on that subject was laid down many years ago in the case of *Toogood v. Spyring*, 1 C. M. & R. 181. Subsequent decisions have illustrated that rule. But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that [321] is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion. For a man ought not to be protected if he publishes what is in fact untrue of some one else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact publishes it. All this is for the judge alone,

and the question of malice, which is for the jury, cannot arise till the judge has ruled on the whole question of privilege.

Language has been used in some cases which seems somewhat to confuse the two separate points, namely, whether the defendant has gone beyond the privilege which the occasion creates, and whether the defendant has forfeited the privilege by malice. Excess of privilege in part of a defamatory publication may of course be evidence of malice as to the whole of it, but the two things are different. The one is a matter for the judge, the other is matter for the jury. And observations made by judges in directing juries as to what is evidence of malice are not necessarily applicable when they have to rule as to excess of privilege. But I agree that in ruling upon that subject a judge may well think that a man is justified in inculpating his accuser in order more effectively to exculpate himself, and also may well think that the defendant has not exceeded the privilege when he has expressed himself with some warmth under real provocation, though no one can be justified in using such an occasion beyond the reasonable limits of self-defence.

I will only add that when one part of a libel is held to be protected by privilege and the other part not protected the jury ought to be told that they cannot give damages in respect of the first part at all, unless they are satisfied that it was malicious, which may be proved by the character of the unprotected part or by other evidence.

Applying this view of the law to the present case, I am quite [322] sure that the attack made on General Scobell by the appellant in the House of Commons not only permitted but required the Army Council to vindicate the conduct of that officer, and that both that Council and the defendant, who acted by their direction, were in the fullest sense within the privilege recognized by the law when they published to the country at large a defence of General Scobell. I have had more doubt upon the question whether or not all that is contained in the letter which forms the subject of this action was covered by the privilege, and am disposed to take on that point the same view of the facts that appears from his summing-up to have been taken by Darling, J.

But in view of the speech of the appellant made in the House of Commons, where he used an absolute privilege to attack another officer who had done him no wrong, but on the contrary had befriended him, I could not possibly approve of the heavy damages awarded by the jury. I shall not dissent from the view of your Lordships.

LORD DUNEDIN.—My Lords, the pleadings and evidence in this case are voluminous and

the issue of importance to those concerned. Yet, notwithstanding the elaborate and painstaking address of the counsel for the appellant, which absolved your Lordships from sharing the regret he expressed at the absence of his leader, I cannot say that I have any doubt or hesitation in thinking that the judgment of the Court of Appeal was right. The reasons given for that judgment by Lord Wrenbury, then Buckley, L.J., are entirely satisfactory to my mind. I only venture to add some remarks of my own, because some of the leading principles of the law of libel and privilege have been freely discussed, and this case will take rank in the future as an authoritative pronouncement on these matters. I do not propose to enter in detail into the facts of the case, as that has already been done by the Lord Chancellor, and I shall only mention those which are necessary to make intelligible the conclusions at which I have arrived.

The primary fact in the case is the speech made by the plaintiff in the House of Commons on June 27, 1910, and in particular the paragraph he read from a typewritten sheet in order, as he said, "that there may be no mistake and that I may not be led away by rhetorical [323] exaggeration." I need not quote it, as that has already been done. To my mind these words could, to the audience which heard them or to the ordinary man who read them in "Hansard" or in a newspaper report, only convey one meaning, namely, that General Scobell had inserted, with deliberate purpose, false statements of fact in a report or reports as to officers under his command and had thereby deceived those in authority, with the consequence that a certain regiment had been unjustly treated. It is true that on a critical analysis of the words "rendered" and "containing" it is possible to make the sentence fit with the idea that the false statements in the report were not of General Scobell's own fabrication, but were merely forwarded by him. But neither is that the natural meaning of the words nor is it what the plaintiff intended should be understood by them, for he admits in cross-examination that he phrased the passage as he did in order to compel General Scobell to take up the matter under the King's Regulations; and the only part of the King's Regulations which imposes such a duty is the paragraph which compels an officer whose "character or conduct as an officer or a gentleman has been impugned" to ask for an inquiry. He seeks to excuse himself by saying that the inquiry, if held, would have shown that the real culprit as to the false statement was Colonel Graham and not General Scobell.

That the words used contained an imputation on General Scobell's honour no one can doubt. Under the King's Regulations,

already referred to, the General could not deal with the matter himself, but was bound to do what he did—bring the matter before the Army Council and ask them to inquire as to the truth of the accusation made against him.

On this it appears to me clear that there arose on the part of the Army Council a duty, not only moral, but actually legal under military law, to make the inquiry demanded. In what particular way or form the inquiry should be held was, I think, a matter for them and for no one else to determine. The Army Council proceeded to institute an inquiry, but before doing so they called on the plaintiff to furnish them with any statement he might wish to make "in amplification or substantiation" of the charge that he had made. To this the plaintiff replied that as the inquiry was to be conducted by themselves, and as the Army Council "had forfeited the [324] confidence of the Army and the public," he did not propose to do anything more.

The Army Council accordingly held the inquiry within, so to speak, their own walls. They came to the conclusion that the charge made was unfounded. They wrote a letter to General Scobell telling him so, and they published that letter.

Now, if the matter is thus baldly stated, can it for a moment be supposed that this publication is not a performance of a moral if not even of a legal duty and as such privileged? Let us look at the situation. General Scobell is grossly attacked in a speech in the House of Commons—a speech which in that place, from motives of high public policy, is protected by absolute privilege. Under the King's Regulations he may not take up the matter himself and defend himself in the public Press. He is bound to refer the matter to the Army Council and await their verdict. The verdict is in his favour. What would that avail him unless there was a right in the Army Council to publish the result at which they had arrived? If it were not so, then the absolute privilege of the House of Commons, intended to safeguard the liberty of discussion, would be really turned into an abominable instrument of oppression.

Two replies are, however, made to this, which I shall take in their order. It is said, first, that the publication here was to an unduly wide public, that there was no duty to publish to every one, but only to those who were likely to have become aware of the accusation, and that to make such a wide publication as was here made was in accordance with no duty or right. My Lords, I think that a man who makes a statement on the floor of the House of Commons makes it to the world. True it never reaches every

person in the world. In some cases, if the orator is unknown to fame and the statement intrinsically unexciting, it may not reach very many. But no one knows whom it may reach, and it was only, I think, plain justice to General Scobell that the ambit of the contradiction should be spread so wide as if possible to meet the false accusation wherever it went. Do what you will, the stern chase after a lie that has got the start is apt to be a long one. As a matter of fact the Army Council instructed their secretary, the defendant, to send the communications to the channels to which they ordinarily send all official communications. The list is a long one and the ambit of [325] influence is wide; but in my judgment the list was not longer or the ambit wider than was demanded by justice to General Scobell.

The second reply raises what is, I think, the real and only point in the case. I have hitherto dealt with the communication as if it was a bald statement of the unfoundedness of the charge against General Scobell. But the letter was a long one, and it is urged that, in so far as it went beyond the bare statement of General Scobell's innocence and proceeds to say things defamatory of the plaintiff, it was not in the exercise of any duty or right, and that for these statements there is no privilege.

My Lords, in discussing this question a controversy was raised at the Bar as to what is the accurate way of expressing the legal doctrine. It has to be kept in view that the learned counsel for the defendant did not put forward the contention that the language used was not defamatory of the plaintiff. At first sight this is rather startling in view of the expressions used and in the light of the facts of the case. I should have thought that what may be called the moral effect of this attitude on the jury would be rather disastrous. I do not doubt that the words used—upon which I shall comment shortly—were such that the judge could not, if asked, have removed them entirely from the cognizance of the jury by ruling that they were incapable of a defamatory interpretation. But they were equally capable of an innocent interpretation and an interpretation which squared with the underlying facts of the case. Now it is one thing, so far as moral effect is concerned, to say "I meant what I wrote innocently, and I contend that is the true meaning of the words used"—even although it may eventually be decided against you that the true interpretation is otherwise, and it is another thing to say from the first "I cannot deny that the words I used were defamatory." That words intended innocently may yet be held to be defamatory is quite certain. No better illustration can be given than the case of *Hulton v. Jones* [1910] A. C. 20, 16 Ann.

Cas. 166. In that case, in which there was difference of opinion between the learned judges, and where certainly the high-water mark of the doctrine was reached, but which, as a decision of your Lordships' House, is certainly the law, no one for a moment supposed that the writer of the article was using words which he thought were defamatory of the plaintiff, Artemus Jones. [326] He did not even know of his existence. Yet none the less the words were held to be defamatory because they could be read by the ordinary reader as so applying. Notwithstanding, however, that the admission thus made is startling, I have come to the conclusion that it makes no difference to the matter in hand. In other words, the admission of the defendant through his counsel that the words used were in themselves defamatory puts the case in precisely the same position as if the judge had left the true meaning of the words to the jury—as I think he would, if there had been no admission, have been bound to do—and the jury had found that they were defamatory.

What now is the situation? You have a communication issued on a privileged occasion; and in *gremio* of that communication are used words which are in themselves defamatory. What test is to be applied? On the one hand, it is said that, the occasion being privileged, the whole document is privileged, but that if in the document you find parts which are not really necessary to the fulfilment of the particular duty or right which is the foundation of the privilege on the occasion, then these parts may be used as evidence of express malice. In other words it stand thus: Malice, which is of the essence of libel, is presumed from defamatory words. Privilege destroys that presumption. But the place of the implied malice which is gone may be taken by express malice which may be proved. It may be proved either extrinsically or intrinsically of the document, and such words in the document are apt as evidence. Thus Buckley, L.J., states as to the whole matter: "There are two questions. The first whether the occasion was a privileged occasion, and if it was, then, secondly, whether there was any evidence of malice."

On the other hand, it is said that it is not necessarily a question of malice at all; that privilege applies to what is written and published in response to a duty or right; and that if anything is found in the thing published which is not reasonably appropriate to that duty or right, then privilege cannot extend to that. My Lords, I think it will be found that in most cases these are merely two ways of expressing the same point. But there is this to be said in favour of the former method, that it is a formula which as a test will fit most if not all cases, whereas the second would necessarily break [327] down

in a good many. For it could always be said with apparent force that it never can be necessary to incorporate in a statement made in response to a duty or right any defamatory statement which is not logically necessary to fulfil that duty or right. Thus cases like *Spill v. Maule*, L. R. 4 Exch. 232 ("most disgraceful and dishonest") and *Laughton v. Sodor*, etc. L. R. 4 P. C. 495 ("bring false witness against a neighbour") would, if tried by this latter test alone, be held to be wrongly decided, though as a matter of fact I do not think it is suggested that they were anything but right, and in my opinion they were right, as, indeed, becomes evident if they are tried by the first test.

My Lords, I have not said that the first test is universally applicable and for this reason: If the defamatory statement is quite unconnected with and irrelevant to the main statement which is *ex hypothesi* privileged, then I think it is more accurate to say that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it, and under it will also range all the cases where the express malice is arguable from the too great severity or redundancy of the expressions used in the privileged document itself. In short, I adopt the law as laid down by Lord Esher, M.R., in the case of *Nevill v. Fine Arts, etc. Ins. Co.* [1895] 2 Q. B. 156, 170. The learned judge there says: ". . . in this case there was no evidence of such malice. That being so, the defendants have proved that the occasion was privileged, and there was no evidence of malice in the mind of anybody to rebut that privilege, and the defence stands good. But then the jury were asked to find, and have found, that the privilege was exceeded. There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the [329] privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion." (A good illustration of this will be found in the case of *Warren v. Warren*, 1 C. M. & R. 250.) "But when there is only an excessive statement having reference to the privileged occasion, and which, therefore,

comes within it, then the only way in which the excess is material is as being evidence of malice."

This question is of necessity closely connected with the question of the respective functions of the judge and of the jury. I do not think it necessary to analyse the very numerous decided cases which were cited to us in the course of the argument. I have studied them all, and what I am about to say is, I believe, the true doctrine to be drawn from them. But it may be as well to make this remark, that certainly some confusion has resulted from the use of the convenient phrases "privileged statement" and "extension of the privilege." Strictly speaking, it is the occasion on which a statement is made that is privileged, and the phrase that such and such a statement is privileged would be more accurately, though perhaps, more clumsily, expressed by saying that, the statement having been made on a privileged occasion, malice cannot be implied from defamatory expressions therein, but must be proved as a real fact. The malice to be proved must be real malice, and is generally called "express malice" to distinguish it from the malice which is implied from the defamatory words themselves. The duty of deciding whether the occasion is privileged is cast upon the judge alone, and the jury has no hand in it. The criterion as to whether the occasion is privileged or not is most tersely stated in the well-known passages of Parke, B.'s judgment in *Toogood v. Spyring*, 1 C. M. & R. 181, 193, ". . . fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned" and again: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." And the judge must put the question suggested by that definition to himself. [329] If the statement is, so to speak, divisible into parts it may be that the judge may come to the conclusion that certain parts are not truly referable to the particular right or duty which in the case in hand is the foundation of the privilege. If so, he will so find—that is to say, he will find that paragraph 1 is referable and appropriate to a privileged occasion, paragraph 2 is not so. Then if paragraph 2 contains defamatory words, malice will be implied as to them. If, however, he finds that both paragraphs are referable and appropriate to the privileged occasion, then, as it is more commonly but less accurately expressed, he finds that the privilege extends to the whole statement. In that case the next question he has to put to

himself is whether the defamatory words complained of are capable of affording, from their own nature alone, evidence of express malice. If he holds them incapable, and there is no other evidence extrinsic of the document, then the plaintiff's case is gone and the jury has not to be called upon at all. But if the judge thinks that the words are so capable, then he must leave it to the jury to say whether from the words alone, or in conjunction with extrinsic evidence, if there be any such, express malice has been proved. It might thus occur, though the case will probably be rare, that, as above imagined, defamatory words in the non privileged paragraph 2 could afford evidence of express malice in connection with the expressions used in the privileged paragraph 1.

I need scarcely add, but it makes the statement complete to do so, that, if there is controversy as to whether the words used are defamatory or not, it is for the judge to determine whether they are capable of a defamatory meaning, and, that being resolved in the affirmative, it is for the jury to find whether they are actually defamatory or not.

My Lords, I now return to the facts of this case, and here I am of opinion, concurring with the Lord Chancellor, that the present case is a case where the defamatory statement was part and parcel of the privileged statement and relevant to it. A grave charge had been made against General Scobell, but it had been made in the guise of calling attention to the grievance of brother officers—particularly one officer—of the plaintiff. It was relevant to show that in so doing the plaintiff was really airing his own grievance, "*Mutato nomine de te Fabula narratur*," and I think that the Army Council [330] were entitled to say so. In doing so, they used the expression relative to the plaintiff of "removed from the regiment," an expression which in the innocent sense was true and not defamatory, for the plaintiff had been removed from his regiment by being sent to Headquarters and subsequently put on half-pay. It is true that it must be taken as settled that the expression must be regarded in a defamatory sense. But, though that is so, it is well settled that express malice cannot be held as proved from the mere fact of the expression being defamatory: *Spill v. Maule*, L. R. 4 Exch. 232, and *Laughton v. Sodor*, etc. L. R. 4 P. C. 495. And, further, when considering whether the actual expression used can be held as evidence of express malice no nice scales should be used. I would particularly cite the words of the judgment of the Privy Council of the latter case L. R. 4 P. C. 508: "Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury.

To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications." This disposes of the first passage pointed out as defamatory.

Then comes the only other passage relied on where the letter says that the plaintiff had been called upon to retire "in consequence of adverse reports which were duly communicated to him." But this is only said as a preface to pointing out that General Scobell, whom he had accused of deliberately making false statements, in virtue of which injustice had been done to regimental officers of whom he was one, had, so far from being actuated by hostile bias against him, been the very man to intercede at Headquarters for the plaintiff, with the result of persuading the authorities to give him another appointment. Indeed, when we come to the language, it is, in my opinion, strictly accurate, and the admission as to defamatory language in general terms cannot be held to apply to it. For he was called on to retire, as witness the War Office letter of December 1, 1906. The reason given for the request was a report by General [331] French. And that that report was communicated to the plaintiff, notwithstanding the plaintiff's denial in the box, is, I think, proved (a) by the evidence of General French; (b) by the expression used in the plaintiff's letter of March 25, 1911, in which he speaks of "the communication of the General Officer Commanding-in-Chief at Aldershot *which I held in my hand*, and requested him to apply for the (Colonel Graham's) report to be sent to me to read;" and (c) by the fact that in his letter of December 9, 1906, referring to the War Office letter of December 1, he begs for reconsideration of the decision announced in that letter and makes no complaint of the non-communication of the report therein mentioned. But even if this were not so the same argument would prevail, as I have already stated in regard to the expression "removed from the regiment."

I am accordingly of opinion that privilege attaches to the statement here complained of; that no malice can be implied; and that to succeed the plaintiff must prove express malice. As to express malice, all the learned judges, including the trial judge, are agreed that there is absolutely no evidence, either extrinsic or intrinsic, of malice on the part of the defendant, Sir Edward Ward. For my own part I fail to see how, if it was once shown that Sir Edward Ward was merely obeying orders when he signed the statement drawn up by the Army Council and sent it

for publication, and was relying, as he was entitled to do, on the privilege which attached to the action of his superior and principal, the Army Council, any evidence as to malice on his part could be relevant. It is not necessary, however, to decide that question. It is only necessary to add that there is not a shred of evidence of malice on the part of the Army Council. Their malice, in my view, would be relevant. But as it does not exist it is unnecessary to consider that question either.

My Lords, there are two other matters which, although not affecting the judgment to be pronounced, ought, in my opinion, to be mentioned. The learned judge who tried the cause took what I believe is a very unusual course in two particulars. He disposed of the question of malice while the question of privilege was still unsettled. I do not know if this can be said to be wrong, but at least it is highly inconvenient. The second matter is more serious. In order to dispose of the question of privilege he put to the jury [332] certain questions, of which three were as follows: Was the publication—that is, the document published—of a public nature? Was the subject-matter of that publication by defendant matter about which it was proper for the public to know? Was the matter contained in the letter proper for the public to know? To all of which the jury returned a negative answer, and upon that the learned judge said: “Upon these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion.” It is clear that so far as the questions go they assume that the foundation of the duty or right which was invoked to support the privilege was that the matter discussed was one of public importance: whereas the true foundation in this case was the duty of the Army Council to make publicly known their vindication of General Scobell's honour. But apart from that, and in view of what I have already stated as to the provinces of judge and jury, I entirely agree with the learned judges of the Court of Appeal, who held that these questions were for the judge and not for the jury. If there is some fact left in controversy which must necessarily be determined one way or the other, to allow the judge to view the complete situation and thus enable him to decide whether the occasion was privileged or not, it would be right for the judge to ask the jury to determine that fact. But to put to them questions such as these and then on the findings to find privilege or the reverse is simply to ask the jury to decide for him the question which it is his duty, and not theirs, to determine.

LORD ATKINSON. — My Lords, I concur. The facts have been fully stated already, and
Ann. Cas. 1917D—17.

I desire to refer to them only so far as is necessary to make what I am about to say intelligible. During the progress of Sir Hugh Fraser's able and candid argument I pressed him several times to indicate what were the precise words in the alleged libel which were reasonably susceptible of a defamatory meaning. In the result his replies amounted as I understood, to this: that the word “removed” and the words “which were duly communicated to him,” occurring after the word “reports” contained the sting of the libel. He admitted that if after the word “removed” the words “by being put on half-pay” had been inserted and the words “which were duly communicated to him” had been deleted there [333] would not have been anything defamatory of the plaintiff in it. Owing to the course taken at the trial, the question of whether the alleged libel as it stands is reasonably capable of a defamatory meaning is not open for the consideration of this House. Neither is it open to it to set aside the verdict on the ground that the damages are excessive. But when it is admitted by the appellant's counsel that the trifling alterations in the alleged libel which I have indicated would have made it innocuous, I think there would be great difficulty in holding that, having regard to all the facts of the case, there is any reasonable proportion between the wrong alleged to have been done, and the damages awarded in respect of it. The truth is, I think, that at the trial the investigation was allowed to wander off into all sorts of irrelevant matters. The case proceeded, and the damages were awarded, as if the cause of action was not the alleged libel, but the unjust treatment the plaintiff was alleged to have received at the hands of the military authorities years before the libel was published. The learned judge who tried the case might possibly have ruled, on the question of law, whether or not the occasion on which the alleged libel was published was a privileged occasion but for the answers he had received from the jury in reply to questions as to certain things the existence of which went to make the occasion of the publication privileged. He did not leave the question of privilege or no privilege to the jury, but he did leave to the jury the question as to the presence or absence of the elements which go to create privilege. For instance, the question “Was the subject-matter of the publication by the defendant matter about which it was proper for the public to know?” And the question “Was the matter contained in the letter proper for the public to know?” It is to be regretted that the remarks of Willes, J. in *Henwood v. Harrison*, L. R. 7 C. P. 606, 628, were not brought to Darling, J.'s notice. Willes, J., a most learned, laborious, and accurate judge, after stating that since the declaratory Act of

1792 (32 Geo. 3, c. 60) the jury are the proper tribunal in civil as in criminal cases to decide the question of libel or no libel, said: "But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made bona fide without malice are libellous." He then proceeds: "It would be abolishing the law of privileged discussion, and deserting the duty [334] of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the Church, the Army, the Navy, Parliament itself, to be of no national or general importance, or the liberty of the Press to be of less consequence than the feelings of a thin-skinned disputant." It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication—a phrase often used loosely to describe a privileged occasion, and vice versa—is a communication made upon an occasion which rebuts the prima facie presumption of malice arising from a false and defamatory statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact: per Parke, B., *Wright v. Woodgate*, 2 C. M. & R. 573, 577. Nor that the question of whether the occasion is a privileged occasion or not is, if the facts be not in dispute, or if in dispute have been found by the jury, a question of law to be decided by the judge at the trial. Nor yet that a person making a communication on a privileged occasion has not, in the first instance and as a condition of immunity, to prove affirmatively that he honestly believed the statement made to be true, his bona fides being in such a case always presumed: *Jenoure v. Delmege* [1891] A. C. 73, 79; *Clark v. Molyneux* [1877] 3 Q. B. D. 237, 249. All these matters were not questioned. They could not be questioned successfully. Nor was it suggested that, while on the question of malice the bona fide belief of the defendant that he was under a moral or social duty to make the communication is relevant and important, the existence, in fact, of this duty or interest, not merely the defendant's belief in its existence, is the thing which is relevant to the question whether the occasion was or was not privileged: per Lindley, L.J., *Stuart v. Bell* [1891] 2 Q. B. 341, 349. It was, however, strenuously contended on the part of the appellant, as I

understood, that the language used in a communication made on a privileged occasion must, if it is to be protected, [335] merely be such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded. It has long been established by unquestioned and unquestionable authority, I think, that this is not the law. This point is of such importance that one may be excused for referring at length to three authorities to show what the law on the subject really is, and in what light the language used in privileged communications is in a Court of law to be regarded. In *Spill v. Maule*, L. R. 4 Exch. 232 the libel sued upon was contained in a letter written by the defendant, a creditor of a firm, who had been engaged by the firm to wind up its affairs, to another creditor of the same firm. The plaintiff had had disputes with his partner before and during the winding up, and he, suspecting that his partner was drawing out the money of the firm on his own account, took from the cash-box of the firm a parcel of bills, directing the clerk to take an account of them and to tell his partner to debit his, the plaintiff's, account with them. The defendant dealt with this transaction in the above-mentioned letter, and stated that the plaintiff's conduct in reference to it "has been *most disgraceful and dishonest*, and the result has been to diminish materially the available assets of the estate." The plaintiff at the trial proved these facts. They constituted his case. Thereupon the presiding judge, Martin, B., directed a verdict for the defendant. A bill of exceptions was tendered to this ruling, on the ground that though the communication was privileged, yet the violent and abusive terms used in the letter were evidence of actual malice. The judgment of the Exchequer Chamber was delivered by Cockburn, C.J., Keating, Lush, Hannen, Hayes, and Brett, J.J., concurring. The case is therefore one of high authority. After stating the facts the Chief Justice said, L. R. 4 Exch. 236: "The question then arises, whether the language is too strong for the occasion; the terms applied to the plaintiff's conduct being 'most disgraceful and dishonest.' Now, the communication being privileged, the presumption is in favour of the absence of malice in the defendant, and in order to rebut this presumption, the plaintiff must show actual malice, and he may no doubt show this by reference to the terms of the libel as being utterly beyond and disproportionate to the facts." He then proceeds [336] to refer to the plaintiff's act in taking away the bills, and says: "This act was capable of a twofold construction; it might have taken place under such circumstances that the plaintiff could not properly be ex-

posed to any moral censure, as, for instance, if he only intended to keep the assets in security for the benefit of creditors: or the circumstances might have been such that in taking the bills he acted dishonestly and disgracefully. Now, the presumption of the law being in favour of the absence of malice in the defendant, and the only evidence of malice being his description of acts done by the plaintiff, which were capable of a twofold construction, that presumption of innocence which attaches to the writer must also, while his act is capable of a double aspect, still attend him. . . . We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully; all we have to examine is whether the defendant stated no more than what he believed, and what he might reasonably believe; if he stated no more than this, he is not liable, and, unless proof to the contrary is produced, we must take it that he did state no more." The direction of Martin B. was accordingly upheld. I cannot find that the authority of this case has ever been questioned. It was cited with approval in the case of *Laughton v. Sodor, etc.* L. R. 4 P. C. 495, to which I am about to refer. It will be observed that the Chief Justice says that the terms of the libel which are evidence of malice are not merely such as are beyond the necessities of the occasion, but such as are utterly beyond and disproportionate to the facts.

The case of *Laughton v. Sodor, etc.* L. R. 4 P. C. 495 has, I think, a direct bearing upon the present case. The appellant, Laughton, a barrister, having been retained to oppose at the bar of the House of Keys a bill in which the respondent was interested, in the course of his remarks very severely criticized the respondent and his mode of discharging his duties. The Bishop, in an address which he read to his clergy assembled in convocation, and subsequently had printed and published in a local newspaper, the *Manx Sun*, did not confine his observations merely to a defence of himself against the charges made against him. He, in addition, violently assailed and denounced his critic, Laughton. He accused him [337] (p. 498) of making slanderous statements and uncharitable imputations under the apparent sanction of well-informed persons; of making statements with an entire disregard of truth; of being a wicked man; of making calumnious assertions; and of being guilty of the sin of bearing false witness against his neighbor. The Deemster before whom the case was tried ruled that the occasion on which the libel was published was a privileged occasion, but left to the jury the question of actual malice, of which the excessive nature of the Bishop's language he apparently regarded as evidence. The jury found a verdict for the plaintiff for

400l. The Appeal Court of the Isle of Man set aside this verdict, on the ground that there was in the case no such evidence of express malice as justified the Deemster in leaving the question of malice to the jury. This decision was upheld by the Privy Council, on the ground that, having regard to the circumstances and the nature of the attack upon him, the Bishop might have honestly believed that everything he said was true and proper for his own vindication, although in fact some of his expressions exceeded what was necessary for it, and that the language of his charge was more consistent with such an honest belief, and with the purpose of self-vindication, than of injuring the plaintiff, but that, had the Bishop referred to the conduct of the plaintiff on any other occasion than that of his addressing the House of Keys, or made any general attack upon his private or professional character, the case would have been different. In delivering the judgment of the Board Sir Robert Collier said, L. R. 4 P. C. 508: "Some expressions here used" (i.e., used by the defendant in his defence) "undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications."

That decision has been approved of many times. It was relied upon by Lord Macnaghten when delivering judgment in the case of *Jenoure v. Delmege* [1891] A. C. 73, 76. Its soundness has not, I think, ever been questioned.

[338] In *Nevill v. Fine Arts, etc. Ins. Co.* [1895] 2 Q. B. 156, 159, 160, 171; [1897] A. C. 68, 75, the appellant Lord William Nevill, in the year 1892 became agent to the respondents, and conducted the agency at his own office, 27, Charles Street, St. James's. The appellant, after some months had passed, desired better terms, and a correspondence passed on this subject. In December, 1893, the secretary of the respondents wrote to the appellant informing him that the board of directors of the respondent company had decided to terminate the agreement with him. An alteration of terms was made, and the appellant continued to act as agent for the respondents. In answer to a question as to the appellant's intentions his solicitor wrote on March 13, 1894, that his client wished to sever all connection with the company, owing to the insufficiency of his terms. On March 15, 1894, the secretary of the respondents sent to certain persons who had transacted

business with them through the appellant's office a circular stating that the agency of Lord William Nevill at 27, Charles Street had been closed by the directors, and requesting them to direct all communications to the West End secretary at 19, St. James' Street. The innuendo put upon these words was that they meant that the plaintiff had been dismissed by the defendants from his employment as their agent for some reason discreditable to him. Pollock, B., tried the case. He stated that he ruled that the occasion which required the writing of some such letter was privileged, that it was contended for the plaintiff that, although the occasion was privileged, that part of the letter which stated falsely that the agency had been closed by the directors was not called for by the requirements of the occasion, and was therefore in excess of the privilege. He accordingly left to the jury the question whether the defendants, in making the statements that the plaintiff's agency *was closed* by the directors, had exceeded the privileged occasion. The jury, having first found that it was untrue that the directors had closed the agency, answered this question in the affirmative, and found a verdict in favour of the plaintiff for 400*l.* damages, for which, after consideration, Pollock, B., entered judgment. There was no finding of actual malice. On appeal to the Court of Appeal it was decided, the occasion being privileged, that in the absence of a finding of actual malice the defence of privilege was not rebutted, [339] and that, it appearing on the facts of the case that there was no evidence of actual malice in the publication of the statement complained of, the action was not maintainable. Lord Esher in his judgment deals with the question of this excess of privilege in the words which have been already quoted by my noble friend who has preceded me. Lopes, L. J., concurred, and in his judgment relied upon the passage I have already quoted from the judgment in *Laughton v. Sodor*, etc., L. R. 4 P. C. 495, 508. On appeal to the House of Lords all the noble Lords who took part in the decision were of opinion that the statement that the agency had been closed was true in fact in the only sense relevant to the context in which it was found, and that there was no evidence of malice. They upheld the judgment of the Court of Appeal. And Lord Halsbury, referring to this statement, says: "But suppose it was not true, suppose it was not accurate in the sense in which people would have understood it, . . . suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though in the mind of some other person it should be inaccurate in form, it seems to me that it would be impossible to contend that that would be evidence of malice."

These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so. It was next urged on behalf of the appellant that the Army Council should have confined themselves to stating that the charges made against Major-General Scobell were on investigation found to be unfounded, and that he had been fully exonerated, and, therefore, that all the references contained in the libel to the appellant himself, his conduct, career, or the treatment he received, were foreign and irrelevant subjects, not pertinent to the discharge of the duty, or to the protection of the interest which [340] form the basis of the privilege claimed; but were separable from the relevant parts of the libel, and, to use the words of Lord Esher, were outside the privileged occasion and had nothing to do with it; and that since, to afford a defence, the whole communication should be within the protection of the privileged occasion, if part only were so, the entire communication ceased to be a privileged communication or to be protected. Some question was raised as to whether the presiding judge was the person to decide whether any foreign and irrelevant matter had been introduced into the libel, and whether it was separable. I think it must be the judge who is to do so. He it is who must decide whether the occasion is privileged or not, and if that be so, he must necessarily decide in respect of what portion of the libel the occasion would be privileged if it stood by itself. A more difficult question, however, remains upon which the authorities cited give little, if any, assistance. It is this: What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice. In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think it is, in law, the true result. Owing, however, to

the view I take of the contents of the libel, this question is, to my mind, a purely academic one. For reasons I shall presently adduce I do not think any foreign or irrelevant matter has been introduced into the libel; but as the point has been raised and fully argued, and is itself of importance, it is, I think, desirable to decide it. I have accordingly expressed my opinion upon it. Some argument was directed to the defendant's precise position in relation to this libel, his rights, duties, and privileges, his feelings towards the appellant, and his express or implied malice. I think his position is plain. He was the mere agent of the Army Council, bound to obey their orders or resign his post—the mere instrument through whose hands the libel passed for publication. His own personal feelings or privileges [341] are, I think, not involved in the case at all. He had nothing whatever to do with the composition of the libel, or the approval of its contents. In the mere routine of the work of the office he signed his name to it and passed it on for publication in the way and over the area usual in such cases. To suppose that it was his duty to attempt to dissuade his principals from publishing the libel, to criticize their language, or, save at their request, to alter it is, in my view, quite absurd. It is no doubt true that one cannot defend himself for publishing a libel simply by saying that another person whom he was bound to obey ordered him to publish it; but it is equally true that when an agent, in obedience to the command of his principal, merely does the mechanical act of publishing the libel handed to him complete the privilege of the principal becomes, as it were, his privilege, and if the principal has caused the communication to be made to protect the interest or discharge the duty which would have made the occasion privileged if he had published the libel with his own hand, the agent can equally rely on the publication having been made on a privileged occasion. For this purpose he stands, in my view, in the shoes of his principal, has the same rights and the same liabilities. I think this follows from the reasoning of the judgments in *London Assoc. v. Greenlands* [1916] 2 A. C. 15. The appellant was not ashamed to admit that he published this vile slander of his friend and benefactor, General Scobell, believing that the charges it contained were untrue. He seeks to justify that most discreditable act by saying that he did it to force General Scobell to demand an inquiry, in which he (Scobell) would be exculpated and the real culprit be discovered. But the Army Council were not told of this unworthy stratagem. They, in their ignorance, could hardly have supposed that the appellant would have stooped to it, and have charged Major-General

Scobell with the shameful act he did charge him with unless he believed that the General was really guilty. It was therefore quite natural that, in order to disabuse the appellant's mind of the notion that either Scobell or the Army Council had any ill-will towards him or any motive for doing him a wrong, they should recall the acts of kindness done to him by both. The appellant, in the House of Commons, posed, no doubt, as a member who was bringing forward the [342] grievances of Captain Wilson, not of himself. That was, however, a mere pretence. The War Office knew it was a pretence. It was too transparent to deceive any one who knew the facts. But the public did not know the facts. It was clearly, therefore, justifiable, if not desirable, that the public should be informed of them, and shown that the appellant in traducing his own superior officer was not the disinterested defender of Captain Wilson, but was grinding his own axe and, under an alias, as it were, airing his own grievances, making his own complaint. It was evidently for the purpose of informing the public on this point that the statement was introduced into the alleged libel to the effect that the appellant himself was one of the officers removed from the 5th Lancers in consequence of the alleged false reports. That was obviously pertinent. So was the statement that the appellant had been called upon to substantiate his charges and had failed to do so. Nothing could tend more to show the public that the charges were untrue and that the exculpation of General Scobell was right. Everything in the libel was, I think, pertinent and relevant to the central facts that the appellant had made these charges against General Scobell, had failed to substantiate them, and that they had been investigated by the Army Council and found to be untrue. The appellant was naturally dissatisfied with the mode of investigation adopted. It manifestly did not suit his book. It frustrated his plan. It afforded him no opportunity, by cross-examination of the man he had made a cockshy of for his calumnies, of discovering the supposed wrongdoer. He would have preferred apparently a Court of inquiry. A Court of inquiry is a Court to collect evidence, not like a court-martial, to pass judgment. The accused apparently did not ask for a Court of inquiry. The Army Council may have considered they had sufficient evidence before them to enable them to decide, and did not need a Court of inquiry to collect further evidence. It can hardly be contended that the traducer has the right to select the tribunal before which the traduced is to defend himself, and that the traducer is aggrieved if that right is denied to him. His complaint on that head may be disregarded. The next point urged on behalf of the appel-

laint was that the publication of the libel was unnecessarily wide; that it extended over too vast an area; that neither the Army Council nor the defendant had any interest or duty to [343] publish it to people inhabiting the remote parts of the Empire which the libel might reach; that these latter had no corresponding interest or duty in receiving the communication; and that either the occasion of the publication was therefore not a privileged occasion, or that this wide publication was evidence of actual malice. I cannot agree. The area was the usual area over which such matters are published by the Army Council. It must be remembered that every subject of the Crown, whatever portion of our farflung Empire he may inhabit, has, and must have, an interest in the British Army, its courage, the confidence of its men in their officers, its discipline and efficiency, for this amongst other reasons, that he never can be sure whether the day may not come when the lives of himself and his family, the safety of his property or his liberty may not depend on its success in the field against the Empire's enemies, or the efficiency of its aid of the civil power in suppressing tumult and crime in the locality where he lives. The efficiency and discipline of troops must depend on the character, training, and acquirements of the officers who lead them. It would be a disgrace and injury to the Service if a man, publicly accused of the shameful breach of duty of which General Scobell was accused, was allowed to continue in command of a brigade in the Army unless and until he had been cleared of the accusation made against him. Every subject, therefore, who had an interest in the Army had an interest in being by a public communication informed of General Scobell's acquittal. But I go further. I think it may be laid down as a general proposition that where a man, through the medium of Hansard's reports of the proceedings in Parliament, publishes to the world vile slanders of a civil, naval, or military servant of the Crown in relation to the discharge by that servant of the duties of his office he selects the world as his audience, and that it is the duty of the heads of the service to which the servant belongs, if on investigation they find the imputation against him groundless, to publish his vindication to the same audience to which his traducer has addressed himself. In my view the Army Council would have failed in their duty to General Scobell personally, and to the great Service which they in a certain sense govern and control, if they had not given the widest circulation to the announcement of the General's vindication. I think, therefore, the appellant's contention on this point [344] cannot be sustained. I am for these reasons clearly of opinion that the occasion on which this alleged libel was pub-

lished was a privileged occasion, and that there was no evidence of express malice either against the defendant or against the Army Council. I think the appeal fails on every point, that the decision of the Court of Appeal was right and should be upheld, and the appeal be dismissed with costs here and below. I wish to point out that though the combined confidential report was not, according to the appellant, shown to him before it was sent in, as it should have been, and he was thus deprived of an opportunity of defending himself, still, if it did not charge him with any specific act or default which he could have disproved, but, as far as we know, like Lord French's report, only expressed the opinion of his superiors as to his inefficiency as a leader of cavalry in the field, there was really nothing he could defend himself against. That the report was of this character is strongly suggested by the fact that, though he did see it on December 6, 1906, no protest whatever against it is made by him in his letter of December 9, written three days afterwards. That is what one would have expected if the report merely expressed the opinion of his superiors on his inefficiency. It would have been useless to protest against their judgment of his skill as a leader of cavalry; but it is certainly not what one would have expected if the report accused him of any act or omission which he could explain or disprove. During the succeeding four years he in his letters requests that the Army Council should reconsider their decision as to his retirement, and as to his being placed on half-pay, but he never said all this time that the reports against him accused him of any such act or omission as he could disprove or explain. I share the regret of my colleagues that we have not had these reports before us, but I can well understand that the War Office were unwilling to make a precedent by their production.

LORD SHAW OF DUNFERMLINE.—My Lords, I concur.

I should have been well content to adopt, as I respectfully do, the judgment of Lord Wrenbury in the Court of Appeal. But the arguments submitted at the Bar by the learned counsel for the appellant with such care and fulness have convinced me that the course of the procedure in this case was such as to cause both [345] embarrassment and mischance; and I am glad, accordingly, that your Lordships have thought that the occasion demanded some fresh enunciation of the principles of the law of libel, which principles do not appear to have been followed in the trial of the action.

In view of the judgments which have preceded my own, I do not require to allude in great detail to the facts.

In the House of Commons on June 27, 1910, the appellant made the following statement: "That Major-General H. J. Scobell, 5th Royal Irish Lancers, did render to superior authority a confidential report or confidential reports on an officer or officers under his command, which report or reports contained wilful and deliberate misstatements of fact, thereby deceiving those in authority to whom the report or reports were rendered, and causing injustice to be done to one of the regiments under his command."

He explained that he was making this charge deliberately, and read it from type. He added: "Major-General Scobell is on his way home at the present moment from South Africa; he arrives in England at the end of this week, and I hope, when he sees the report of this in the paper, as I intend he shall do, he will appreciate the meaning of the words, 'wilful and deliberate misstatements of facts.' I have tried to make it clear, and I hope he will turn up that paragraph in the King's Regulations which compels an officer in a case like this to refer the matter to his superior authority, the superior authority in this case being the Army Council. I hope sincerely that the Army Council will see that justice is done to Captain Wilson, and that penalties are meted out to those officers who deserve it."

The meaning of this was only too plain. It was a charge made against Major-General Scobell of a gravely injurious and, unless true, of a deeply calumnious character. The charge was not made against him recklessly, but deliberately; and it was made under circumstances than which none can be more public or command wider attention throughout the Empire, namely, in the House of Commons. It was made under the shelter of the absolute privilege which covers proceedings in Parliament, and it was directed against a man whose mouth was closed by the King's Regulations applicable to the Army. It was acutely pointed at his honour by the reference to that regulation which compels an officer to refer the matter to the [346] Army Council. So serious was the charge against Major-General Scobell's character and conduct as an officer and a gentleman that he became obliged to submit the case under paragraph 446, a paragraph which prescribes that pending the investigation an officer in such a case may be suspended from duty, "in which case he will be placed under the same restrictions as an officer under open arrest."

Major-General Scobell acted. On his return to this country he requested "that the Army Council may cause inquiry to be made regarding the charge brought against me by Major Adam of having made a 'deliberate misstatement' as I consider that my honour is impugned by such a statement." The ap-

pellant was asked by the Army Council whether he wished to forward any statement in amplification or substantiation of his charge. He then indicated that it was something else he was after, namely, investigation into the administration of the War Office as well as into Major-General Scobell's conduct; and he did not comply with a most fair and reasonable request.

On investigation the charge was found to be baseless. The result was a complete acquittal of Major-General Scobell. In February, 1912, that gallant officer died. After his death, namely, in November, 1912, this action was brought.

Before adverting to the terms of the alleged libel I desire to refer to the situation of the War Office created by the demand for and the result of their investigation. It humbly appears to me that the right of the War Office in such a case is, first, to investigate and to condemn or acquit; and, secondly, in the case of an acquittal to publish that fact; while thirdly, on the head of publication, it has the right, and may properly consider it its duty, in justice to an officer who has been publicly wronged, to use its utmost endeavour to undo the wrong whithersoever that wrong may have penetrated.

With regard to the acquittal no complaint is now made. It is not maintained by the appellant that the charge was true; but he regrettably offers no apology for it, but a reason. That reason is of a sinister character—the charge was made against the honour of one officer as a means of forcing a public inquiry in the course of which blame might have been brought home to another.

But with regard to the second and third of these things, namely, the publication of the acquittal and its publication most widely, [347] the appellant challenges these transactions. I do not think that this challenge is well founded. In my view these things fall not only within the right, but, as I say, within the duty of the War Office. It may be said in general terms that whenever the character of one person is made the subject of a false charge communicated to another in a public manner, that other has the right to overtake the charge wherever it may have reached, and if possible to eradicate the falsehood by the refutation. In the case of an employer generously anxious to undo a wrong to a falsely accused servant the exercise of this right appeals to the former as a duty; and in the case of a public department dealing with the character and conduct of servants of the King the right is no less a duty to the aggrieved officers than also to the public at large. I desire in the next place on this head of the case to express my opinion that it will be only in the most exceptional cases that it will be considered a

breach or excess of duty (at present I do not figure for myself any possible case) for the public department or other recipient of the public slander to have published too widely its refutation.

Much time and expense were needlessly caused, in my opinion, in this case on this latter head. What the War Office did was to send the notice of the acquittal to, *inter alia*, Reuter's and to the Press Association, and so to every newspaper of importance which would care to publish it. In my opinion, in doing so it was within its rights. To recognize that it erred in this particular would be to sanction calculations as to how far the fact of an acquittal of an officer of a charge against his honour should be made public—which calculations upon the part of the War Office would have been shabbily scrupulous. Furthermore, it has to be borne in mind, with regard to the whole question of the repudiation of a false charge, that it has not to be weighed in nice scales. This is so in regard to the language employed, a subject to which I shall presently advert. But it is particularly so with regard to the width of the area selected for the refutation of a wrong which has been done.

It is now necessary to point attention to the subject-matter of both charge and refutation. In his letter of November 12, 1912, the appellant treated the matter as "of the most vital public interest as affecting the pure administration of our Army." I am of opinion that this view is right. The subject-matter was an attack upon the [348] honour of a soldier of the Crown. In my view this gives just occasion for investigation, and the War Office would be acting with scant justice if, having acquitted the officer, it kept the cleansing of his honour a secret and left the refutation without the widest and most effective publication. I am accordingly humbly of opinion that the occasion of publishing the deliverance of the War Office alleged to be libellous in this case was a privileged occasion, and that the scale and range of the publication of that deliverance were not only within the privilege, but were in themselves proper.

The terms of the published communication by the War Office which is alleged to be libellous have been cited by your Lordships. It took the form of a letter to Major-General Scobell announcing the result of the investigation made.

Privileged, however, as the occasion might be, it was contended that the communication went beyond the occasion and so was not protected by the privilege. I humbly think that this is a more correct way of stating the proposition than that usually adopted. Privilege is a term which is applied in two senses. There is a privileged occasion, and there is

also said to be a privileged communication. The former expression is correct; the latter, strictly viewed, tends to error. What is meant with regard to a privileged communication is that it was protected as being within the scope of the privilege attaching to the occasion. The occasion is privileged, the communication is protected.

If, accordingly, and in so far as the communication deals with matter not in any reasonable sense germane to the subject-matter of the occasion, the protection is gone: the occasion with its privilege does not reach a communication upon this foreign and totally unconnected matter. Further, the introduction of such matter into a communication otherwise protected by the occasion may sometimes (this is conceivable) have a bearing upon the issue of whether the other and protected matter was published with express malice.

To apply these observations to the present case: It is admitted that the main and manifest object of the letter is to deal with the charge made against Major-General Scobell. But it is said that in acquitting the accused the department should not have dealt with the accuser. Upon the facts it is conceded that the truth was that Major-General Scobell had befriended Major Adam at a critical [349] period in the latter's career (when he had been called upon to retire from the Service), had interceded for him, and had prevailed upon the authorities to give him a chance in an extra-regimental appointment. The communiqué stated this "as showing the absence of hostile bias." I think it proved that; and in my humble opinion the communication in doing this did not enter upon any foreign field. What it stated was germane: indeed I go so far as to say that I think it would have been scant justice merely to say that the accuser's charge was disproved and to withhold what they knew, namely, that instead of the accused having ill-treated the accuser he had been emphatically his friend.

Having reached this stage, the case, I humbly think, becomes, or should have become, a very ordinary one both in principle and in procedure. The occasion was clearly privileged—the communication dealt with matter germane to the occasion and was protected. Everything else was familiar ground, namely, that in such circumstances the inference that might otherwise have arisen from a statement prejudicial to the plaintiff is rebutted, and it is put upon him (the plaintiff) to establish affirmatively—in the words of Parke B.—that there was "malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made:" *Wright v. Woodgate*, 2 C. M.

& R. 573, 577. The leading place in authority is still held by *Toogood v. Spyring*, 1 C. M. & R. 181. The most valuable judgment of Willes, J., in *Henwood v. Harrison*, L. R. 7 C. P. 606, 622, gathers the decisions together, including, especially, *Toogood*, and *Harrison v. Bush* (1855) 5 El. & Bl. 344, 85 E. C. L. 344, and *Whiteley v. Adams* (1863) 15 C. B. N. S. 392, 109 E. C. L. 392, and sums them up in these terms: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

In actions for defamation it is the province and duty of the judge to settle the question of privilege, and that without reference of it, or of what goes to establish it, to the jury. The entire mass of [350] authority is, in my opinion, in support of this view; and it is the view adopted in every-day practice. It is not the province or duty of the jury to adjudicate upon or to settle the question of privilege. To use the language of Willes, J. (*Henwood v. Harrison*, L. R. 7 C. P. 606, 628), "It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury." How far this rule was departed from in this case will be presently seen.

As has been indicated, I am of opinion that this case is one in which privilege should have been affirmed by the judge and the jury directed accordingly to proceed to what was the one and only remaining question—a question of fact within their province, namely, whether express malice on the part of the defendant had been affirmatively established by the plaintiff.

It might have well been considered that there was nothing in the communiqué to which a libellous meaning could by any reasonable person be attached. This was not the course adopted by the learned counsel for the respondent: they not only admitted that there was matter which was open to a libellous construction, but they, as I read the proceedings, also admitted that the matter was in fact libellous. I fear that this caused much confusion: if it referred to the expressions "removed from the regiment" when the plaintiff was put upon half-pay, it put briefly what the plaintiff himself spoke to when, being asked the effect of putting an officer on half-pay, he said, "It takes him off the regimental list," and what the defendant said, in answer to the Court, namely, an officer "put on half-

pay is no longer an officer in the regiment." The admission made appears accordingly to run counter to the facts; and confusion might have ensued from a verdict of malice in such circumstances.

Fortunately this situation was saved by the learned judge, who closed the whole matter by ruling "that there is no evidence of malice—not only no evidence of malice in the publication, but no evidence of malice on the part of the defendant in the publication of this document which would make it necessary for me to leave the case to the jury, if the occasion of its publication were a privileged occasion."

[351]. With this ruling it was not open to the jury to find malice as a fact, and, again quite properly, there is no such finding. The case, however, went on for days after this intimation; the inquiry ranged very wide, so wide that I feel convinced that the jury may very well have come to the conclusion that the case they were trying was a case not of libel but truly of wrongful dismissal; and I do not for myself see how the verdict obtained in such circumstances could have stood. It is certainly unusual to find a verdict of a jury taken not upon the fact "was there malice," not even upon elements which lead up to that as a fact, but upon the question of privilege and the elements which might be supposed to bear upon that question of law. I am humbly of opinion that the whole of that procedure was contrary to law.

What happened was that the learned judge asked from the jury answers to certain questions, and the jury found (1.) that the document was not of a public nature, (2.) that the defendant made the publication in the discharge of his duty as secretary to the Army Council, (3.) and for the purpose of affording information to the public, but that (4.) it was not proper for the public to know the subject-matter of the publication. They gave a verdict for 2000*l.* damages.

It is not necessary to consider whether these findings are supported by evidence. For it is clear beyond all question that the whole of them are in the region of the case relating to the purely and exclusively legal question of privilege. I respectfully agree with the submission made at the trial by the learned counsel for the respondent that "there is no issue of fact proper to be submitted to a jury in order to determine the privileged occasion."

The learned judge did not accede. On the contrary, he relied in determining the question of privilege on the jury's findings, his language being: "On these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion."

For the reasons already given I am of opinion that this procedure was erroneous. The respective provinces of judge and jury were confounded. I think the verdict so obtained cannot stand, and this quite apart from the large admission of irrelevant and misleading matter to which I have adverted.

[352] But, further—being of opinion that the occasion was privileged, that the communication did not go beyond it, and that no malice was proved in making it—it humbly appears to me that judgment should be entered for the defendant, and that the course taken by the Court of Appeal was correct.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

NOTE.

The reported case passes on a somewhat unique application of the doctrine of privilege attaching to defamatory words published with respect to a matter of public interest. It appears that a member of Parliament, formerly an army officer, made on the floor of Parliament a charge of misconduct against an army officer with respect to proceedings which had led to the removal of the speaker and other officers from the service. The officer in question appealed to the Army Council for an inquiry into the charges against him. The Army Council investigated, made a report vindicating the accused officer and reflecting on the maker of the charge, and published the report generally in the press. In an action against the Secretary of the Army Council it is held that the words were privileged and that the public importance of the subject warranted the general publication of the report. Whether publications relating to matters of public interest are privileged within the law of libel or slander is discussed in the note to *Flanagan v. Nicholson* Pub. Co. Ann. Cas. 1917B 402.

RICHARDS

v.

DISTRICT SCHOOL BOARD ET AL.

Oregon Supreme Court—December 21, 1915.

78 Oregon 621; 153 Pac. 482.

Schools — Removal of Teacher — Marriage as Ground for Removal.

Laws 1913, p. 69, by section 1 gives the board of directors of every school district the power to remove and discharge all teachers

as it may deem necessary; by section 4 provides that teachers employed in a district as regularly appointed teachers for not less than two successive years shall be placed upon the list of permanently employed teachers; by section 5 that such teachers shall serve until dismissed, subject to the board's rules which shall be reasonable; by section 6 that before dismissal, any teacher on the permanent list shall receive written notice stating the cause, a copy of any charges filed, and, on request, shall be entitled to a hearing before the board; and by section 11 repealed all acts in conflict therewith. Laws 1913, c. 172, a general law, detailing the powers of district school boards, effective the same day, provides by section 1, subd. 22, that the board shall dismiss teachers only for good cause shown. Relator, a teacher on the permanent list, on her engagement on May 19, 1913, for the ensuing school year commencing September 15, 1913, signed an acceptance form, containing a resolution of the board that marriage of women teachers should terminate their service, and, upon her marriage on January 4, 1915, was removed under the resolution without charges, notice, or hearing. It is held that the board had no power to dismiss a teacher for a cause which was not reasonable; that if her marriage was a reasonable cause for dismissal, the attempted dismissal was ineffective for want of complaint, notice, and hearing; that the acceptance agreement had expired; but that her marriage was not a reasonable cause for dismissal.

[See note at end of this case.]

Mandamus — Subjects of Relief — Reinstatement of Teacher.

In such case, mandamus is available as a remedy, for reinstatement.

[See 98 Am. St. Rep. 878.]

Appeal from Circuit Court, Multnomah county: MORROW, Judge.

Action by Maud L. Richards, plaintiff, against District School Board for School District No. 1, in Multnomah County, Oregon, et al., defendants. Judgment for plaintiff. Defendants appeal. **AFFIRMED.**

[622] School District No. 1, in Multnomah County, has a population of 20,000 or more persons. Maud L. Richards is the holder of a life diploma, entitling her to teach in any high department of the public schools of the district. On September 22, 1911, the board of directors of the school district elected the plaintiff, whose name was then Maud L. Marsh, a teacher in the Trades School for the ensuing year; on May 23, 1912, she was re-elected for the school year beginning September 16, 1912; on May 19, 1913, she was again [623] elected for the ensuing school year, which commenced September 15, 1913, and, having been employed for two successive annual terms, her name

was placed upon the list of permanently employed teachers, as directed by Chapter 37 of the Laws of 1913, which became effective on June 3d of that year. The plaintiff performed the duties of teacher from September 22, 1911, when first elected, until January 5, 1915, when she received oral notice that she was dismissed because she had married on the preceding day. The school board had adopted a rule that:

"Married women shall not be eligible to positions as teachers in the district except by special resolution of the board. All women teachers who marry during their time of service, thereby terminate their contracts with the district."

On or about May 19, 1913, the plaintiff received from a board a notice which, so far as material here reads thus:

"At a meeting of the board of directors held on the above date, you were elected a teacher in the schools of this district for the ensuing school year, day sessions. Your term of service will begin on Monday, September 15, 1913, . . . By special resolution of the board, all women teachers who marry while in the service of the district, thereby terminate their service with the district; but such marriage shall not operate to bar them from reappointment, should it be deemed by the board to be to the best interests of the school to retain their services. This agreement is subject to the rules and regulations of the board, which are at present in force, or which may hereafter be made while you are in the service of the district. . . . By another resolution of the board, it was also ordered and provided, that in case of a repeal of the law making the tenure of the position of teachers permanent, no action of the board would extend the [624] teacher's service beyond the end of the school year, during which such law should be repealed. If you accept the position to which you have been elected, as herein noted, please fill in the blanks on, and sign the inclosed acceptance form, and file in my office, on or before July 10, 1913; otherwise the board will consider the position vacant, and will proceed to fill same.

"Yours very truly,

"R. H. THOMAS,

"Clerk.

"I accept the position above named and defined, on the conditions specified."

The plaintiff signed the acceptance form and returned the paper to the board.

At some time in the forenoon of January 4th, the plaintiff informed the principal of the school that she "expected to be married that evening, and expected to continue teaching," whereupon the principal called her attention to the rule that marriage terminated the employment of a teacher. The plaintiff

also interviewed the city school superintendent in the afternoon of January 4th, and told him, "I expect to be married and expect to go on teaching," and he then "called attention to the by-law of the board." During the evening of January 4th, the plaintiff was married to O. R. Richards, and the next morning she presented herself at the school building at the usual hour, with the avowed purpose of continuing her service as teacher. The principal of the school appeared with a substitute and informed plaintiff that "they had received word from Mr. Alderman [the city school superintendent] that I leave," and thereupon Maud L. Richards left. On January 6th the plaintiff filed with the clerk of the board a petition which recites that she had been summarily dismissed, and asks that "she may be reinstated [625] to her former position." No charges were made against Maud L. Richards; no notice was given except as already detailed; no hearing was held; and no action was taken by the board, except as shown by the minutes of the meeting of January 21, 1915, where it is recorded that: "Mr. Alderman submitted the following: . . . That the following vacancies have occurred in the various schools which should be filled, and reported that four teachers had been appointed subject to the approval of the board . . . School of Trades for Girls, Maud L. Marsh, married 1-4-15. . . . It was moved by Director Beach, and seconded by Director Plummer that the place of Maud L. Marsh, reported by Superintendent L. R. Alderman married January 4th, 1915, be declared vacant, and that the appointment of the following teachers be ratified," and the board ratified the appointment of a successor to plaintiff. A trial in the Circuit Court resulted in the allowance of a peremptory mandamus against the school board, commanding that the plaintiff be reinstated as a teacher and that her salary be paid "from the date when it should have been paid until such time as the said Maud L. Richards be reinstated to her former position."

The defendants appealed.

Charles William Fulton and Fulton & Bowerman for appellant.

Richards & Richards and Coy Burnett for respondent.

[632] HARRIS, J. (after stating the facts).

—In the final analysis the decision of this controversy depends upon whether the school board possesses the right to enforce a rule which provides that the marriage of a woman teacher automatically terminates her "service with the district." The question presented for determination necessarily involves a consideration for certain statutes, and for

that reason it is proper first to direct attention to such legislative acts as may be applicable. In 1913 the legislature passed two measures, which became effective simultaneously on June 3, 1913. One act is known as Chapter 37 of the Laws of 1913, and the other is referred to as Chapter 172 of the Laws of 1913. The provisions of Chapter 37, so far as they may be of interest here, read thus:

"Section 1. The board of directors of every school district in this state now having or which at any time hereafter shall have a population of 20,000 or more persons shall have the power and authority to appoint and remove, hire and discharge all teachers, officers, agents and employees as it may deem necessary, and to fix their compensation.

"Sec. 3. The teachers employed in any such district or districts, during their first two years of service shall be classed as probationary teachers. . . .

"Sec. 4. Teachers who have been employed in the schools in any such district or districts as regularly appointed teachers for not less than two successive [633] annual terms shall by the board of directors be placed upon the list of permanently employed teachers.

"Sec. 5. Teachers so placed upon such list shall not be subject to annual appointment, but shall continue to serve until dismissed or discontinued in the service by the board in the manner herein provided, subject to the rules of the board concerning suspensions, but such rules shall be reasonable and for the good of such schools. . . .

"Sec. 6. Before being dismissed any teacher on the permanent list shall receive written notice, stating the reason for the proposed dismissal, together with a copy of any charges or complaints which may be filed against him or her, and upon written request filed with the clerk the teacher shall be entitled to and given a hearing before the board within ten days after said notice, with full benefit of witnesses and subpoenas issued in blank by and over the hand of the clerk therefor and the right to be represented by counsel. Of any such hearing such teacher and each member of the board shall have due notice not less than three days before the date set for the hearing, and such hearing may be continued from time to time on account of sickness or absence of material witnesses. . . .

"Sec. 8. All complaints and criticisms made against any teacher on such list shall be in writing and signed by the person preferring the same and filed with the clerk of such board, and the same may be inspected at any time during office hours by such teacher or any other person. . . .

"Sec. 10. All teachers who shall have been employed in such district or districts two or more years prior to the first day of July, 1913, shall be eligible to re-election as permanent teachers, and all such teachers who shall be re-elected for employment by the board for the school year beginning in September, 1913, shall be permanent teachers under the provisions of this act.

"Sec. 11. All acts and parts of acts in conflict herewith are hereby repealed. Provided, however, that [634] all general laws of this state relating to public schools shall be applicable to districts under this act except in so far as the same may be in conflict with the provisions hereof."

Chapter 172 in detail enumerates the duties and powers of district school boards, and among "the general duties of the district school boards of the state of Oregon" it is prescribed by Section 1, subdivision 22, that:

"The board shall dismiss teachers only for good cause shown, and in case the board shall pass an order to dismiss, the material reason therefor shall be spread upon the record by the district clerk."

The contention of the defendants proceeds upon the theory that Section 1 of Chapter 37 confers upon the board the unrestricted power to discharge teachers "as it may deem necessary," while the argument of plaintiff is founded upon the claim that Section 1 must be read in connection with all the provisions of that chapter, as well as "all general laws of this state relating to public schools," and that, when thus read, it will be ascertained that the power of the board to dismiss is limited to such causes as may be good or reasonable.

1. No attempt is made to decide whether the board is empowered to discontinue a position, and on that account terminate the service of a teacher; but, the discussion will be confined to a consideration of the single question presented by the facts, because here the plaintiff was dismissed by a rule which was designed to operate automatically the moment the plaintiff married. No formal charge was filed; no written notice was given; no copy of a complaint was received by plaintiff; and the position was filled by the appointment of another teacher. If Section 1 of [635] Chapter 37 stood alone, there would be ample reason to support the contention that the power to dismiss is unrestricted; but it does not stand by itself. The chapter provides for permanent tenures for teachers, clothes the board with power to dismiss teachers, and prescribes a procedure which must be followed when the board attempts to exercise its power of dismissal. When a teacher is "placed upon the list of permanently employed teachers,"

that teacher by force of the law shall continue to serve until dismissed in the manner provided for by Chapter 37 and "the manner herein provided" contemplates that there shall be a complaint, which must be in writing and filed with the clerk of the board, the teacher shall be given a written notice, stating the reason for the proposed dismissal, together with a copy of the complaint which has been filed, and if the teacher files a written request with the clerk, then the board must give the teacher a hearing within 10 days. It is true that the power to dismiss exists, but the power cannot be exercised unless the board observes the procedure pointed out by the very statute which confers the right to dismiss.

It is plain that the statute contemplates that the complaint or criticism or charge shall present some good cause or some reasonable cause for dismissal. If the board can dismiss for any cause, whether it be reasonable, capricious or whimsical, then a hearing would be an idle ceremony. Requiring a written complaint, making notice of the charge necessary, and providing for a hearing, all imply at least that the charge made and to be heard shall afford a reasonable cause for dismissal before the board can discharge a teacher, and the implication is emphasized when it is remembered that the main purpose of Chapter [636] 37 is to provide permanent tenures for teachers: *Matter of Guden*, 71 App. Div. 422, 75 N. Y. S. 794.

The conclusion that the dismissal must be for some reasonable cause is still further strengthened by the terms of Section 5, which declares that teachers upon the permanent list shall continue to serve "until dismissed or discontinued in the service by the board in the manner herein provided, subject to the rules of the board concerning suspensions, but such rules shall be reasonable and for the good of such schools."

The meaning of the term "suspensions" may be doubtful. It may apply only to cases of temporary forced withdrawals, as where a teacher is temporarily relieved from service, or it may have a more comprehensive meaning and include, not only temporary releases, but also permanent dismissals. Whether the term be accorded the larger or the narrower meaning, the rules concerning such "suspensions" must be reasonable and for the good of the schools. If the rules mentioned in Section 5 include rules concerning dismissals, then we have the positive mandate of the law that such rules shall be reasonable; and, if the language of Section 5 is referable only to a temporary discontinuance of service, then the implication that the graver and more important act of dismissal must be founded upon some reasonable cause is made more manifest.

2. There is yet another statute which accentuates the conclusion that a teacher on the permanent list can only be discharged for some good or reasonable cause. Section 11 of Chapter 37 recites that:

"All general laws of this state relating to public schools shall be applicable to districts under this act except in so far as the same may be in conflict with the provisions hereof."

[637] Subdivision 22 of Section 1, Chapter 172, Laws of 1913, is a general law relating to public schools, and by the terms of that law "the board shall dismiss teachers only for good cause shown." Assuming that subdivision 22 of Section 1 does not apply to the instant case, yet the general law affords protection, against unreasonable charges, to teachers who are not within the classes intended to be favored by Chapter 37, and the fact that both Chapters 37 and 172 were enacted by the same lawmakers only fortifies the view that Chapter 37 limits the right of the board to dismiss to the cases where reasonable cause is shown, and that the limitation attaches to the power to dismiss, either because of the express language found in Section 5, or if that section be given the narrower meaning, then the language of the act, when considered as a whole, gives expression to the limitation by necessary implication. If the right to dismiss cannot be exercised unless a good or reasonable cause is shown, it necessarily follows that the board is powerless to discharge for a cause which is not reasonable. Marriage either does or does not furnish a reasonable cause. If it is not a reasonable cause, then the board was utterly powerless to dismiss, because their authority is limited to the cases within the purview of the statute, and the law contemplates dismissal for reasonable cause only: *People v. Maxwell*, 177 N. Y. 494, 69 N. E. 1092; *People v. Board of Education*, 82 Misc. 684, 144 N. Y. S. 87; *Jameson v. Board of Education*, 74 W. Va. 389, 81 S. E. 1126; *Barthel v. Board of Education*, 153 Cal. 376, 95 Pac. 892; *Fairchild v. Board of Education*, 107 Cal. 92, 40 Pac. 26; *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *Thompson v. Gibbs*, 97 Tenn. 489, 37 S. W. 277, 34 L.R.A. 548. If the act of marriage is alone a reasonable cause, then the [638] attempted dismissal was ineffective because no written complaint was filed and the plaintiff was not furnished with a written notice, stating the reason for the proposed dismissal, and she did not receive a copy of any charge. The attempted dismissal was void in any event. If marriage is not a reasonable cause, the dismissal was ineffective, because the board was without any power to discharge for an unreasonable cause; if marriage is a good cause, the summary act of the board was of no effect

because the power to dismiss was not exercised in the manner provided by law.

3. It is argued, however, that the notice received by plaintiff and signed by her on or about May 19, 1913, constituted a contract which bound the teacher to abide by the rule concerning marriage. The writing purports to cover the "ensuing school year," which commenced on September 15, 1913. No contract was signed upon the expiration of the "ensuing school year," and, in the absence of Chapter 37, a continuance of service might be presumed to be governed by the terms of the contract made in 1913. The writing, however, purports to cover the "ensuing school year," which commenced on September 15, 1913, and even though it be assumed that her service during "the ensuing school year" was governed exclusively by the terms of the contract made in 1913, unmodified by the provisions of Chapter 37, which became a governing law on June 3, 1913, that assumption cannot be continued and made applicable to her service on January 4, 1915, because at that time the "ensuing school year" had expired and the plaintiff occupied the position of teacher by virtue of the express terms of a statute. The relation had been created by and existed because of a law which had been enacted for that purpose.

[639] Conceding that the contract signed in May, 1913, was valid when signed, still a stipulation making marriage a cause for peremptory dismissal would not be binding where the contract was made after June 3, 1913, when Chapter 37 became a law. The board cannot dismiss at all for an unreasonable cause, and can dismiss for a reasonable cause only in the manner provided by Chapter 37. Keeping in mind the purpose for which the statute was enacted, the board cannot, by contract, enlarge a power which is limited and restricted by the very law that creates the power. The board cannot do indirectly that which it is prohibited from doing directly. An apt illustration of this rule appears in *Thompson v. Gibbs*, 97 Tenn. 489, 37 S. W. 277, 34 L.R.A. 548. The school authorities cannot "accomplish by indirection that upon which the statute had placed its ban." *Fairchild v. Board of Education*, 107 Cal. 92, 40 Pac. 26. See also *People v. Board of Education*, 82 Misc. 684, 144 N. Y. S. 87, 94.

The views herein expressed might be sufficient to dispose of the instant case, but we prefer to proceed with the inquiry and determine whether the single fact of marriage can, in advance and alone, be said to be a reasonable cause for dismissal, keeping in mind all the while that the purpose of Chapter 37 is to provide permanent tenures for teachers. Efficiency and competency of

teachers and the welfare of the schools are of course consummations "devoutly to be wished." If a teacher becomes inefficient or fails to perform a duty, or does some act which of itself impairs usefulness, then a good or reasonable cause for dismissal would exist. The act of marriage, however, does not, of itself, furnish a reasonable cause. That the marriage status does not necessarily impair the competency of all [640] women teachers is conceded by the school authorities when they employ married women, as they are even now doing, to teach in the schools of this district. The clerk of the board admitted that in some instances a woman becomes a better teacher after marriage than she was before. The reason advanced for the rule adopted by the board is that after marriage a woman may devote her time and attention to her home rather than to her school work. It would be just as reasonable to adopt a rule that if a woman teacher joined a church it would work an automatic dismissal from the schools on an imagined assumption that the church might engross her time, thought, and attention to the detriment of the schools; but such a regulation as the one supposed would not even have the semblance of reason. It must be conceded that quite a different case is presented where the act ruled against is inherently wrong. The act to which the instant rule relates does not involve a single element of wrong, but, on the contrary, marriage is not only protected by both the written and unwritten law, but it is also fostered by a sound public policy. It is impossible to know in advance whether the efficiency of any person will become impaired because of marriage, and a rule which assumes that all persons do become less competent because of marriage is unreasonable because such a regulation is purely arbitrary. If a teacher is just as competent and efficient after marriage, a dismissal because of marriage would be capricious. If a teacher is neglectful, incompetent and inefficient, she ought to be discharged whether she is married or whether she is single. Instructive discussions of the principles involved herein may be found in *State v. Duluth*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; *McCully v. State*, 102 Tenn. 509, 53 S. W. 134, [641] 46 L.R.A. 567; *People v. New York*, 19 Hun (N. Y.) 443; *People v. Thompson*, 94 N. Y. 451; *Matter of Guden*, 71 App. Div. 422, 75 N. Y. S. 794; *Street Comrs. v. Williams*, 96 Md. 232, 53 Atl. 923. See also *Biggs v. McBride*, 17 Ore. 640, 21 Pac. 878, 5 L.R.A. 115.

5. Since the mere fact of marriage is not alone sufficient to warrant the discharge of a teacher, mandamus is available as a remedy: *People v. Board of Education*, 82 Misc.

684, 144 N. Y. S. 87, 160 App. Div. 557, 145 N. Y. S. 853; Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; State v. Board of Education, 18 N. M. 183, 135 Pac. 96, 49 L.R.A. (N.S.) 62.

Some complaint is made of the form of denial appearing in the reply. While the form is not ideal, yet the denial in the instant case is not like the pleading in *Kabat v. Moore*, 48 Ore. 195, 85 Pac. 506, but bears more of a resemblance to the pleading which was approved in *Harrison v. Birrell*, 58 Ore. 410, 115 Pac. 141.

The judgment of the circuit court was correct, and it is affirmed.

Affirmed.

Rehearing denied January 18, 1916.

NOTE.

Marriage as Ground for Removal of Woman School Teacher.

In the reported case it appears that a school board attempted to enforce a rule providing that the marriage of a woman teacher automatically terminated her service. The reason advanced for the rule adopted by the board was that after marriage a woman may devote her time and attention to her home to the neglect of her school work, and in discussing the reasonableness of the rule the court says: "It would be just as reasonable to adopt a rule that if a woman teacher joined a church it would work an automatic dismissal from the schools on an imagined assumption that the church might engross her time, thought, and attention to the detriment of the schools; but such a regulation as the one supposed would not even have the semblance of reason. It must be conceded that quite a different case is presented where the act ruled against is inherently wrong. The act to which the instant rule relates does not involve a single element of wrong, but, on the contrary, marriage is not only protected by both the written and unwritten law, but it is also fostered by a sound public policy." Accordingly it is held that the rule is unreasonable and that the marriage of a woman teacher is not a ground for dismissal under a statute providing that teachers may be dismissed only for good cause shown. The reported case is supported by the following decisions: *People v. Maxwell*, 177 N. Y. 494, 69 N. E. 1092, reversing 87 App. Div. 131, 83 N. Y. S. 1098, and affirming 39 Misc. 166, 79 N. Y. S. 174; *Jameson v. Board of Education*, 74 W. Va. 389, 81 S. E. 1126. See also *People v. Board of Education*, 82 Misc. 684, 144 N. Y. S. 87, reversed on other grounds 160 App. Div. 557, 145 N. Y. S. 853, which was af-

firmed 212 N. Y. 463. Thus in *Jameson v. Board of Education*, supra, the court, in discussing the question whether the marriage of a female teacher was a good ground for the revocation of her appointment under the statute quoted by the court, said: "Was plaintiff's marriage after her appointment good ground for revocation? While the fact of marriage was evidently the one, and the only one, on which defendant founded its action, it is apparently not relied upon, for it was not covered by briefs or oral arguments. The only grounds of removal prescribed by section 58, chapter 45, serial section 2099, Code 1913, are 'incompetency, neglect of duty, intemperance, profanity, cruelty or immorality.' Marriage is not covered by any of these, and therefore does not constitute in and of itself ground of removal. . . . We have no question of absence or neglect of duty, or other ground of removal present in this case. As marriage is not a ground of removal under the statute of this state, the action of the board in removing plaintiff, or in revoking or attempting to revoke its action, is unfounded." In *People v. Maxwell*, 177 N. Y. 494, 69 N. E. 1092, reversing 83 N. Y. S. 1098, and affirming 39 Misc. 166, 79 N. Y. S. 174, it appeared that a by-law of the Brooklyn Borough school law provided that if a female teacher should marry her place should become vacant. The charter of Greater New York in one section provided that members of the educational staff of the city should continue to hold their positions subject to removal for cause, and in another section provided that a borough president or an associate superintendent was authorized to prefer charges against teachers "for gross misconduct, insubordination, neglect of duty or general inefficiency," and that the school board should then determine the case and fix the fine, penalty or punishment. It was held that the by-law was in conflict with the charter and did not operate to vacate the position of a woman teacher on her marriage without the affirmative action of the school board as prescribed by the charter. In the intermediate appellate court it was held that the by-law was a reasonable one but on appeal that question was expressly left undecided.

In *People v. Board of Education*, 82 Misc. 684, 144 N. Y. S. 87, it was held that a teacher in the city of New York could not be dismissed by the school board for "neglect of duty" on account of her absence for the purpose of bearing a child, the court basing its decision on the ground that if the board of education was without authority to remove a female teacher because of her marriage, it could not dismiss her because of an act which was a natural incident of her marriage. But in *People v. Board of Education*, 212 N. Y. 463, affirming 145 N. Y. S. 883,

that decision was reversed and it was held that the action of the school board could not be reviewed by mandamus.

In *Matter of Grendon*, 114 App. Div. 759, 100 N. Y. S. 253, it appeared that a teacher in the Borough of Brooklyn on her marriage resigned her position after being assured by her superior that it would be necessary for her to do so because of the by-law hereinbefore set out and declared to be void in *People v. Maxwell*, 177 N. Y. 494, 69 N. E. 1092. After the decision in that case, the teacher applied for a writ of mandamus requiring the board of education to determine whether her resignation was her free act or was obtained by fraud and duress. In affirming an order denying the writ the appellate court said: "It is well known that it was a common custom of married teachers to resign upon their marriage, in obedience to the by-laws, and voluntary obedience to the rules and regulations, whether lawful or otherwise, cannot be regarded as duress in a legal sense. In February, 1904, the court of appeals, in *People v. Maxwell*, 177 N. Y. 494, held that the regulation in question was illegal and void, and on the 28th of December, 1905, the petitioner applied to the board of education to revoke its acceptance of her resignation and to reinstate her as a teacher. This not having been done, she made the petition for a mandamus, the order denying which is now under review, such petition being verified January 29, 1906. No sufficient excuse appears in the record for the long delay in the institution of this proceeding after the decision of the court of appeals, and were there no other ground for denying the petitioner's application, the denial would be justified by her laches. In view of the many cases of resignations and the time which has elapsed, it would greatly embarrass the authorities of the city who have charge of public education, if all who have resigned could be reinstated upon the mere suggestion that in resigning as teachers they did so upon the assurance of their superiors that they could be forced out of their places by virtue of the by-laws, and that such assurance constituted legal duress."

In *Guilford School Tp. v. Roberts*, 28 Ind. App. 355, 62 N. E. 711, it appeared that in an interview between a school trustee and the plaintiff in reference to her employment as a teacher she stated that she was not married, and did not intend to be married during the school year. The trustee gave her to understand that he would not employ a married woman as a teacher. Subsequently and after the plaintiff had been married for several days a contract employing her as a teacher was entered into and was signed by her in her maiden name. The trustee had no knowledge of her marriage and she did not disclose

that fact to him at the time of the signing of the contract. After the plaintiff had taught school for several months the trustee learned of her marriage and promptly rescinded the contract. The plaintiff brought an action on the contract against the school board to recover the amount due her from the time of her discharge until the close of the school term and recovered a judgment which on appeal was reversed, the court saying: "Counsel for appellee assert that 'fraud cannot be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design, or purpose either in doing or not doing the acts complained of,' citing *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78. The principle does not apply where one, for a consideration, agrees not to do what under the law, but for the agreement, he would have the right to do. The condition of the employment in the case before us was that the appellee was unmarried, and would remain so for a limited time. It is further insisted that a promise to do an act in the future is not fraud, although there may be no intention of fulfilling the promise; for fraud consists in the misrepresentation of an existing fact. But appellee agreed, and in effect made her employment conditional upon a promise, not to marry. . . . The verdict is without evidence fairly tending to support it, and it is the duty of this court to set it aside."

PEOPLE

v.

WATSON.

New York Court of Appeals—January 11, 1916.

216 N. Y. 565; 111 N. E. 243.

Argument of Counsel — Reference to Failure of Accused to Testify.

Under Code Cr. Proc. § 393, declaring that the neglect or refusal of a defendant to testify does not create any presumption against him, statements by the prosecutor in argument, reflecting on defendant's failure to take the stand, by pointing out that the testimony of the only eyewitness was absolutely uncontradicted, and that it would have been contradicted, if possible, are improper. [See note at end of this case.]

Plea for Death Penalty — Reference to Expense of Imprisonment.

Argument by the prosecutor, urging the jury not to burden the state with the ex-

pense of maintaining accused, if he is guilty of murder in the first degree, is improper.

Appeal and Error — Scope of Review — Necessity of Exception — Capital Case.

In a capital case, where justice requires it, the court of appeals may review errors, though no exception was taken.

Argument of Counsel — Reference to Failure of Accused to Testify — Prejudice.

Under Code Cr. Proc. § 524, declaring that the court must give judgment without regard to technical errors, improper comment by the prosecutor on accused's failure to take the stand, which the jury was by the trial court directed to disregard, is no ground for reversal; accused's guilt being abundantly shown.

[See note at end of this case.]

Appeal from Kings County Court, Kings County.

Criminal action. Walter Watson convicted of murder in first degree, and appeals. The facts are stated in the opinion. **AFFIRMED.**

Patrick E. Callahan for appellant.

James C. Cropsey and *Harry G. Anderson* for respondent.

[567] CHASE, J.—The defendant has been convicted of murder in the first degree. The indictment was drawn without the care and consideration in its statements that a matter of such importance should receive. However, the motion to dismiss the indictment on the ground that it does not state facts sufficient to constitute the crime of murder in the first degree was properly denied. It in substance charges that the defendant willfully, feloniously and of malice aforethought struck Elizabeth Watson with a knife on March 23, 1915, from the effects of which she died on March 26, 1915.

Elizabeth Watson was the wife of the defendant. The evidence taken on the trial was sufficient to sustain the verdict of the jury and it is unnecessary here to repeat the gruesome and unpleasant detail of facts constituting the testimony as it appears in the record. There would be no reason for writing this opinion and one would not be written except to avoid an apparent approval of improper statements made by the assistant district attorney (not the one appearing in this court) who tried the case.

[568] The statute provides that "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him." (Code Criminal Procedure, § 393.)

The only person who saw the blows struck with the knife that resulted in the death of Mrs. Watson, or heard what was said, and saw what was done by the defendant and his victim immediately before and after the assault, was their son and oldest child, Thomas Watson. He was necessarily the most important witness at the trial. The defendant was not sworn as a witness. Notwithstanding the statute which expressly states that the defendant's neglect to testify does not create any presumption against him, the assistant district attorney in addressing the jurymen called their attention many times to the fact that the testimony of Thomas was uncontradicted. This was not done as a mere assertion of a fact, but in a way to suggest that contrary to the statute a presumption be indulged in against the defendant because he did not testify in contradiction of the testimony of his son. We quote two statements from the address as follows:

"I call your attention to the fact that Thomas Watson's testimony has been absolutely uncontradicted. Now you know that. You saw that, and you must be aware of the fact that if there was anything about what Thomas Watson stated that was not true there was a way to contradict his testimony. Now how can you, therefore, conscientiously perform your duties as jurymen right here, and when you go into the jury room and say to yourselves: 'We don't believe this or that of Thomas Watson's testimony.'"

"Every single part of the testimony in this case falling from the lips of the son prove that (premeditation) unquestionably, and if it were not true, and you gentlemen of the jury cannot sit there and tell me it would not have been contradicted."

So far as it was possible to explain or contradict evidence [569] other than by the defendant's taking the stand the argument was proper (*People v. Leonardo*, 190 N. Y. 432, 446, 92 N. E. 1060), but, so far as it necessarily called upon the jurymen to disregard and disobey the statute, it was improper. (Code of Criminal Procedure, § 393; *Ruloff v. People*, 45 N. Y. 213; *People v. Rose*, 52 Hun 33, 4 N. Y. S. 787; *People v. Ryan*, 120 App. Div. 275, 105 N. Y. S. 160; *People v. Friedman*, 149 App. Div. 873, 878, 134 N. Y. S. 153.) We are compelled to assume that the statements made to the jurymen in this case were intended to be in disregard and defiance of the spirit and letter of the statute.

In such address he also said: "Now there is no sense in burdening the state with this man if he is guilty of murder in the first degree. If you are satisfied that he is guilty of murder in the first degree there is no sense in doing that."

We cannot understand how a prosecuting officer, with any true conception of the high duties of his office, could thus appeal to the jurymen to take into account the expense of maintaining a person in a penal institution as a consideration which should weigh with them in determining whether their verdict should be murder in the first degree, which would result in the defendant's death, or of some lesser degree of crime which would result in penal servitude.

The trial judge left the case to the jury and in doing so stated the law applicable thereto fairly and clearly, and among other things he said: "The defendant has not taken the stand here and under our law you are not to indulge in any inference unfavorable to him from that circumstance." No exception was taken to the remarks of the prosecuting officer quoted, but this court has the power to order a new trial in a capital case when justice requires it, even when no exception has been taken. (*People v. Schermerhorn*, 203 N. Y. 57, 72, 96 N. E. 376; *People v. Pindar*, 210 N. Y. 191, 197, 104 N. E. 133.)

Statements such as those quoted although improper [570] can be disregarded by this court when the guilt of the defendant is reasonably certain. The possibility of the defendant's substantial rights having been affected is materially lessened when the trial court expressly directs the jury to disregard such statements. (*People v. Priori*, 164 N. Y. 459, 58 N. E. 668.)

Counsel for the People in the trial of criminal cases should avoid allowing their zeal to overcome their better judgment and their sense of duty and right. In a case where the guilt of the defendant is doubtful, improper and unjustifiable suggestions tending to a violation of statutory or other rights of the defendant would require this court to order a new trial. Other alleged errors have been called to our attention by the defendant's counsel, but after a careful study of the record we do not think the defendant's substantial rights have been affected. (Code of Criminal Procedure, § 542.)

The judgment of conviction should be affirmed.

HOGAN, J. (*dissenting*).—Defendant, upon appeal, alleges that he was not convicted under the rules of law after a fair trial. I shall refer to the facts only so far as necessary to present my reasons for the views I entertain.

The defendant was charged with murder in the first degree; the victim was his wife. The crime was committed in the living rooms occupied by the deceased. The only person present when the crime was committed, other than the deceased and defendant was the son

of the defendant. As a witness for the People he detailed the facts tending to prove the guilt of defendant. The defendant was not called as a witness in his own behalf, and the effort of his counsel, other than seeking to weaken the evidence presented by the People was directed to an attempt to disclose a lack of responsibility of defendant for the crime of murder in the first degree.

Under the humane provisions of our Constitution no person shall be compelled to be a witness against himself. By [571] the provisions of the Code of Criminal Procedure the neglect or refusal of a defendant to testify as a witness in his own behalf shall not create any presumption against him. In my judgment the rights thus guaranteed to defendant were denied to him. Keeping in mind that the son of the defendant and defendant are the only living witnesses to the crime, attention is invited to the following quotations from the closing argument to the jury of counsel representing the People. In asking the jurors to give credence to the testimony of the son, against whom the counsel for the defendant had cast aspersions, the prosecuting attorney said:

"I call your attention to the fact that Thomas Watson's testimony *has been absolutely uncontradicted*. Now, you know that. You saw that and you must be aware of the fact that if there was anything about what Thomas Watson stated that was not true *there was a way to contradict his testimony*. Now, how can you, therefore, conscientiously perform your duties as jurymen right here and when you go into the jury room, and say to yourselves, 'We don't believe this or that, of Thomas Watson's testimony?'"

Referring to the defendant and his condition on the day the crime was committed, the following argument was made: "When he (the defendant) came there on the twenty-second (March) he had come there with the determination and the purpose with a pre-conceived notion, with a premeditation and deliberation to kill his wife. Every single part of the testimony in this case *falling from the lips of the son* proves that unquestionably, and if it were not true, and you gentlemen of the jury, you cannot sit there and tell me *it would not have been contradicted*."

One Mary Dunleavy was called as a witness by defendant and was asked to state what was said to her by the defendant on the 16th day of March, some six days before the crime was committed. Objection to the evidence [572] made by the prosecution was sustained, and to the criticism made by counsel for the defendant relative to the same the prosecuting officer said: "Mr. Callahan objected and said that I was unfair on my part to have objected to having Mrs. Dun-

leavey state what Mr. Watson said to her. Why, gentlemen of the jury, was that unfair on my part? Why should I be interested in what Mrs. Dunleavy heard from the lips of someone else? Why should I take the conversations second hand? Why from Mrs. Dunleavy? You know just as well as I do that if there was any conversation between Mrs. Dunleavy and Mr. Watson *there was a method of proving what their conversation was. That was the reason I objected.*"

Replying to a suggestion made by counsel for defendant to the jury that the evidence of defendant's son need not be taken wholly and solely by the jury, and that the jury had a right to disregard it, the prosecuting attorney said: "We have got testimony, gentlemen of the jury, which fell from the lips of a bright young man, *which on the record remains uncontradicted.*"

Again, "I said before, and I say it now finally: that there could be no case presented to a jury of twelve men with testimony so convincing, so absolute of the guilt of a defendant of murder in the first degree as is the testimony in this case; *because all you have is the testimony of the boy and the testimony of other witnesses*, and the testimony which is material in this case, *which goes to the crux of the case, stands absolutely uncontradicted.* And that you have a duty to perform you know. You cannot perform it conscientiously if you are going to brush aside testimony which is absolutely *uncontradicted.*"

In view of the fact that the son and defendant are the only living witnesses to the crime and as to what transpired at the time of and immediately previous to and subsequent to the commission of the crime, I am at a loss to understand what more forceful language could have been employed by the trial assistant district attorney [573] to emphasize the failure of the defendant to take the witness stand in his own behalf. By whom was it possible to contradict the testimony of the son save by the defendant? The jurors to whom the remarks were addressed understood the effect of the language so frequently employed. It was less difficult to comprehend than was the distinction in the degrees of murder. True, counsel for defendant did not interrupt or make objection to the statements quoted. This being a capital case it is the duty of this court to consider the error irrespective of objection or interruption.

The trial justice did not interfere with the conduct of the prosecuting attorney or rebuke him for his continued reference to the failure of the defendant to take the witness stand. In the main charge to the jury the trial justice did not even refer to the rule of law that no unfavorable inferences were

to be indulged in by the jury against the defendant by reason of his failure to take the witness stand, and not until the trial justice was asked by counsel for defendant to charge the jury that it was for that body to pass upon the credibility of the testimony of the son Thomas did the justice charge the above rule. The prejudicial remarks of the trial assistant were fresh in the minds of the jurors unrebuked by the trial justice, and as stated in the prevailing opinion "were intended to be in disregard and defiance of the spirit and letter of the statute." This appeal presents a case where the trial assistant district attorney has, as stated, intentionally made statements to the jury which were intended to be in disregard and defiance of the spirit and letter of the statute. Such statements were also made in defiance of the admonitions of this court in several criminal cases where reversals of convictions were had by reason of less glaring violations by prosecuting attorneys, which decisions we must assume were known to the trial attorney in this case. Was this court in error when it reversed the judgments to which I shall call attention? If so, [574] why not expressly overrule such decisions, to the end that the bench and bar may definitely understand the limitations, if any, which are to prevail on the trial of future cases? If this court intended by its former decisions to lay down a rule of law for the protection of the liberty of the individual and the guidance of the courts as well as prosecuting attorneys, why not enforce it in all cases? Condemnation of the methods adopted in this case does not explain why this court reversed judgments in former cases for like conduct on the part of trial attorneys. In view of what has been written by this court, that however strong the evidence against a defendant may be, if he did not have a fair trial the judgment of conviction should be reversed and a new trial had according to law, I am unable to agree that in the case at bar "when the guilt of the defendant is reasonably certain" the error may be disregarded. I believe that the repeated decisions of this court should be followed and respected, for only by adherence to the same can the liberty and property rights of the individual be secured. A defendant charged with crime is entitled to a trial according to the law as defined by the legislature and the courts. The appellant was not awarded a fair trial and should not be condemned until such time as he has been convicted in accordance with the rules of law.

In *People v. Wolf*, 183 N. Y. 464, 472, 78 N. E. 592, the defendant was convicted of the crime of abduction. Remarks made by the assistant district attorney during the opening of the case were objected to from time to time, and are set out at length in

the case as reported. The trial justice, in his charge, directed the jury to disregard any statements of the district attorney or counsel for the defense that were not borne out by the evidence in the case and to determine the case upon the evidence submitted by the court and upon such evidence alone. The court, through Judge Vann, said:

"An unfair trial, especially in a criminal case, is a [575] reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. However strong the evidence against the defendant may be, if she did not have a fair trial, as shown by the rulings of the court subject to proper objections and exceptions, the judgment of conviction should be reversed and a new trial ordered so that she may be tried according to law. We have repeatedly laid down the rule governing prosecuting officers in addressing the jury and to govern trial judges also in their duty relating to the subject. We have repeatedly admonished both, the former at times with severity, and the latter more mildly, not to depart from that rule, but our admonitions have not always been regarded, although they were followed by a reversal of the judgment involved, founded solely on the improper remarks of the prosecuting officer and the failure of the trial judge to do his duty in reference thereto. (*People v. Mull*, 167 N. Y. 247, 60 N. E. 629; *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 70 Am. St. Rep. 495, 46 L.R.A. 641.)

"A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law. The defendant did not have a fair trial, for the trial assistant, who did not argue the appeal before us, in his opening address to the jury stated ominous and startling facts which he should have known he could not prove. The trial judge allowed and sanctioned continuous departures from the law by the assistant district attorney, although he should have known that it was his duty to prevent them, even of his own motion without suggestion from the defendant's counsel. It was his duty not only to warn the district attorney to desist, but also, if he continued, to rebuke him and punish him for contempt if necessary to prevent further infraction of the law."

In *People v. Fielding*, 158 N. Y. 542, 546, 550, 53 N. E. 497, 70 Am. St. Rep. 495, 46 L.R.A. 641, the defendant was indicted for the crime of consenting to and conniving at the auditing or allowance of a false or fraudulent bill or claim against the city of Brooklyn. The single [576] question presented to this court was raised by the extract in the appeal book of the summing up of the district attorney, the principal features of which are set forth in the case as reported. In charging

the jury, in that case, the court said that the remarks about popular clamor and the burden of taxpayers and other matters discussed by the district attorney were to be disregarded by the jury. This court, again writing by Judge Vann, said:

"We do not wish to express any views which would restrict counsel in fair argument, comment or appeal. We object, however, to the assertion by the learned district attorney of facts not proved, to his inflammatory appeals to passion and prejudice, and to his threat to the jury of popular denunciation, all under the sanction of the trial court. If the record in this case is sustained by the deliberate judgment of the court of last resort, it is difficult to see the limit to intemperate language, unproved assertion or pernicious appeals on the part of counsel for the prosecution, except their own sense of propriety. The law, in our judgment, does not thus leave an accused person, presumed to be innocent until proved to be guilty, bound and helpless in the hands of his accuser."

Judge Vann referred to numerous cases in various jurisdictions bearing directly upon the subject under consideration, and then said:

"In a case that is free from doubt upon the merits, the appellate courts disregard errors of the trial court, even in a criminal case, when it is reasonably certain that they could not have affected the result. A proposition is reasonably certain when it is supported by the strong probabilities, but here the strong probabilities are that the errors did affect the result. The average man cannot read the eloquent but inflammatory language of the district attorney without being impressed by it, and it is safe to presume that the effect would be heightened by hearing those words spoken with animation and enthusiasm under the exciting circumstances surrounding an important [577] criminal trial. The jury might be told by the court to forget them, but could they forget them? They might be told to disregard them, but how can we be certain that they did disregard them? Moreover, some of the most objectionable language was not alluded to by the court in its charge, and instructions to the jury do not always neutralize, either as a matter of law or fact, the effect of improper remarks in their presence. (*People v. Corey*, 157 N. Y. 332, 346, 51 N. E. 1024; *Brooks v. Rochester R. Co.* 156 N. Y. 244, 252, 50 N. E. 945; *People v. Hill*, 37 App. Div. 327, 56 N. Y. S. 282; *Swan v. Keough*, 35 App. Div. 80, 54 N. Y. S. 474.)"

In *People v. Mull*, 167 N. Y. 247, 60 N. E. 629, the defendant was convicted of murder in the first degree. This court held, Judge Landon writing, that the evidence was ample

to sustain the verdict, and the exceptions other than those taken to portions of the closing address to the jury made by the district attorney did not require reversal. The character of the address of the district attorney is referred to in the reported case, and this court reversed the judgment of conviction for such error, approving the rule laid down in *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 70 Am. St. Rep. 495, 46 L.R.A. 641, and re-affirmed the doctrine there stated.

In *People v. Conrow*, 200 N. Y. 356, 369, 93 N. E. 943, the defendant was convicted of murder in the first degree. Upon the trial, the district attorney upon cross-examination of defendant, quoted in detail incriminating statements and assertions made in the presence of defendant by an accomplice, which were subsequently stricken from the record by the court and the jury instructed not to consider the same. This court held that in a capital case the evidence thus erroneously received was calculated to affect the jury in determining the guilt or innocence of the defendant, notwithstanding the fact that it was at least in form removed from its consideration, and under such circumstances it was the duty of this court to give the defendant a new trial. In that case, Judge Chase, writing, said:

"The statements and charges of Monat must have been [578] repeated to the jury for the express purpose of influencing it in its deliberations upon the question of the defendant's guilt.

"It is not always an easy thing for a jurymen to eliminate from his memory the effect of damaging statements made in his presence. (*Brooks v. Rochester R. Co.* 156 N. Y. 244, 50 N. E. 945; *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024; *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 70 Am. St. Rep. 495, 46 L.R.A. 641.) In this case where the defendant's life is involved, we are unwilling to take the responsibility of saying that the statements and charges of Monat erroneously received, although stricken out, did not affect the result.

"It is unfortunate that incompetent testimony, even when peculiarly calculated to materially influence a jury, is so frequently urged upon its attention in criminal cases when slight care given to its consideration would not only reveal its incompetency but the danger and wrong in persisting in its consideration."

In *People v. Becker*, 210 N. Y. 274, 104 N. E. 396, the error complained of by the appellant upon the subject of a fair trial had reference to the conduct of the court towards counsel and the conduct of the prosecuting officer in charge in his opening address to the jury. When the *Becker* case was before the court upon the second appeal (215

N. Y. 126, 133, Ann. Cas. 1917A 600, 109 N. E. 127) Chief Judge Bartlett wrote: "The first judgment of death against the defendant was reversed because he did not have a fair trial." Upon the first appeal (210 N. Y. 274, 311, 104 N. E. 396) Judge Hiscock wrote: "The fundamental demand of our law is that the accused shall have a fair trial, and that if that right has been infringed, not in respect to mere technicalities but in substantial matters, and however undesignedly, he shall have another opportunity to meet his accuser and establish his innocence. . . . He (the defendant) never had a fair chance to defend his life and it would be a lasting reproach to the state if under those circumstances it should exact its forfeiture. (*People v. Wood*, 126 N. Y. 249, 269, 27 N. E. 362; *People v. Barberi*, [579] 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717; *People v. Davey*, 179 N. Y. 345, 347, 72 N. E. 244; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Freeman*, 203 N. Y. 267, 271; *People v. Kinney*, 202 N. Y. 380, 397, 95 N. E. 756.)"

Even in civil actions, statements made by counsel which tend to arouse sympathy or to create prejudice in the minds of jurors constitute error requiring a new trial, even in cases where the court instructs the jury to disregard such statement. (*Halpern v. Nassau Electric R. R. Co.* 16 App. Div. 90, 45 N. Y. S. 134; *Bagully v. Morning Journal Assoc.* 38 App. Div. 522, 56 N. Y. S. 605.)

An examination of the record discloses in connection with the long line of decisions of this court from the early days to and including the *Becker* case, that this defendant has not had a fair trial. If he has not been legally tried and convicted it is the duty of the court as I construe the decisions to grant a new trial to the end that proof may be presented in the regular way and the guilt or innocence of the defendant be determined according to the rules of law.

I vote for a reversal of the judgment of conviction and for a new trial.

Willard Bartlett, Ch. J., Collin, Seabury and Pound, JJ., concur with Chase, J.; Hogan, J., reads dissenting opinion; Hiscock, J., absent.

Judgment of conviction affirmed.

NOTE.

Comment by Prosecutor on Failure of Accused to Testify.

Introductory, 278.

General Rule, 278.

What Constitutes Reference to Failure to Testify, 279.

Effect of Action by Court, 280.

Introductory.

Discussions of the earlier cases dealing with the right of a prosecuting attorney to comment on the failure of an accused to testify will be found in the notes to Jackson v. State, 3 Ann. Cas. 164; Com. v. Richmond, 20 Ann. Cas. 1273, and Powers v. State, 121 Am. St. Rep. 801. Since those notes were written a number of cases relating to the subjects have been decided, which the present note is designed to review.

General Rule.

Where a statute expressly prohibits any comment on the failure of an accused to testify, or provides that his failure to become a witness in his own behalf shall create no presumption against him, it is well established that it is improper for the prosecuting attorney to refer, in the presence of the jury, to the failure of the defendant to testify.

Arkansas.—Tiner v. State, 110 Ark. 251, 161 S. W. 195; Starnes v. State, 194 S. W. 506.

California.—People v. Keko, 27 Cal. App. 351, 149 Pac. 1003; People v. McLeod, 30 Cal. App. 435, 158 Pac. 506. See also People v. Kromphold, 172 Cal. 512, 157 Pac. 599; People v. Waugh, 30 Cal. App. 402, 158 Pac. 336.

Illinois.—People v. Annis, 261 Ill. 157, 103 N. E. 568.

Iowa.—State v. Hector, 158 Ia. 664, 138 N. W. 930; State v. Nicola, 169 Ia. 171, 161 N. W. 70.

Kansas.—Compare State v. Holman, 90 Kan. 105, 132 Pac. 1175.

Louisiana.—State v. Sinigal, 138 La. 469, 70 So. 478.

Missouri.—State v. Ferrell, 233 Mo. 452, 136 S. W. 709; State v. Miller, 234 Mo. 588, 137 S. W. 887; State v. Nardini, 186 S. W. 557. Compare State v. Donaldson, 243 Mo. 460, 148 S. W. 79.

New York.—People v. Minkowitz, 220 N. Y. 399, 115 N. E. 987. And see the reported case.

Ohio.—Morrow v. State, 34 Ohio Cir. Ct. Rep. 140.

Oklahoma.—Kelly v. State, 6 Okla. Crim. 175, 117 Pac. 887; Nowlin v. State, 7 Okla. Crim. 27, 115 Pac. 625, 121 Pac. 791; Weinberger v. State, 8 Okla. Crim. 441, 128 Pac. 160; Hayes v. State, 10 Okla. Crim. 647, 142 Pac. 1108; Hopkins v. State, 11 Okla. Crim. 385, 146 Pac. 917.

Pennsylvania.—Com. v. Green, 233 Pa. St. 201, 82 Atl. 250.

South Dakota.—See State v. Sonnenschein, 159 N. W. 101.

Texas.—Morgan v. State, 62 Tex. Crim. 120, 136 S. W. 1065; Deary v. State, 62 Tex. Crim. 352, 137 S. W. 699; Williams v. State,

66 Tex. Crim. 254, 146 S. W. 168; Eads v. State, 66 Tex. Crim. 548, 147 S. W. 592; Minter v. State, 68 Tex. Crim. 47, 150 S. W. 783; Jones v. State, 70 Tex. Crim. 343, 166 S. W. 1191; Cober v. State, 72 Tex. Crim. 374, 162 S. W. 869; Jemison v. State, 184 S. W. 807. See also Skidmore v. State, 57 Tex. Crim. 497, 123 S. W. 1129, 26 L.R.A.(N.S.) 466.

Canada.—Rex v. Beaulieu, 24 Can. Crim. Cas. 65; Rex v. Lindsay, 26 Can. Crim. Cas. 163, 36 Ont. L. Rep. 171, 10 Ont. W. N. 1, 30 Dominion L. Rep. 417.

In *Ohio* by a constitutional amendment which became effective January 1, 1913, the failure of an accused to testify may be considered by the court and jury and may be made the subject of comment by counsel. Morrow v. State, 34 Ohio Cir. Ct. Rep. 140.

It has been held that although the state's counsel may refer to the fact that he cannot attack the defendant's reputation unless the defendant sees fit to make that an issue, he is not authorized to refer in that connection to the fact that the defendant did not testify. Manley v. State, 69 Tex. Crim. 169, 153 S. W. 1138.

It has been held that when the defendant takes the stand to testify as a witness in his own behalf, he thereby waives the statutory protection, so that the district attorney may refer to his failure to deny his guilt on the witness stand, or to explain certain incriminating circumstances. Diggs v. U. S. 220 Fed. 545, 136 C. C. A. 147; Coleman v. State, 15 Ga. App. 338, 83 S. E. 154; State v. Larkin, 250 Mo. 218, 157 S. W. 600, 46 L.R.A.(N.S.) 13; State v. Raftery, 252 Mo. 72, 158 S. W. 585; State v. Lewis, 264 Mo. 420, 175 S. W. 60; State v. Murray (Mo.) 193 S. W. 830; People v. Trybus, 219 N. Y. 18, 113 N. E. 538; State v. Sonnenschein (S. D.) 159 N. W. 101. And it has been held that while it is not permitted to refer to the fact that the defendant has not made a statement, the state's counsel may properly comment on the fact that the accused has failed to adduce testimony in rebuttal of evidence introduced by the state to show his guilt. Saffold v. State, 11 Ga. App. 329, 75 S. E. 338. But where one is on trial on two indictments charging different offenses, he does not, by taking the stand and limiting his testimony to a particular charge in one of the indictments, waive his constitutional privilege not to testify with reference to a charge contained in the other indictment, so that inferences may be drawn against him on his failure to testify. Myrick v. U. S. 219 Fed. 1, 134 C. C. A. 619.

Where it is clear from the evidence that a conviction would have been reached in any event, a reference to the failure of the accused to testify has been held not to be

ground for reversal, especially where the language was withdrawn by the prosecutor, and the court directed the jury to disregard the language. *State v. Baker*, 246 Mo. 357, 152 S. W. 46. And see the reported case.

What Constitutes Reference to Failure to Testify.

The general rule has been held to include allusions to a defendant's failure to testify, where by inference the prosecutor in his comment could refer only to the defendant. Thus it has been held to be an improper allusion to the failure of the defendant to testify where the district attorney, in a prosecution for the unlawful possession of intoxicating liquors with intent to sell the same, in his argument to the jury said: "And no one has taken the stand and said that he did not intend to sell it." *Bradley v. State*, 11 Okla. Crim. 693, 146 Pac. 1195.

It has been held to be error, as commenting on the failure of the accused to testify, for the state's attorney in argument to the jury to say: "They tell you the prosecuting witness has not been corroborated; . . . but . . . they have not dared to put a witness on the stand to contradict her testimony in any particular." *Vickers v. State*, 69 Tex. Crim. 628, 154 S. W. 578.

So a statement by the prosecuting attorney "I do not mean to refer to his [meaning defendant] failure to testify," has been held to refer clearly and unequivocally to the fact that the defendant did not testify. *Wilcock v. State*, 64 Tex. Crim. 1, 141 S. W. 88.

Where it appeared that the accused was shot by the decedent and the evidence of the eyewitnesses was conflicting, a remark by the prosecutor to the effect that if the decedent had recovered and the accused had died, the decedent would have been tried, and in that event he would have testified as to how the killing occurred, was held to be objectionable. *Gurley v. State*, 101 Miss. 190, 57 So. 565.

It has been held to be erroneous for the prosecutor to refer to the defendant's objection to a question put to him by the state's attorney. *State v. Potts*, 239 Mo. 403, 144 S. W. 495.

A remark that the "defendant has a right to prove his innocence if he wants to" has been held to be prejudicial as being an indirect reference to the fact that the defendant had a right to testify in his own defense. *People v. Carter*, 188 Ill. App. 22.

An assertion by the counsel for the state that "the witness was not produced, because the defendant was guilty, and conscious that he was guilty," has been held to be prejudicial. *Moore v. State*, 10 Ga. App. 805, 74 S. E. 315.

To constitute ground for reversal, a reference to the failure of the accused to testify must tend to bring directly to the attention of the jury the fact that the accused did not become a witness on his own behalf. A remote or indirect reference is not sufficient to reverse. *Vickers v. State* (Tex.) 169 S. W. 669. See also *Com. v. Fox*, 46 Pa. Super. Ct. 171 (question to defendant's attorney whether he was not going to offer defense); *Mitchell v. State*, 65 Tex. Crim. 545, 144 S. W. 1006 (statement that certain witness knew better than anyone except accused that he was guilty); *Link v. State*, 73 Tex. Crim. 82, 164 S. W. 987 (question in argument whether anyone except enumerated witnesses testified for accused). In *Com. v. Moyer*, 52 Pa. Super. Ct. 548, it was said that a remark by the district attorney that "all of the defendants except one who did not go on the stand here admitted that the association was then in good condition," was merely an obscure remark, not intended as a reference to the defendant's failure to testify. In *Guererro v. State*, 75 Tex. Crim. 558, 171 S. W. 731, a reference to the failure of the defendant to deny his guilt in a private conversation was held not to be improper. See also *State v. Knapp*, 33 S. D. 177, 144 N. W. 921.

A general statement that the evidence adduced by the prosecution has not been contradicted is not a reference to the failure of the accused to testify. *Carlisle v. U. S.* 194 Fed. 827, 114 C. C. A. 531; *State v. Perry*, 165 Ia. 215, 145 N. W. 56; *Farley v. Com.* 165 Ky. 600, 177 S. W. 431; *Knight v. State*, 64 Tex. Crim. 541, 144 S. W. 967; *Wilson v. State*, 76 Tex. Crim. 413, 175 S. W. 1067. And see *State v. Robertson*, 133 La. 806, 63 So. 363 ("No answer have you heard gentlemen from a single witness sworn in this case"). Compare *Bradley v. State*, 11 Okla. Crim. 693, 146 Pac. 1195; *Vickers v. State*, 69 Tex. Crim. 628, 154 S. W. 578.

So the prosecuting attorney may call the attention of the jury to the fact that certain testimony is uncontradicted. *Cashin v. State*, 18 Ga. App. 87, 88 S. E. 996; *People v. Donaldson*, 255 Ill. 19, Ann. Cas. 1913D 90, 99 N. E. 62; *State v. Krampe*, 161 Ia. 48, 140 N. W. 898; *State v. Riley* (Ia.) 158 N. W. 570; *Topeka v. Briggs*, 90 Kan. 843, 135 Pac. 1184; *People v. Boyd*, 174 Mich. 321, 140 N. W. 475; *Johnson v. State*, 109 Miss. 622, 68 So. 917; *State v. Fields*, 234 Mo. 615, 138 S. W. 518; *People v. Schermerhorn*, 203 N. Y. 57, 96 N. E. 376; *State v. Winner*, 153 N. C. 602, 69 S. E. 9; *Walker v. State*, 65 Tex. Crim. 615, 145 S. W. 904; *Harris v. State*, 74 Tex. Crim. 52, 167 S. W. 43. Thus comment on the defendant's failure to introduce evidence to contradict the state's witness or to call on the defendant's counsel to explain certain facts has been held not

to be improper. *Merrill v. State*, 11 Ala. App. 224, 65 So. 709. So it has been held that there was no error in the following remark: "You have a right to consider this conversation with Miss Barham in presence of her sister, gentlemen of the jury, so unexplained by any one, and unexplained and undenied by any one, and I call on them now to explain this conversation, if untrue." *Davidson v. State*, 108 Ark. 191, Ann. Cas. 1915B 436, 158 S. W. 1103. A comment that "nobody denied" a certain fact has been held not to be a reference to the defendant's failure to testify. *People v. Spira*, 264 Ill. 243, 106 N. E. 241. A statement by the state's attorney that "there has been no evidence offered by the defendant"—at which point he was interrupted, and withdrew the remark, has been held not to be a violation of the statute as commenting on the defendant's failure to testify, where the defendant had offered evidence which might legitimately be discussed. *People v. Osborne*, 278 Ill. 104, 115 N. E. 890.

It has been held that reference may be made to the failure of the accused to explain a specific incriminating circumstance. *People v. Waugh*, 30 Cal. App. 402, 158 Pac. 336; *Pullen v. State*, 70 Tex. Crim. 156, 156 S. W. 935; *Howard v. State (Tex.)* 184 S. W. 505. Compare *People v. Keko*, 27 Cal. App. 351, 149 Pac. 1003; *Bennett v. State (Tex.)* 181 S. W. 197.

So commenting to the jury on the failure of the accused to account for his whereabouts at the time the crime was committed has been held not to refer to the failure of the defendant to take the stand as a witness. *Price v. U. S.* 14 App. Cas. (D. C.) 391; *State v. Jack*, 139 La. 885, 72 So. 429; *State v. Rosenberg*, 88 Vt. 223, 92 Atl. 145.

A question by the prosecutor in his argument as to why the defendant does not produce witnesses to prove a certain fact is held not to be a reference to his failure to testify. *People v. Lay (Mich.)* 159 N. W. 299; *State v. Gordon*, 253 Mo. 510, 161 S. W. 721; *State v. Hughes*, 258 Mo. 264, 167 S. W. 529; *State v. Williams*, 35 Nev. 276, 129 Pac. 317; *State v. Dodson*, 23 N. D. 305, 136 N. W. 789, 791; *Com. v. Bingle*, 62 Pa. Super. Ct. 105; *Mason v. State*, 74 Tex. Crim. 256, 168 S. W. 115; *Ethridge v. State*, 74 Tex. Crim. 635, 169 S. W. 1152; *Sloan v. State*, 75 Tex. Crim. 33, 170 S. W. 156; *State v. Gunnoe*, 74 W. Va. 741, 83 S. E. 64. So where a county attorney remarked "if it was not so do you think he would not bring some witnesses to swear to it?" the language was held not to be a comment on the defendant's failure to testify. *Cutler v. State*, 15 Ariz. 343, 138 Pac. 1048. Neither is it improper for the prosecuting attorney to refer in his argument to the fact that

the codefendants of the accused, who were not then on trial, did not take the stand. *State v. Madden*, 170 Ia. 230, 148 N. W. 995; *McElwain v. Com.* 146 Ky. 104, 142 S. W. 234. But see *Hopkins v. State*, 11 Okla. Crim. 385, 146 Pac. 917. A question of the prosecutor in his argument "why didn't they put some one on the stand who could testify that the gun that killed poor old man Prichard was accidentally discharged, and that Norman Henson did not intend to kill him" has been held not to be erroneous as a reference to the defendant's failure to testify. *Henson v. State*, 74 Tex. Crim. 277, 168 S. W. 89.

In some jurisdictions a reference by the prosecuting attorney to the defendant's testimony on a former trial has been held not to be a comment on his failure to testify. *State v. Kimes*, 152 Ia. 240, 132 N. W. 180; *State v. Wheeler*, 95 Kan. 679, 149 Pac. 701; *Vickers v. State (Tex.)* 169 S. W. 669. But see *Smithson v. State*, 127 Tenn. 357, 155 S. W. 133, wherein comment by the state's attorney on the accused's failure to testify on a former trial was held to be objectionable and ground for reversal. And in *Swilley v. State*, 73 Tex. Crim. 619, 166 S. W. 733, it was held to be improper for the district attorney to ask the witness whether he testified in a habeas corpus proceeding.

Effect of Action by Court.

Improper comment on the failure of the accused to testify may be cured by an instruction to the attorney not to further indulge in such statements; or by an instruction to the jury to disregard the statements in arriving at the verdict. *Starnes v. State (Ark.)* 194 S. W. 506; *People v. Kelly*, 28 Cal. 46, 151 Pac. 295; *People v. Kromphold*, 172 Cal. 512, 157 Pac. 599; *Price v. U. S.* 14 App. Cas. (D. C.) 391; *State v. Sinigal*, 138 La. 469, 70 So. 478; *Com. v. Richmond*, 207 Mass. 240, 20 Ann. Cas. 1269, 93 N. E. 816; *People v. Valentine*, 147 App. Div. 31, 131 N. Y. S. 733; *Diegel v. State*, 33 Ohio Cir. Ct. 82, *affirmed* 86 Ohio St. 310, 99 N. E. 1125; *State v. Pendarvis*, 88 S. C. 548, 71 S. E. 45; *State v. Glover*, 91 S. C. 562, 75 S. E. 218; *Gatlin v. State*, 72 Tex. Crim. 516, 163 S. W. 428; *Millner v. State*, 75 Tex. Crim. 22, 169 S. W. 899; *Rogers v. State (Tex.)* 180 S. W. 674. Compare *Gurley v. State*, 101 Miss. 190, 57 So. 565. And see the reported case. A remark by the prosecutor that the defendant had an opportunity to go on the witness stand himself, has been held not to warrant a reversal where the court disapproved of the misconduct of the county attorney by sustaining an objection to the statement, and the county attorney thereupon stated he should not have made it.

Hardesty v. State, 95 Neb. 839, 146 N. W. 1007.

A direct reference to the failure of the defendant to testify will not be cured where the court merely sustains an objection to the remark. The court must rebuke the prosecuting attorney and compel him to refrain from commenting on the defendant's silence. *People v. Annis*, 261 Ill. 157, 103 N. E. 568; *State v. Ferrell*, 233 Mo. 452, 136 S. W. 709; *People v. Smith*, 84 Misc. 348, 147 N. Y. S. 341. And so where a direct reference is made in violation of the statute the misconduct is not cured if the court merely directs that an exception shall be noted. *State v. Volz* (Mo.) 190 S. W. 307; *People v. Myer*, 164 App. Div. 296, 150 N. Y. S. 317.

GARD ET AL.

v.

MASON ET AL.

North Carolina Supreme Court—September 22, 1915.

169 N. Car. 507; 86 S. E. 302.

Marriage — Restraint of Marriage — Validity of Condition in Deed.

A condition subsequent in general restraint of marriage, contained in a deed to land, will be disregarded as invalid, and marriage will work no forfeiture.

[See note at end of this case.]

Appeal from Superior Court, Pasquotank county: JUSTICE, Judge.

Action by A. W. Gard et al., plaintiffs, against Cora L. Mason et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. AFFIRMED.

Aydlett & Simpson and *J. B. Leigh* for appellants.

Ward & Thompson for appellees.

[507] HOKE, J.—On the hearing it was made to appear that on the first day of August, 1911, T. M. Gard and his wife, Corinda, executed to their daughter, Cora L. Gard, a deed in fee simple for the house and lot in controversy, with full covenants, and that, just after the description of the property, the said deed contained the following provision: "It is understood and agreed between all the parties herein that if the said Cora L. Gard marries, this property reverts

back to the said grantors, their heirs and assigns;" that, at the time of the execution of the said deed, the grantors had three children, plaintiffs, A. W. Gard and his sister, Vertie Burton, and Cora Gard, grantee in the deed, who was [508] then single, living on the property with the father and mother; that the mother died in 1911, the father in April, 1913; that Cora L. Gard, grantee in the deed, intermarried with her codefendant, Z. L. Mason, in February, 1913, and, after the death of the father, the other two children, A. W. Gard and his sister, Vertie Burton, instituted this proceeding against Cora and her husband, claiming that, under and by virtue of the stipulation in the deed, the title had reverted to all the children and heirs at law. Defendants contended that the stipulation was void as being in restraint of marriage, and his Honor being of that opinion, judgment of nonsuit was entered, as heretofore state.

It is the principle very generally recognized here and elsewhere that, when an estate has been definitely conveyed to another, a condition subsequent, in general restraint of marriage, will, as a rule, be disregarded. In *re Miller*, 159 N. C. 123, 74 S. E. 888; *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218; *Otis v. Prince*, 10 Gray (Mass.) 581; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L.R.A. 837; *Lowe v. Doremus*, 84 N. J. L. 658, 87 Atl. 459, 49 L.R.A. (N.S.) 632; *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L.R.A. (N.S.) 605; In *re Alexander*, 149 Cal. 151, 9 Ann. Cas. 1141, 85 Pac. 308; 2 Devlin on Deeds, 3d ed. p. 1792.

The instrument being free from ambiguity, the language expressing plainly and distinctly the meaning of the parties, there is no place for extraneous evidence in aid of its interpretation; *Gilbert v. Waccamau Shingle Co.* 167 N. C. 286, 83 S. E. 337, and the case presented is that of a deed with full covenants, conveying the property to *feme* defendant and containing a stipulation in the nature of a condition subsequent in general restraint of marriage and we concur in the ruling of his Honor that the stipulation is void.

We are reminded that in *Miller's case*, 159 N. C. 123, 74 S. E. 888, the provision in apparent restraint of marriage was upheld, and it is insisted that the decision is direct authority in support of plaintiff's position, but, in *Miller's case*, it will be noted that there was language on the face of the will which tended to show that a conditional limitation was intended, and much stress was given, also, to the fact that there was a limitation over, a circumstance that is usually made determinative in personal property and is always allowed much weight in cases of real estate.

Speaking to this question, in *Miller's case*, the Court said: "Even though the words used may, in strictness, be those of condition subsequent, if there be a limitation over to a third person, the courts are inclined to consider it as an estate upon limitation rather than one upon condition."

It seems that this fact of a limitation over is only allowed as controlling in cases of bequests of personalty. See notes to case of *Coppage v. Alexander*, reported in 38 Am. Dec. 159; but both *Blackstone* and *Kent* speak of it as prevailing in devises of realty also. 4 *Kent*, p. 128; 2 *Blackstone*, p. 155. But whether made determinative in cases of real property or otherwise, and whether the facts bring the [509] present case within the principle or not—and we are inclined to think they do (see *Stillwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240)—the fact that there is such a limitation over should always be given full and proper weight in arriving at the mind and will of the testator and determining whether the disposition made of the property shall be considered an estate upon limitation or a condition in *terrorem*, void as being in general restraint of marriage."

In our case, there is no perplexity by reason of the language used, nor is there any limitation over, but, as stated, an ordinary deed with full covenants, containing a stipulation in general restraint of marriage.

We find no error in the trial, and plaintiff's judgment of nonsuit must be affirmed.

No error.

NOTE.

Validity of Condition in Deed in Restraint of Marriage.

In accordance with the policy which invalidates contracts (see the notes to *Crowder-Jones v. Sullivan*, 4 Ann. Cas. 729, and *Appleby v. Appleby*, 10 Ann. Cas. 563) and testamentary gifts (see the notes to *Holbrook's Estate*, 5 Ann. Cas. 137, and *Matter of Alexander*, 9 Ann. Cas. 1141) in unreasonable restraint of marriage, the rule seems to be that an absolute provision in a deed operating in restraint of marriage is void if the condition imposed is the result of a mere whim on the part of the grantor or of a desire unreasonably to prevent the marriage of a person. But where the provision serves a legitimate purpose such as to provide for a woman until she marries or to restrain one from marrying rashly, or contrary to the grantor's wishes, the condition will be upheld. In *re Whiting* [1905] 1 Ch. (Eng.) 96, 91 L. T. N. S. 821, 21 Times L. Rep. 83; *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281; *Waters v. Tazewell*, 9 Md.

291; *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409; *Munroe v. Hall*, 97 N. C. 206, 1 S. E. 651; *Cloud v. Calhoun*, 10 Rich. Eq. (S. C.) 358. See also *Knost v. Knost*, 229 Mo. 170, 129 S. W. 665, 49 L.R.A.(N.S.) 627. The doctrine that a provision in a deed in general restraint of marriage is void, was laid down as early as 1856 in the case of *Waters v. Tazewell*, *supra*. The court in commenting on the rule said: "Unqualified restrictions on marriage are discouraged on grounds of public policy, and instead of aiding them by applying liberal rules of construction, the courts have been disposed to construe them strictly, in such manner as will favor the persons on whom the restraints are laid."

In *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281, it appeared that a father conveyed to his daughter land by a deed of warranty on condition that she should remain single, otherwise to be divided among his three children. The daughter later married, and in an action by another child of the grantor for one-third part of the land, the court held that the condition was void. The court said: "If a condition in restraint of marriage is annexed to a devise or conveyance of real estate, and the condition is subsequent and of a general character, it is held by the law to be void. (Whether this doctrine applies to the widow of a testator or not is held differently by different courts.) If the condition be partial, and not general, as where it relates to the time when or the place where or the person with whom a marriage may take place, then it may or may not be void according as the condition imposed may be considered reasonable or otherwise."

In *Munroe v. Hall*, 97 N. C. 206, 1 S. E. 651, it appeared that an estate was conveyed by a father to his two daughters as long as either of them was single, but on the marriage of either it was to go to a son. The daughters sold the land and afterwards died unmarried. In an action by the heir of the son against the heir of the grantees of the daughter it was held that the provision in the conveyance "as long as either of them is single" was an absolute restraint of all alienation, and therefore void, and that the deed conveyed the fee simple in the land.

But in *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409, it appeared that a brother conveyed by deed to his two sisters a leasehold "to have and to hold the same unto the said Martha and Elizabeth, as tenants in common, so long as they both shall live, and from and after the death of either of them, then unto the survivor so long as she shall live, and no longer, or so long as they both shall remain unmarried, and from and after the marriage of either of them, then unto the one remaining unmarried so long as she shall live and remain unmarried, and no longer." The

purpose of the brother apparently being not to restrain the marriage or promote the celibacy of his sisters, but rather to provide them with a small property as a home or support until they should marry and have husbands to maintain them. It was held that the provision was not a condition in restraint of marriage.

In *Haupt v. Wolverton*, 2 Lanc. L. Rev. (Pa.) 194, it appeared that a husband gave his wife by deed some property to hold so long as she bore his name. It was held that this conveyed an estate to his wife on condition, which was forfeited to the grantor or his heirs upon her remarriage.

In the case of *In re Whiting* [1905] 1 Ch. (Eng.) 96, it appeared that a father by a deed of settlement gave funds in trust for his daughter on condition that she should marry only with the consent of persons named in the deed. This condition was accompanied by a gift over of the funds on her marriage without the required consent. The condition was held to be valid and enforceable since there was a gift over.

In *Cloud v. Calhoun*, 10 Rich. Eq. (S. C.) 358, it appeared that a father conveyed slaves to a trustee for the use of his daughter during her lifetime, and after her death without children, then for the use of her husband so long as he should remain single, but if he should marry the slaves were to be returned and to be divided among the remainder of the heirs. It was held that the limitation was not void as in restraint of the marriage of the son-in-law. In commenting on the validity of conditions in restraint of marriage the court said: "Without entering into doubtful disputations, it may be conceded that where a life estate, or greater interest, is granted to one, to be defeated on a condition subsequent if he marry, that the condition is void and the estate unaffected by the condition. But here no estate whatever is conferred on Mr. Calhoun. An option or privilege of retaining the custody and enjoyment of the slaves while he remained widower of his wife, Margaret, is bestowed on him, but no defeasible estate for life, or otherwise, is bestowed. But if such estate be conceded to be given to him, it is by express limitation to him while he remains single, and not a condition to be void if he marry again. His second marriage is mentioned only to describe the time and event on which the property was to go over, and not to prescribe a condition defeating a larger estate previously given to him."

DONOVAN

v.

EXCELSIOR LIFE INSURANCE COMPANY.

Canada Supreme Court—June 24, 1916.

53 Can. Sup. Ct. 539.

Insurance — When Policy Becomes Effective — Delivery to Agent.

An insurance policy providing that it shall not become effective until delivery, and which is sent to a local agent with instructions not to deliver it until a certain matter is adjusted, does not become effective on his adjusting the matter in question, neither that policy or the new one sent, in view of the adjustment having been delivered.

[See note at end of this case.]

Appeal from Supreme Court of New Brunswick, Appeal Division.

Action by Katherine Donovan, plaintiff, against Excelsior Life Insurance Company, defendant. Judgment for defendant in trial court. Judgment affirmed by Appeal Division of Supreme Court of New Brunswick. Plaintiff appeals. The material facts are stated in the opinions. **AFFIRMED.**

Daniel Mullin, K. C. for appellant.

Fred R. Taylor, K. C. for respondent.

[540] **THE CHIEF JUSTICE.**—This appeal should be dismissed with costs.

DAVIES, J. (dissenting).—The defence set up by the insurance company in this action is, in my judgment, an unrighteous one. I am glad to be able to find that, so far as I am concerned, it cannot prevail.

The real questions, and indeed the only material ones, in my judgment, are whether the policy of insurance was legally delivered before there was a change in the nature of the risk, and if so, whether condition 1 of the policy prevented it attaching.

[541] The application for insurance of Mrs. Donovan was taken by the provincial manager and forwarded by him to the company. On the 18th March, 1912, they had received the application, and wrote to their manager as follows:—

Toronto, March 18th, 1912.

F. S. Ferris, Esq.,

Provincial Manager,
St. John, N. B.

Dear Sir,

Re Application of Mrs. Julia Donovan.

We have accepted this application, and are issuing policy, but, before delivering the

same, you will please ascertain from Dr. Pratt that he has sent in his confidential report, and that it is satisfactory. It is not yet to hand.

You will also reconcile Dr. Pratt's statement that the applicant is sixty-five, whereas the applicant herself gives her age as sixty-four. In a case of this kind, in future, in view of the age, it is best that proof of age be submitted, with a view of the same being admitted on the policy.

Yours truly,
E. Marshall,
General Manager.

Now, I take it as clearly decided by this court, in the case of *North American L. Assur. Co. v. Elson*, 33 Can. Sup. Ct. 383, that if the letter contained nothing more than the first two statements, "we have accepted this application and are issuing policy," just as soon as the policy was executed and posted to the general agent, the contract of assurance would have been complete. If it was destroyed in the mail or otherwise lost, that would not have affected its validity nor could any action of the local agent do so. There would then have been a completed contract of assurance, the premium having been paid and accepted.

The question, however, in this case is whether the letter did not shew a qualified or conditional delivery, [542] and, if so, whether the conditions were complied with. I think it did, because the general agent was informed he was not to deliver the policy until he had ascertained, first, that Dr. Pratt had forwarded his confidential report and that it was satisfactory, and had "reconciled Dr. Pratt's statement that the applicant was 65, whereas the applicant herself gave her age as 64."

The policy itself, a 20-year endowment policy for \$1,000 on the life of Julia Donovan, was issued by the defendant under its seal from the head office in Toronto, payable, in the event of the death of the insured, to her daughter, the plaintiff. The manager in St. John received it in due course of mail, and, in his evidence, says "he presumed he called upon Dr. Pratt," but could not remember whether he saw him, but he would not undertake to say that he did not see him.

He, then, to carry out his instructions, on March 26, called on the insured to reconcile Dr. Pratt's statement that the applicant's age was 65 years with the applicant's statement that it was 64.

The learned trial judge found as a fact that there had not been any wilful misrepresentation as to age, and that at *this time, March 26, when Ferris called, the applicant was in good health*. The learned judge says:—

"I accept her statement that when Mr. Ferris called—that is to say, on the 26th March—her mother was in good health."

Mr. Ferris admitted that, in calling the plaintiff's attention to the alleged discrepancy between the age mentioned in the application and that reported by Dr. Pratt, she at once stated that her mother would be 65 on her next birthday. The agent and inspector of the company, Dr. King, who filled in the application, stated in his evidence that Mrs. Donovan had told him her age was 64 at that time, consequently she would be 65 [543] on her next birthday, and the doctor had put her age for insurance purposes at 65, her next birthday.

These facts reconciled the apparent discrepancy, and Mr. Ferris, the provincial manager, then accepted from the plaintiff the \$4.15 of additional premium, calculated on the age of 65, told her, after receiving it, that he would send back the policy to have the age and the premium corrected, and that, while it would be some days before he would receive it back, "in the meantime everything was all right." In this both the plaintiff and Mr. Ferris, the manager, agree.

He did mail it back to the head office the same day, 26th March, and on April 4 he received a corrected policy in accordance with the age discrepancy he had "reconciled."

At that time, Mr. Ferris says that, because he had learned of the then illness of the assured, he did not hand over the policy to her. He said he knew that the premium had been paid and that the company had been informed of the payment.

Now, with respect to the crucial point of the delivery of the policy, what is the proper inference to be drawn from the evidence as to whether the company's provincial agent had ascertained "that Dr. Pratt's confidential report had been sent in and that it was satisfactory," and that he, the agent, had reconciled the age discrepancy? Surely, only one inference can be drawn. He "presumed, he says, that he went to see Dr. Pratt" before going to see the insured. He cannot remember whether he saw him or not. It was his duty to see him, and the fact that after "he presumed he called upon Dr. Pratt" he went to the insured, reconciled the age discrepancy question, recovered the excess premium of \$4.15 from her required because the assured's [544] next birthday would be 65, and, on being asked whether everything was all right now, replied that it was—completes the necessary facts to enable a proper inference to be drawn from them.

The inference then and the only inference which can be drawn from these proved facts is that he had fully complied with his instructions as to Dr. Pratt's confidential report, and had subsequently satisfactorily

"reconciled" the age discrepancy and then received the excess premium, and assured the plaintiff that everything was all right.

It seems to me from that moment the contract of assurance was complete, and that the company could have been compelled to issue a policy in accordance with it, and that, if the assured died in the meantime, there was a contract which the plaintiff, as beneficiary, could have enforced. The subsequent illness of the assured at the time when the rectified policy came back to the provincial agent, namely, the 4th April, could not operate to annul a completed contract. Manual delivery of the second or rectified policy was not essential to complete the contract. That was complete when the conditions contained in the letter from the general manager of March 18th had been complied with or at any rate when the new policy was executed and forwarded unconditionally from Toronto. The policy was merely the evidence of the contract.

It does not seem to me that the withholding of the manual delivery of the rectified policy from the assured by the provincial agent on April 4th, after he had unconditionally received it, because he heard the assured was then ill, could in any way operate to destroy or impair that completed contract.

The learned judges in the court of appeal for New Brunswick [545] "inclined to the view that the first policy did not represent a concluded and completed contract expressive of their true intentions between the parties."

But, apart from that they held and, as I understand their reasons, they based their judgment upon the fact that the condition (1) of the policy had not been complied with alike as to its delivery and the surrender of the official receipt. That condition reads:—

"This policy shall not take effect until the same has been delivered, the first premium paid thereon and the official receipt surrendered to the company during the lifetime and continued good health of the assured."

I have already given my reasons for holding that there was a legal delivery of the policy, if not when the first policy was forwarded to the provincial agent and the instructions enclosing it complied with, at any rate when the rectified and fully executed policy was posted from Toronto on the 1st or 2nd of April, directed to the provincial agent *without any conditions as to its delivery*. That unconditional forwarding of the policy to the provincial agent operated in law as a legal delivery from its posting. The agent says distinctly that he did not get any letter of instructions from the company with that policy. They simply enclosed the policy and the official receipt to him, and, as he heard the assured was ill, he returned

both to the company, and did not hand them over to the assured. As to the full premium, that he had been admittedly paid and received, and as to the "surrender of the official receipt," there is not a particle of evidence that I can find shewing that any such official receipt ever was given to the assured which could be surrendered. On the contrary, there was merely a receipt for the monies paid given by the provincial agent, and it could not be contended and was not contended that such a receipt was in any sense an official [546] receipt such as that referred to in condition (1), the official receipt there mentioned being, as I understand it, substantially an interim insurance issued by the head office and held by the assured until he receives his formal policy, and, when the latter is given him, the receipt is to be surrendered.

If no official receipt was given to the assured, and no one says it was, and there is no evidence from which it can be inferred it was, then it is plain that its "surrender" could not be required by the company before the policy attached and that part of condition (1) would not be applicable at all. It is surely plain and clear that the surrender up of the "official receipt" is only necessary in cases where such a receipt has been delivered. In this case there is no pretence that it was delivered.

As authority for this position taken by me, that there was a complete delivery of the corrected policy when, with full knowledge of the facts, it was executed by the officials of the head office in Toronto and mailed without conditions to their provincial agent in St. John, and, secondly, that, when received by that official, he had no power to cancel it, and that physical possession of the policy by the assured was not necessary to complete the contract, I rely not only upon the case already cited from this court, but also upon the well-known case decided by the House of Lords, after having the opinions of the judges summoned before them, of *Xenos v. Wickham*, L. R. 2 H. L. 296.

The facts of that case, of course, are different from this, but the principles there laid down, it seems to me, govern this case. It was there held that

"A policy of insurance purported to be 'signed, sealed and delivered' by two of the directors of an insurance company in the presence of [547] their secretary, and according to the powers vested in the directors by the deed of settlement of the company. This statement was taken, as against the company, to be conclusive that it was not only duly signed and sealed, but also duly delivered."

"A policy 'signed, sealed and delivered' is complete and binding as against the party executing it, though, in fact, it remains in his

possession, unless there is some particular act required to be done by the other party to declare his adoption of it."

That case was decided in 1867. Then, again, in 1896, the case of *Roberts v. Security Co.* [1897] 1 Q. B. 111, was decided by the court of appeal, affirming the decision of the divisional court.

It determined two points: First, that when there was no evidence of a conditional delivery and when the policy was executed by the directors of the company, the insurance became effective and constituted a completed contract of insurance; and, secondly, that by the recital therein the defendants had waived the condition for prepayment of the premium, and, therefore, the policy had attached. On the first point, the language of Lord Esher is in full accord with the decision of the House of Lords in *Xenos v. Wickham*, L. R. 2 H. L. 296, and admits of no doubt as to the law.

The learned trial judge suggests that this decision of *Roberts v. Security Co.* [1897] 1 Q. B. 111, had been questioned by the Privy Council in the appeal of *Equitable F. etc. Office v. Ching Wo Hong* [1907] A. C. 96, but a reference to the latter case shews clearly that the observation of Lord Davey, in delivering the opinion of the Judicial Committee, was confined solely to the second point decided in *Roberts v. Security Co.* [1897] 1 Q. B. 111, as to the recital in the policy operating as a waiver, and had nothing to do with the first point decided that the execution of the policy by the directors constituted a complete [548] contract, although the assured had not received physical delivery of the policy.

Then there was the case of *Canning v. Farquhar*, 16 Q. B. D. 727, where the court of appeal decided that, the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy.

But in the case before us there is no pretence for saying that, when the premium was paid in full and accepted by the provincial agent, who then wrote to the company, and when the company, acting upon their agent's letter, executed the new or later policy, the nature of the risk had been altered. The learned trial judge, on this crucial point, as I have already pointed out, found the fact in plaintiff's favour.

Lord Esher, in that case of *Canning v. Farquhar*, 16 Q. B. D. 727, says, at p. 731:—

"When does the contract of insurance commence? It commences at the time when the premium is offered."

If at that time the offer of the premium is accepted and there has been no change in the nature of the risk, the negotiations for a contract have matured and the contract is complete.

That I take to be the substance of the decision in *Canning v. Farquhar*, 16 Q. B. D. 727.

The text writers on the subject of insurance are, I think, quite in accord with what I have written as to the above several decisions which are binding upon us.

The grounds of my judgment for allowing this appeal are that there was no wilful misstatement of fact in the application for insurance by the deceased; that the first policy sent to the assured by the company [549] had been sent for delivery conditionally; that the two conditions, the seeing to the confidential report of Dr. Pratt and the "reconciliation" of the discrepancy between the ages of the assured as stated by her and that stated by Dr. Pratt, had been effected; that at the time the assured "was in good health," and the trial judge so found the facts; that the company had been informed by its agent of the true facts and of the payment to its agent of the full premium based upon the age of 65, and had then (2nd April, 1912), with full knowledge of all material facts, executed the second or corrected policy and mailed it to the agent without any conditions attached; that the contract of insurance was, if not before, then at least fully completed, and that there was no power on the part of the agent, on his receipt of the policy without conditions and simply on his then hearing of a change in the health of the assured, to withhold the policy or to attempt to cancel a completed contract.

I am, therefore, of opinion that the appeal should be allowed and judgment entered for the plaintiff for the amount of the policy executed by the company and mailed from Toronto to its provincial agent in St. John on the 2d day of April, 1912, \$1,000, with interest from the due date of that policy, and costs in all the courts.

IDINGTON, J.—The findings of fact by the learned trial judge and maintained by the court of appeal have reduced anything involved in this appeal to the bare question of law relative to the delivery of the policy in question. The delivery of the first policy can certainly not be maintained as complete in face of the terms of the letter of March 18th, 1912, by the general manager to the provincial manager. If the [550] conditions set forth in that communication had been complied with, then it would be fairly arguable that the company had intended to deliver the policy. If, for example, the provincial manager had been able to reconcile Dr. Pratt's statement that the applicant was 65 with the fact that the applicant had given her age as 64, there would have been much in favour of the appellant's contention. Inasmuch as it was impossible to reconcile these statements, it would seem to have been his obvious duty to return the policy as he

did. There is, however, a statement in the application which must be taken to the basis of the consensus of mind between the parties and to govern the question involved herein relative to the delivery. The application reads thus:—

"That any policy which may be issued under the application shall not be in force until the same be delivered and until the actual payment to and acceptance of the premium by said company, or its authorized agent, in accordance with the company's rules, during my lifetime and continued good health, and said premium shall then be considered to have been paid and the insurance to have been begun at the due date named in the policy"

In pursuance thereof it is competent for the company to define the mode of delivery by which it is to be bound.

The first condition of the policy provides:—

"1. When Policy in Force.—This policy shall not take effect until the same has been delivered, the first premium thereon paid and the official receipt surrendered to the company during the lifetime and continued good health of the assured."

It seems to me impossible within the language of that condition to hold that it had been the intention of the company to deliver, or be held as having delivered, any policy unless and until the condition had been complied with.

As the policy and official receipt for the premium [551] were not dealt with within the terms of the said condition, the company cannot, I think, be held bound.

To hold otherwise would seem to conflict with the supreme rule, relative to the common purpose or intention of the parties thereto, which must govern this and every other contract.

The courts in both the cases of *Roberts v. Security Co.* [1897] 1 Q. B. 111, and the *North American L. Ins. Co. v. Elson*, 33 Can. Sup. Ct. 383, so much relied upon by appellant, observed, or intended to observe, that rule, and only decided that, after fully assenting to an insurance contract, the insurer could not recede.

This company, now respondent herein, would seem to have taken special pains to avoid any misunderstanding by courts of its intention, though it may thereby have misled others.

I think the appeal must be dismissed with costs.

ANGLIN, J.—There was no delivery of the first policy of insurance—that sued upon. By a condition of the application, delivery of the policy was made a prerequisite of the creation of contractual liability. The present

case is in several particulars distinguishable from *North American L. Ins. Co. v. Elson*, 33 Can. Sup. Ct. 383, relied on by the appellant, notably in that in the case now at bar the policy was sent to the company's agent not for unconditional delivery, as in the *Elson Case*, 33 Can. Sup. Ct. 383, but to be delivered only upon conditions stated in the letter from the company to their agent referring to it. Instead of delivery being made when the agent called at the applicant's residence on the 26th of March, he became satisfied that there had been a misstatement of the age of the applicant—one of the matters subject [552] to which the policy had been forwarded mentioned in the company's letter. He appears to have explained to the applicant's daughter (the plaintiff in this action), with whom he dealt on her mother's behalf, the effect which the difference between the age stated in the policy and the actual age of the applicant would have upon the amount that would be payable under the policy, and also to have informed her that for a slight additional premium a policy could be obtained which would entitle the beneficiary to the full amount of the insurance. Thereupon it was determined that such a policy should be taken rather than the policy which the company had sent to the agent, and the policy so sent was accordingly returned by the agent to the company at Toronto with the additional amount of premium which he had obtained from the applicant's daughter. A second policy of insurance was thereupon prepared and forwarded to the agent, but it was not delivered by him because he learned that the insured was ill. The evidence clearly establishes that when the agent visited the house of the insured on the 26th of March for the purpose of discussing the difficulty arising out of the misstatement of age in the application for the first policy, the applicant had already become ill. She never recovered and died on the 7th of April. Her daughter deposes that she had been continuously ill for about three or four weeks before her death, and there is no contradiction of this evidence. In face of it, the finding of the learned trial judge that the plaintiff's mother was in good health on the 26th of March is somewhat difficult to understand. The application made continued good health of the insured at the time of payment and acceptance of the premium a condition of the policy coming into force. The conclusion, therefore, seems [553] inevitable that the risk never attached, and that the judgment dismissing the plaintiff's action is correct and must be affirmed.

BRODEUR, J.—This is an action concerning a contract of insurance instituted in the following circumstances:—

In the month of March, 1912, the plaintiff's mother, Mrs. Donovan, expressed her wish to the agent of the respondent company to take a life insurance policy for \$1,000. As she was then 64 years of age, the agent, however, would not receive the application before conferring with the company. He came back to Mrs. Donovan's residence a few days after, and an application was made for a policy.

She did not know how to read and write at all; the necessary answers were written by the agent. She declared that she was 64 years of age, and the agent, instead of entering 65 as being her next birthday, as required by the printed form, inserted by mistake 64, and received the payment as based upon the age of 64.

When she was examined by the doctor she must have made the same declaration about her age, but the doctor properly entered 65 as being her next birthday.

The policy was issued by the company and sent to the provincial manager in St. John, N. B. He was advised, however, that before delivering the policy he should "also reconcile Dr. Pratt's statement that the applicant is sixty-five, whereas the applicant herself gives her age as sixty-four. In a case of this kind, in future, in view of the age, it is best that proof of age be submitted with a view of the same being admitted on the policy."

On the 26th of March the provincial manager called at the home of the assured with the policy, and the following occurred, as told by the plaintiff:—

[554] Q. Mr. Ferris came to the shop, did he?

A. Yes.

Q. You saw him personally?

A. Yes.

Q. Just tell us what took place, what he said to you?

A. He said he brought the policy and he opened it and he told me it was for \$800; there was a mistake of one year in the age.

Q. Did he say this?

A. Yes, he said that. So he said to secure the other \$200, to pay a few more dollars, and that would make the thousand; so he took away the policy and said it would be nine or ten days before the other would come back, but in the meantime that it was all right.

Q. What did you do when he said that?

A. I gave him the balance.

Q. How much?

A. I gave him a five-dollar bill and he gave me some change back.

Q. You gave him what he asked?

A. Yes, I gave him what he asked.

Q. What did he say then?

A. He said it might be nine or ten days before the policy would come back, but in the meantime everything was all right; that was all the conversation.

At that time the insured was in good health. Unfortunately, she took sick a few days after, and she died on the 7th of April.

In the meantime the policy was sent back to Toronto to be modified or to have a new one issued and a new one was issued on the 1st of April. When the agent received it, he did not make the delivery immediately, because he heard that the insured was sick, and after her death he went and offered to return the money.

The question is whether the plaintiff, in those circumstances, as a beneficiary under the policy of insurance, would be entitled to recover.

In the policy it was provided that, in order that a policy should be binding, it should be delivered. It is contended by the respondent that there was no delivery in the present case, and that, consequently, the contract was not binding.

[555] It was decided in the case of *North American L. Assur. Co. v. Elson*, 33 Can. Sup. Ct. 383, that an insurance policy having been sent from Toronto on the 27th September to the company's agent at Winnipeg and forwarded by him on October 1st to the insured, that the contract of insurance was complete; that the policy and receipt were delivered when the papers were mailed at Toronto on the 27th September.

It was contended in this case that the policy was binding, and, relying on that judgment in the case of *Elson* (1), that the policy was duly delivered when it was mailed from Toronto. But the instructions given by the company to their provincial manager in New Brunswick not to deliver the policy until he would have reconciled the different ages given by the agent and by the doctor may and must affect the case and lead me to distinguish this case from the *Elson* Case (1).

But when the facts had been ascertained by the provincial manager of the respondent and when he goes to the insured with the policy and when the facts and circumstances reported above have taken place, can it be said that there was actual delivery?

I am inclined to answer that question in the affirmative.

Constructive delivery has taken place. It is true that the policy had been given back to the manager to have another one issued for a larger amount, but there was, according to my opinion, a binding contract, which bound the respondent company for at least \$800. The representations with regard to the age of the insured are not sufficient to invalidate the contract, because it was formally stated that if some [556] errors happen with regard to the age, the amount of the policy or the premiums varied.

I have come to the conclusion that there was a binding contract for \$800, and that

the judgment of the courts below dismissing appellant's action should be reversed

The appeal should be allowed, with costs of this court and of the courts below.

Appeal dismissed with costs.

NOTE.

The reported case, giving a rigid construction to a provision of an insurance policy that it shall not take effect until delivery, holds that the policy in suit did not become effective. It appears that the insurer accepted the application and sent the policy to its local agent with instructions not to deliver it until a certain discrepancy had been reconciled. The agent reconciled the discrepancy in question, collected an additional premium made necessary by the change, and on his report a new policy was sent to him for delivery, but did not reach him until the insured had become ill. The earlier cases discussing the question when a contract of insurance is consummated are reviewed in the notes to the following cases: *Hartford F. Ins. Co. v. Whitman*, 9 Ann. Cas. 218; *Bell v. Hudson Bay Ins. Co.* 21 Ann. Cas. 788; *Mutual L. Ins. Co. v. Jordan*, Ann. Cas. 1916B 674; *New York L. Ins. Co. v. Babcock*, 69 Am. St. Rep. 134, and *Stephenson v. Allison*, 138 Am. St. Rep. 26.

STATE

v.

CESSNA.

Iowa Supreme Court—June 23, 1915.

170 Iowa 726; 153 N. W. 194.

Criminal Law — Harmless Error — Conviction of Included Offense.

Accused, convicted of assault with intent to do great bodily harm, cannot complain that the evidence showed that he should have been convicted of assault with intent to kill.

Assault — Defenses — Defense of Habitation.

One assaulted in his habitation need not retreat, but may repel force with force.

[See note at end of this case.]

Same.

One unlawfully in a dwelling must be warned to leave before the occupant may use force to eject him, but a person or persons entering without right, as with violence, may be repelled or ejected with all necessary force, and without warning.

[See note at end of this case.]

Ann. Cas. 1917D—19.

Instructions — Necessity of Request — Effect of Erroneous Request.

In a prosecution for assault with intent to murder, where an erroneous requested instruction on the issue, raised by the proof of defense of habitation, served to call the attention of the court thereto, the failure of the court to submit such issue to the jury under a proper instruction is error.

Assault — Defenses — Supposed Intruder.

One unaware that persons entering his dwelling are officers, supposing them mere intruders, may resort to such force to eject them as a reasonably cautious and prudent man would use under like circumstances, without incurring criminal responsibility.

[See Ann. Cas. 1914B 541.]

Instructions — Abstract Instructions.

Instructions should be concrete as to each issuable fact, and not abstract.

Appeal from District Court, Hamilton county: WRIGHT, Judge.

Criminal action. Charles Cessna convicted of assault with intent to do great bodily injury and appeals. The facts are stated in the opinion. REVERSED.

D. C. Chase and R. G. Remley for appellant.

George Cosson, W. S. Rankin and O. J. Henderson for appellee.

[727] LADD, J.—The defendant, with his family, resided in the second story of a flat, and at about 9 o'clock in the evening of October 29, 1913, Rufus E. Nelson, sheriff of Hamilton county, with his deputy, C. D. Carl, night policeman, Bert Williams, and Herman Rutledge, entered from the hallway a room about 18 feet long and 12 feet wide. Immediately thereafter, defendant came in through a door at the opposite corner and, according to the testimony of Nelson, said, "It's me you are looking for, is it?" and pointed an army gun at Carl, who cried, "Cessna, don't shoot." Nelson moved a little toward him, when he turned the gun on Nelson, and, as some of the witnesses say, the hammer clicked as though he had pulled the trigger. He was then overpowered; but, as is said by witnesses for the state, told his son to get the gun and "shoot these fellows," and also asked for a knife, declaring, "I will cut the guts out of the g— d— s— of a b— of a Norwegian." No information had been filed against the defendant, and he was not informed by the sheriff or any other of those present that they were officers. The evidence on behalf of the state tended to show that the defendant was not intoxicated, and Robertson, who was visiting at the place with defendant's father-in-law, testified that before

the officers came, defendant had said that "if that marshal comes up here to-night I am going to kill him. I am going to spill his blood on this floor."

It seems that Mrs. Cessna had become frightened because of defendant's having been drinking during the day, and had called the night policeman. On the other hand, defendant testified that on the way home from doing carpenter work the day previous, he had noticed some geese flying and concluded to take his rifle with him to see if he could get some of them; that he cleaned up the gun, loaded it with five shells, put two quarts of whisky in his suitcase with some tools; but, as "it was kind of stormy," concluded not to go out, and, as he testified, "about 10 o'clock that morning when I found that I wasn't going back to work, I opened one of the quart bottles from my suitcase and began drinking. About 2 o'clock, I [728] lost that one, misplaced it, and so I opened the other one." He testified farther that he did not know how long he continued drinking, whether he ate dinner or supper or not, and that he had no recollection whatever of the sheriff and those with him having come to his house or entered the room or of anything whatever that occurred there, and he denied having made the threat testified to by Robinson.

I. Several questions are raised in the record, and the first of these is that the evidence did not justify a conviction of the particular offense of assault with intent to inflict great bodily injury, it being contended that, as the gun was pointed at the head of the defendant, he must have intended to kill, if he entertained any intent, and therefore could not have been guilty as found in the verdict. But the sheriff testified that "he pulled the gun on to Carl and on to me, and in the same position he had it on Carl," and that "he pulled the gun on to Carl." Carl testified that the gun was pointed at Nelson's head or upper part of his body when he snapped the trigger, so that the jury was not required to find that it was aimed at the sheriff's head, as assumed by appellant. There was room, then, to find his purpose as the jury found, and the defendant cannot complain if the jury was lenient in convicting him of a lower offense than it might under the evidence.

II. Appellant complains of the refusal to give the following instruction:

"You are further instructed that if you find that the sheriff and officers summoned a posse of citizens, and with them, they went to the home of defendant, and while there, without any warrant for his arrest, and while defendant was in no manner violating the law, and if, without first making themselves known to defendant and informing him the object of their visit, they endeavored to over-

power and take him, then the resistance of the defendant was not unlawful. [729] and if, in making such defence, defendant pointed a gun at the officers, he is not guilty of assault with intent to murder, or assault with intent to commit manslaughter, or assault with intent to do great bodily injury, or of simple assault, and must therefore be acquitted by you."

Though this does not correctly state the law, it did direct the attention of the court to a very important issue, which was not alluded to in the instructions. The defendant was in his own dwelling and not engaged in the commission of any offense. The sheriff with his posse entered in the night-time without any intimation as to their purpose, and, as might have been found, unknown by defendant to have been officers of the law. Had the sheriff intended to arrest him, he should, if afforded an opportunity so to do, have so informed him, and also of the cause of the arrest, of his authority to do so, that he was a peace officer and that defendant must submit. Sec. 5199, Code. Being unaware that he was about to be arrested, the defendant might have assumed that the sheriff and his posse were intruders and have taken such reasonable precautions to protect his home as an ordinarily cautious man would under like circumstances. The doctrine that every man's house, however humble, is his castle and he may protect it against invasions had its origin when the peace of the body politic as well as of individuals depended on the maintenance of the inviolability of houses as castles, and it still exists with equal reason for the maintenance of the inviolability of houses as homes. 1 Wharton's Crim. Law, Sec. 634. A person when assaulted in his habitation is not required to retreat, but may meet force with force. *State v. Middleham*, 62 Ia. 150, 17 N. W. 446; *State v. Bennett*, 128 Ia. 713, 5 Ann. Cas. 997, 105 N. W. 324. And he may defend his habitation, not as property, but because this may be necessary to the protection of himself and family. The principle is well expressed in *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200:

[730] "The idea that is embodied in the expression that a man's house is his castle is not that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such an assault be injury to the person of the occupant or members of his family, and, in order to accom-

plish this, the assailant attacks the castle in order to reach the inmates. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault."

Of course, one who is lawfully in a habitation must have warning to leave before force may lawfully be applied, but this having been done, force reasonably and apparently necessary to expel may be resorted to. But if the person or persons entering or who have entered are intruders and violent, and there without right, then such warning is not essential, and the same rule with respect to the application of force is applicable. The rules are accurately stated in 1 Bishop's New Crim. L. Sec. 859:

"If a man enters another's dwelling house peaceably, on an implied license, he cannot be ejected except on request to leave, followed by no more than the necessary and proper force, even though misbehaving himself therein. Yet if the entry itself is with violence, or is opposed, no request to depart need precede the act of turning out; since the [731] trespasser knows, as well without express words as with, that his absence is desired."

The jury might have concluded that defendant was unaware that the persons entering were officers and supposed them mere intruders; and if so, should have been instructed that if they so found, defendant might, in repelling them from his dwelling, resort to such force as a reasonably cautious and prudent man would have done under like circumstances, and that if defendant so did, and did what such a man would have done, he should be acquitted; and on the other hand, if excessive force was used, or if such cautious and prudent person would not make use of the gun as defendant did, the defendant should have been convicted.

The record, in view of the request, was such as to exact the submission of this issue to the jury, and the omission so to do was error. In view of another trial, it is suggested that the jury be instructed concretely instead of abstractly as to the intent with which defendant may have acted.

Reversed.

Deemer, C. J., Gaynor and Salinger, JJ., concur.

NOTE.

Defense of Property as Justification for Assault.

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Introductory.

While an attack or aggression against the property of another necessarily includes the offense of trespass, this note is intended to include only those cases in which the defense relied on to justify an assault embodies primarily the protection of property. The right to justify an assault on the ground of trespass generally is treated in the notes to *Slingerland v. Gillespie*, 1 Ann. Cas. 886, and *State v. Flanagan*, reported post, this volume, at page 305. Further, this note is not intended to include cases dealing with the rights and liabilities arising from an assault committed in an attempt to recapture property either real or personal. For cases dealing with the recaption of personal property see the note to *Stanley v. Payne*, 6 Ann. Cas. 501. As to the liability of the owner or occupant of premises for an assault committed in removing a disorderly person therefrom, see the notes to *Holden v. Carraher*, 11 Ann. Cas. 724, and *Noonan v. Luther*, Ann. Cas. 1914A 1038. The liability of a person calling a dog to his assistance in ejecting a trespasser is treated in the note to *Ryan v. Marren*, Ann. Cas. 1915B 760; and the liability for homicide committed in defense of the habitation is discussed in the note to *Newman v. State*, 21 Ann. Cas. 718. Since the rules of law governing the liability of the owner of property for an assault in defending it against aggression are applicable alike to a civil action for damages and a criminal prosecution, no attempt has been made to separate the civil and criminal cases. They may, however, be readily distinguished, when so desired, by the style of the case.

General Rule.

As an incident to the right to acquire and own property recognized by the laws of all civilized communities, the owner has the right to defend and protect it against aggression, and if he commits an assault in so

doing the law will justify him. Blackstone says: "In defense of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. . . . And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose." 3 Bl. Com. 120. This doctrine finds universal support in the adjudicated cases, from which may be deduced the general rule that a person in possession of property, either as owner or as the agent or servant of the owner, may justify a charge of assault and battery by alleging and proving that in defense of the property, and to protect it from threatened and impending injury or destruction at the hands of the person assaulted, he used such force and no more than was necessary to prevent the injury or loss.

England.—Jones v. Tresilian, 1 Mod. 36, 86 Eng. Rep. (Reprint) 713; Weaver v. Bush, 8 T. R. 78, 101 Eng. Rep. (Reprint) 1276; Polkinhorn v. Wright, 8 Q. B. 197, 55 E. C. L. 197, 115 Eng. Rep. (Reprint) 849; Alderson v. Waistell, 1 C. & K. 358, 47 E. C. L. 358; Reg. v. Sullivan, C. & M. 209, 41 E. C. L. 118.

Canada.—McQuarrie v. Duggan, 44 Nova Scotia 185, 8 East. L. Rep. 5.

United States.—Wright v. Southern Exp. Co. 80 Fed. 85. See also Denver, etc. R. Co. v. Harris, 122 U. S. 597, 7 S. Ct. 1286, 30 U. S. (L. ed.) 1146.

Alabama.—Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202.

California.—Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116.

Colorado.—Goshen v. People, 22 Colo. 270, 44 Pac. 503.

Connecticut.—Baldwin v. Hayden, 6 Conn. 453; Heminway v. Heminway, 58 Conn. 443, 19 Atl. 766; Mathews v. Livingston, 86 Conn. 263, Ann. Cas. 1914A 195, 85 Atl. 529.

Delaware.—State v. Brittingham, 2 Boyce 330, 89 Atl. 242.

Hawaii.—Territory v. Savidge, 14 Hawaii 286.

Illinois.—Allen v. People, 82 Ill. 610; Wharton v. People, 8 Ill. App. 232; Devor v. Knauer, 84 Ill. App. 184; Winter v. Atkinson, 92 Ill. App. 162.

Indiana.—Rauck v. State, 110 Ind. 384, 11 N. E. 450.

Iowa.—Biggs v. Seufferlein, 164 Ia. 241, 145 N. W. 507, L.R.A.1915F 673.

Kentucky.—Tribble v. Frame, 7 J. J. Marsh. 599-616, 23 Am. Dec. 439; McClelland v. Kay, 14 B. Mon. 103; Howell v. Hopkins, 8 Ky. L. Rep. 527.

Massachusetts.—Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L.R.A. 623.

Michigan.—Ayres v. Birtch, 35 Mich. 501; Phillips v. Jamieson, 51 Mich. 153, 16 N. W. 318; Carter v. Sutherland, 52 Mich. 597, 18 N. W. 375; People v. Foss, 80 Mich. 559, 45 N. W. 480, 20 Am. St. Rep. 532, 8 L.R.A. 472.

Missouri.—State v. Dooley, 121 Mo. 591, 26 S. W. 558.

Montana.—State v. Howell, 21 Mont. 165, 53 Pac. 314.

Nebraska.—Fossbinder v. Svitak, 16 Neb. 499, 20 N. W. 866.

New Jersey.—Moore v. Cambden, etc. R. Co. 74 N. J. L. 498, 65 Atl. 1021, 122 Am. St. Rep. 399.

New York.—Scribner v. Beach, 4 Denio 448, 47 Am. Dec. 265; Harrington v. People, 6 Barb. 607; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; Bliss v. Johnson, 73 N. Y. 529.

North Carolina.—State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714.

Pennsylvania.—Overdeer v. Lewis, 1 Watts & S. 90, 37 Am. Dec. 440; Com. v. Gillam, 8 Serg. & R. 50; Com. v. Mitchel, 2 Pars. Eq. Cas. 431.

South Carolina.—Davis v. Whitridge, 2 Strob. L. 232.

Texas.—Coleman v. State, 45 Tex. Crim. 120, 74 S. W. 24; Taylor v. State, 47 Tex. Crim. 122, 80 S. W. 378, 122 Am. St. Rep. 675.

Wisconsin.—Raefeldt v. Koenig, 152 Wis. 459, 140 N. W. 56.

The rule was stated in Biggs v. Seufferlein, 164 Ia. 241, 145 N. W. 507, L.R.A.1915F 673, as follows: "If one attempts to take or takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession when he can stop it, and he is not guilty of assault, in thus defending his right, by using force sufficient to prevent the property from being carried away."

It has been held that the well-established rule of defense of property is not changed or superseded by the enactment of a statute making it a misdemeanor for a person to go on the cultivated or enclosed lands of another and refuse to depart on being requested to do so by the owner. Fossbinder v. Svitak, 16 Neb. 499, 20 N. W. 866.

Nor does the fact that a person is not at the moment of the assault interfering with the property of the owner alter the rule. Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116, wherein the court, holding to be erroneous

an instruction to the effect that if the plaintiff at the time of the injury complained of was not trying to injure the defendant or his property, then any force used against the plaintiff was wrongful, said: "From this instruction the jury might well get the impression that if when the force was used the respondent was not, at that very moment, engaged in the act of injuring appellant's property, then appellant had no right to use force, and such impression would have been a wrong one. When respondent went into the room and commenced endangering appellant's property, as above stated, he became a trespasser, and appellant had a right to put him out, and to use sufficient force to do so; and the fact that at the moment when the force was used respondent was not then handling the machines was of no consequence."

But where the owner of property is actuated by purposes other than the defense of his property he cannot justify an assault on that ground. Thus where an abutting owner, with whom the assaulting owner was on bad terms, was engaged as a laborer in assisting a road commissioner in removing a drain laid by the owner, it was held that an assault on the abutting owner could not be justified on the ground of defense of property, the commissioner being present and acknowledging responsibility for the work. *People v. Sayers*, 105 Mich. 708, 63 N. W. 1002.

In *Love v. State*, 14 Ga. App. 49, 80 S. E. 209, the court stated the rule as follows: "One on trial for the offense of assault with intent to murder cannot rely upon the theory of defense set forth in section 72 of the Penal Code, to wit, forcible attack on or invasion of the property or habitation of the accused, unless it appears that the attempt to kill was necessary to prevent such forcible invasion or attack. If the difficulty was caused by a matter wholly independent of and disconnected from the invasion, the mere fact that the person assaulted entered the habitation of the assailant would be no defense."

Assault on Officer.

The courts are not in accord as to the extent to which the owner may go in resisting an officer who attempts to take the goods of the assaulting person under a writ against a third person. In some jurisdictions the rule is stated to be that as the owner of property seized under a warrant against a stranger has his redress in the courts he cannot justify an assault on the officer attempting to take the property on the ground of defense of property. *State v. Cokeley*, 4 Ia. 477; *State v. Fifield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208, 75 Am. Dec. 173;

People v. Hall, 31 Hun (N. Y.) 404; *Faris v. State*, 3 Ohio St. 159; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482; *State v. Miller*, 12 Vt. 437; *Merritt v. Miller*, 13 Vt. 416; *State v. Buchanan*, 17 Vt. 573. And see *State v. Selengut*, reported in full, post, this volume, at page 303.

The doctrine was stated in *State v. Fifield*, 18 N. H. 34, as follows: "If the owner of property may resist an officer in its defense, so may one who believes himself to be the owner;" and thus the property, rescued by violence from legal process, may be lost to the creditor, and the authors of the violence be protected. . . . The obvious tendency of the doctrine for which the defendant contends, to promote disturbances of the peace by emboldening parties, otherwise sufficiently disposed to be strenuous in cases of doubt, and to appreciate, in such cases, the benefits of actual possession and present use of the disputed goods, suffices, of itself, to awaken the gravest doubt of its soundness. It is true that the owner of goods in possession of them, may, in general, resist a trespass designed to take them from his possession. It is also true, that the seizure of the goods of one person upon the process against another is technically a trespass, for which the law has provided the same remedy as for wanton aggression of a stranger without color or excuse. But it does not necessarily follow that the two acts may not be distinguished in the particular under consideration. For one, preventive force is the only protection; for the other, the law has provided remedies so perfect as to take away all excuse and all strong necessity or temptation for the exertion of such force."

So it has been held that one obstructing the delivery of property, which had been sold by a constable, on the claim that it did not belong to the judgment debtor, could not defend a prosecution for assault on the ground of defense of property as the law provided a means for his protection by appeal to the courts. *Mitchell v. State*, 101 Ga. 578, 28 S. E. 916.

But where a special officer attempts to attach the property of one person under a writ against another, and he fails to make known his official position, the owner can justify the reasonable use of force to protect his property. *Leach v. Francis*, 41 Vt. 670, wherein it was said: "Wood being the owner of the mare had the legal right to protect his property against any person that had no legal authority to take her from him. Leach, the plaintiff, had an execution against Francis, on which he was seeking to attach the mare; he was not a public officer, but was specially authorized to serve said execution; he had no authority

except that conferred by such deputation; he was entitled to no respect, consideration or obedience by reason of his being in any public position; he could claim nothing in this respect until he made his authority known, or until it was known to those with whom he was dealing. In attempting to take possession of the mare, when Wood informed him that the beast was his property and manifested a disposition to defend it, if he would avail himself of the immunities that attach to public officers in the execution of process, he should at once have made known his authority, and that he was acting under it; until he did this, Wood had the right to treat him as a mere trespasser, and to protect his property against him."

In other jurisdictions the rule is laid down that an officer attempting to seize property of one person under a writ against another, stands in no better position than a stranger, and the owner may resist the levy by necessary force and defend a charge of assault on the ground of defense of property. *Smith v. State*, 105 Ala. 136, 17 So. 107; *Wentworth v. People*, 4 Scam. (Ill.) 550; *Com. v. Kennard*, 8 Pick. (Mass.) 133. See also *Com. v. Middeby*, 187 Mass. 342, 73 N. E. 208. In *Com. v. Kennard*, supra, the rule was stated as follows: "Certainly the officer in such case would be a trespasser, for he does not act under any precept against such owners, nor is he commanded to take their goods. Actions of trespass against officers thus transgressing are among the most common actions in our courts, and they depend upon the same principle as actions of assault and battery, or false imprisonment, by one who is arrested on a writ or warrant against another person. In such case there is no authority for the arrest, and the person making it, whether by mistake or design, is a mere trespasser. And the same facts which would sustain an action of trespass by the person arrested, will justify any resistance which may be necessary to defend his personal liberty, short of injurious violence to the officer. We cannot distinguish between an officer who assumes to act under a void precept, and a stranger who should do the same act without any precept; for a command to arrest the person or seize the goods of B, is no authority against the person or goods of A. And an officer without a precept is no officer in the particular case in which he so undertakes to act. The officer must judge at his peril in regard to the person against whom he is commanded to act. This is said to be hard, but it is a hardship resulting from the voluntary assumption of a hazardous office, and considering that in all cases of doubt the officer may require indemnity before he executes his precept, the hardship is imaginary."

In *Wentworth v. People*, 4 Scam. (Ill.) 550, the court stated the rule and the reason therefor as follows: "If the act of the constable was in violation of law, was not the defendant justified in resisting him? Although the policy of the law affords ample protection to its officers while in the discharge of their official duties, yet it does not clothe them with a mantle of immunity against a violation of its precepts or the rights of the citizen, nor does it give to his acts such a sanction as to require the citizen to submit to an invasion of the latter's rights without resistance. It seems to be conceded that if an officer, by virtue of a process against one person, offers to take into custody another, he may be resisted, and that the officer alone will be responsible for the consequences. Upon this principle, then, the resistance of the defendant was justifiable, for the law equally allows the protection of one's property and person from illegal aggression. From the principles thus stated, it results that, in a case like the present, each party acts at his peril, and he only is amenable to the law who it can be shown has violated it. If the officer acts in violation of the command of his writ, by attempting to seize the person or property of one not liable to be taken by it, he becomes the wrongdoer, and may be resisted; but if it turns out that the person or property was subject to its operation, then those who resist its execution are guilty of an infraction of the law and subject to its punishment. This reciprocal obligation to look to, and abide by the consequences of their conduct, is just and equal, and whatever hardship or inconvenience this may impose upon the officer is a consequence incident to the nature of his office; but there is little necessity for him either to incur responsibility, or to allow the mandates of the law to be put at defiance, for he is not required to levy a writ against the property of one man, upon that of another; and when his opinion as to the ownership of property in possession of, or claimed by another, is well grounded, he may call to his aid the power of the county in executing his process; and after levy, he can have a controverted title tried by a jury, whose verdict will be a guide and warrant for his future action: while on the other hand, to deny to the citizen the authority to assert his undoubted rights, but require him quietly to submit to their invasion, under color of process, at the mere caprice of every one clothed with a little brief authority, would be to convert the law, which he should be able to look to for protection against wrong, into a scourge and an instrument of oppression. It will not do to say that the individual should appeal to the law in every case, and submit to a trial of the right of property.

This would unquestionably be prudent in doubtful cases, but in many it would be a very inadequate remedy, and in some a mere mockery of justice. Suppose an officer should, out of pure wantonness, seize the horse of a traveler upon the highway, under the authority of a writ against the property of another, or even without any writ, for his authority for the act would be the same in either case. Can it be contended that the owner of the horse would have no right to repel this aggression on his property? Surely not."

The doctrine that an illegal levy may be resisted by force has been limited by the Alabama court to cases in which the direction to levy is general, the court holding that where the mandate specifies the property to be seized no one can be justified in obstructing or interfering with its execution. *Smith v. State*, 105 Ala. 136, 17 So. 107. So it has been held that the owner of property exempt by law from levy may use all necessary force in defending it against seizure under process. *State v. Johnson*, 12 Ala. 840, 46 Am. Dec. 283.

While the owner of property may resist by force the execution of a void writ, *Lassiter v. State*, 73 Tex. Crim. 35, 162 S. W. 710, it has been held that he cannot do so where the writ is merely informal or voidable. *Witherspoon v. State*, 42 Tex. Crim. 532, 61 S. W. 396, 96 Am. St. Rep. 812. In *People v. Mines*, 164 Ill. App. 658, wherein the defense to a prosecution for assault and battery on an officer attempting to serve a writ of dispossession was that the judgment on which the writ was issued was defective, the court stated the rule as follows: "It would be an intolerable doctrine to hold that an officer receiving a perfect process issued by a court which had jurisdiction of the subject-matter and of the parties, may be shot with impunity by the defendant in the writ while the officer is executing it, if it shall turn out that there is some defect in the judgment upon which the writ was issued. If that were the law, then every sheriff and constable must consult a lawyer before executing a writ and have the judgment examined and an opinion thereon, and even then would be liable to be shot if his lawyer made a mistake in his advice. But again, even if the judgment was defective and that defect would give the defendant in the writ a right to resist, it would give him no right to kill the officer, where there has been no violence used against his person."

It has been held that a constable who was unlawfully appointed might be resisted in the execution of a levy on the ground of defense of property. *State v. Briggs*, 25 N. C. 357. And in *People v. Ross*, 19 Cal. App. 469, 126 Pac. 375, it was held that a city

recorder, who without a proper search warrant entered the dwelling of a citizen to search for liquor, was a trespasser and might be ejected by the owner with such force as might be necessary, though not to the extent of committing homicide.

Though armed with a valid writ and in the lawful exercise of his duties it is generally held that an officer may not break and enter the home of the debtor in order to levy the writ on his property contained in the house. And if he attempts to do so he may be resisted by force. *People v. Hubbard*, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; *Curtis v. Hubbard*, 1 Hill (N. Y.) 336; *Com. v. Moreland*, 9 W. N. C. (Pa.) 272. But where an officer enters peacefully and in the lawful discharge of his duty, neither he nor the execution creditor whom he takes with him for assistance are trespassers, and the owner is not justified in using any force to remove them. *People v. Sylva*, 143 Cal. 62, 76 Pac. 814.

It has been held that a charge of assault and battery cannot be defended on the ground of the defense of habitation, where the officer assaulted states that he had a warrant for the arrest of a person in the house and demanded admittance and on refusal broke the door, as in such a case the officer could not be treated as a trespasser. *Com. v. Irwin*, 1 Allen (Mass.) 587; *Com. v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510. In the case last cited it was said: "An officer, who is provided with a warrant to arrest one charged with a misdemeanor, and who has information which leads him reasonably to believe that the person sought is within the dwelling house of a third person, upon notice to such third person that he has a warrant against one who is in the house, and, upon demanding admission, such admission being refused, is entitled, for the purpose of serving his warrant, to make forcible entrance through the outer door of the house; and . . . the officer cannot be treated, when he has thus entered, by the owner of the house, as a trespasser therein, even if he has failed to notify the owner who the person sought to be arrested is (no inquiry having been made in relation thereto), and even if such person is not actually within the house. The doctrine that a man's house is his castle, which cannot be invaded in the service of process was always subject to the exception that the liberty or privilege of the house did not exist against the king. It had no application, therefore, to the criminal process. Even in case of a misdemeanor, while it has been held in some cases that, before breaking open the outer door, the officer should demand admission, it is fully recognized in all the cases, that, after such demand and its refusal, the of-

ficer may lawfully enter by force and serve his process, even if it be against the occupant of the house."

Degree of Force.

GENERALLY.

While a man may use as much force as is necessary in the defense of his property it is generally held that in the absence of the use of force on the part of the trespasser, he is not justified in the use of such force as to inflict great bodily harm or to endanger human life. *Collins v. Renison*, Say. 138, 96 Eng. Rep. (Reprint) 830; *People v. Teixeira*, 123 Cal. 297, 55 Pac. 988; *Golibart v. Sullivan*, 30 Ind. App. 428, 66 N. E. 188; *Littlefield v. Littlefield*, 114 Me. 494, 96 Atl. 789; *Gates v. Lounsbury*, 20 Johns. (N. Y.) 427; *Scribner v. Beach*, 4 Denio (N. Y.) 448, 47 Am. Dec. 265. In *Golibart v. Sullivan*, supra, it was held that to seize, bind and imprison a boy caught stealing cherries was the use of excessive force in the protection of property. And in *Gates v. Lounsbury*, supra, it was held that to beat and knock down a trespasser could not be justified on the ground of defense of property. In *Scribner v. Beach*, supra, wherein it appeared that the owner of property knocked down a trespasser with his fist and struck him with a rake handle hard enough to break his arm it was held that the force used was unnecessarily violent. In *Collins v. Rennison*, supra, it was held that to throw down a ladder on which a trespasser was standing whereby he was severely injured could not be justified on the ground of defense of property.

But it has been held that where the legal justification of defense of property existed for the use of reasonable force, that fact would operate to reduce the offense of using more violence than was necessary from an aggravated assault to a simple assault. *Filkins v. People*, 69 N. Y. 101, 25 Am. Rep. 143.

USE OF DEADLY WEAPON.

The use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force and to render the owner of the property liable both civilly and criminally for the assault. *Rauck v. State*, 110 Ind. 384, 11 N. E. 450; *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257; *Shriver v. Bean*, 112 Mich. 508, 71 N. W. 145; *Robinson v. Stimmer*, 154 Mich. 244, 117 N. W. 634; *State v. Smith*, 12 Mont. 378, 30 Pac. 679; *Braddy v. Hodges*, 99 N. C. 319, 5 S. E. 17; *State v. Scott*, 142 N. C. 582, 55 S. E. 69, 9 L.R.A. (N.S.) 1148. In *State v. Morgan*, 25 N. C.

186, 38 Am. Dec. 714, the court stated the rule as follows: "When it is said that a man may rightfully use as much force, as is necessary for the protection of his person or property, it should be recollected that this rule is subject to this most important modification, that he shall not, except in extreme cases, endanger human life or [do] great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong, that may rightfully be redressed by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty—in taking or endeavoring to take the life of a fellow being, in order to save one's self from a comparatively slight wrong—which is essentially wicked, and which the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. Thus an officer, acting under a legal process, has a right to arrest the person against whom it is directed, and to retake him, if he break custody; and for such purpose he may and ought to use necessary force—yet, if the process be in a civil case, or a misdemeanor only, and the officer, although he cannot otherwise arrest or retake his prisoner, intentionally kills him, it is murder. . . . The purpose is indeed rightful, but it is not one of such paramount necessity as to justify a resort to such desperate means. So it is clear, that if one man deliberately kills another to prevent a mere trespass on his property—whether that trespass could or could not be otherwise prevented—he is guilty of murder. If indeed he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own."

In *State v. Martin*, 52 Mo. App. 609, wherein it appeared that a constable's bailee in protecting a lot of corn intrusted to his protection threatened those attempting to take it with a shotgun, the court stated the rule as follows: "While perhaps it was the duty of the defendants to protect their bailment, they were not authorized by any law with which we are acquainted to use the 'shot gun argument' in its defense. The defendant Martin had only been requested to notify the constable in case of the interference with the corn. The conduct of the defendants can find no justification in the law. The rule of law is everywhere recognized to be that one, in the defense of his

person, relatives or property, must not employ more force than is necessary for that purpose. So in resisting aggression on his property the law justifies no greater force than is necessary in the exercise of a reasonable and proper judgment to prevent the consummation of the injury. . . . If defendants had shot and killed Frazier the homicide thus committed would have been neither justifiable nor excusable under our statute. According to the evidence there seems to have been neither occasion nor excuse for the rude, angry and threatening manner in which the defendants exhibited their guns to Frazier and the other persons who were with him. Such unprovoked conduct was calculated to provoke riot and bloodshed."

But in *State v. Yancey*, 74 N. C. 244, it was held that a threat to use a deadly weapon may be justifiable in the defense of property, although a battery with the same may not be. The court applying the doctrine said: "The prosecutor at that time was committing a trespass upon the property of the defendant in his presence, by holding on to the defendant's saddle and claiming it as his own, and calling to another for help with the purpose of taking it by force, as the defendant had reasonable ground to believe. This conduct of the prosecutor was not such as to justify an actual battery with the knife in the first instance; but the defendant had the right to do what was necessary to make the prosecutor let go his saddle, beginning with moderate force, and increasing in the ratio of the resistance, without measuring it in golden scales. We are not left to any speculation as to whether he used too much or too little force; for the result shows that he used just enough to accomplish his purpose. If he had used more he would have injured the prosecutor. If he had used less, and allowed the prosecutor's help to come up he would have lost his property, or engaged in an unequal contest, with probably serious consequences."

However, the use of a deadly weapon to repel a trespasser about to injure property is not necessarily the use of unreasonable force, the true rule being that each case is governed by the necessity as presented therein. *Dinan v. Gibbon*, 63 Cal. 387, wherein it was said: "If the defendant used the weapon 'to resist the encroachment of the plaintiff' as a trespasser on his premises, such use would not be unlawful, unless it was unnecessary. For there is no doubt that a person in the lawful possession of premises has a right to protect them or to eject an intruder upon them; and in the exercise of his right, for that purpose, he may use such force as may be reasonably necessary. Acting within the limits of a reasonable use

of force to protect himself or his property he is justifiable in law; but if he exceeds the force necessary he becomes a trespasser *ab initio*."

Where a trespasser goes on property with the intent and with the means to commit an assault or a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force. *State v. Brittingham*, 2 Boyce (Del.) 330, 80 Atl. 242; *Shain v. Markham*, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; *Fossbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866; *Layman v. State* (Okla.) 156 Pac. 907. Thus where a trespasser armed with a pistol invades the premises of another with the declared intention of taking and carrying away certain property, the owner is justified in defending his possession with a pistol. *People v. Dann*, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151. Similarly, where a mob under threats of personal injury invades the premises of another and attempts to remove his personal property with the avowed intention of destroying it, it has been held that it cannot be said as a matter of law that the use of a shotgun is the use of more force than is necessary for the defense of property, but the question should be left to the jury. *Atkinson v. State*, 58 Neb. 356, 78 N. W. 621, wherein it was said: "We do not decide whether the prisoner was, under the circumstances detailed in the evidence, justified in shooting King. Whether he was or not was a question of fact for the jury, and this defense the prisoner was entitled to have the jury pass upon; and by the instruction under consideration the court took that theory entirely from the jury and in effect instructed them to find him guilty. We are not justifying the possessor of property for shooting one who is committing a trespass thereon. But here was a man in his own home, in the peaceable and quiet possession of his property. A howling mob of brawlers, masquerading under the name of 'Hallowe'eners,' is parading the streets of his town injuring and destroying property, threatening to take the property of this prisoner and destroy it, threatening him with bodily injury if he interferes, and this mob takes possession of his property and attempts to take it away. It was for the jury to say whether the prisoner, as a reasonable human being, was justified under the circumstances in making the assault he did for the purpose of protecting his property, for he certainly had the right to protect his own."

Under the *Texas* statute (Penal Code, art. 593), which provides that violence used to the person does not amount to an assault and battery when committed in the defense of the lawful possession of property, it has

been held that the owner of property may arm himself with a deadly weapon and if all other means fail may use it in the protection of his property. *George v. State*, 47 Tex. Crim. 545, 84 S. W. 1057; *Wenzel v. State*, 48 Tex. Crim. 625, 90 S. W. 28; *Roch v. State*, 52 Tex. Crim. 48, 105 S. W. 202. See also *Johnston v. State*, 19 Tex. App. 545. In *Lassiter v. State*, 73 Tex. Crim. 35, 163 S. W. 710, wherein it appeared that a constable was attempting to take a mule under a void writ, the court stated the Texas rule as follows: "We are of opinion that the following requested instruction should have been given: 'When W. A. Simington attempted to seize and levy upon defendant's mule, the defendant had the right to arm himself with a shotgun and go to where Simington was and to forbid the said Simington taking said mule, and the fact that defendant so armed himself with said shotgun should not be taken as a circumstance against him in this case.' The law seems to be well settled that appellant would have the right under the circumstances of this case to arm himself and forbid Simington from interfering with his home and his property. . . . Appellant had the right to defend his home and he had the right to arm himself and go where Simington was and forbid his entry upon his premises or to seize his property, and if he could not get rid of him otherwise and it became necessary to do so, he had the right to shoot, even the right to kill. This was a case of apparent danger. It was also a case of the defense of a man's home and his property and the rights involved against a trespasser who had come and threatened to take the property of appellant without any process of law for that purpose and with the further express purpose that if he interfered with him he would hurt or kill him." And in *Vann v. State*, 43 Tex. Crim. 244, 64 S. W. 243, wherein it appeared that the owner of land by the use of a gun drove away a trespasser who was cutting timber on the land, the court said: "We would not be understood as holding that one in the first instance would have the right to assault a person in order to prevent an intrusion upon his possession of property, or to cause one to leave premises he was trespassing upon. But we hold that one who is in the lawful possession of property has the right, as against a trespasser, to arm himself for his protection, and go to where the trespass is being committed, and request such person to leave; and, if the trespasser refuses to go, he can insist upon his going, and use all reasonable means to compel him to leave, using no more force than is reasonably necessary. And if, under such circumstances, he is himself attacked, he can oppose force with force."

DEFENSE OF HABITATION.

Where the property attacked is the home or habitation the rule limiting the use of force in its defense to such as will not endanger life or do great bodily harm does not apply, and it is generally held, on the theory that a man's house is his castle, that after a warning to desist he may use any and all such force as may be necessary to repel the intruders. *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116; *State v. Mills*, 6 Penn. (Del.) 497, 69 Atl. 841; *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508; *State v. Raper*, 141 Mo. 327, 42 S. W. 935; *Sage v. Harpending*, 49 Barb. (N. Y.) 166; *Com. v. Eyre*, 1 Serg. & R. (Pa.) 347; *State v. Lightsey*, 43 S. C. 114, 116, 20 S. E. 975. And see the reported case. See also *Hickey v. U. S.* 168 Fed. 536, 93 C. C. A. 616, 22 L.R.A. (N.S.) 728. The rule was stated in *Foye v. Sewell*, 21 Abb. N. Cas. (N. Y.) 16, as follows: "Every man is entitled to the quiet and peaceable possession of his own house; so zealously does the law protect one in the occupation of his home, that even an officer of the law in the execution of civil process is not permitted to force himself into a man's house, except in certain cases, which it is not now necessary to specify. It has often been called his castle, and this he has a right to defend with all necessary force against intruders who enter or attempt to enter against his will." And in *Newcome v. Russell*, 133 Ky. 29, 117 S. W. 305, 22 L.R.A. (N.S.) 724, the court after stating the rule applicable to the expulsion of a mere trespasser said further: "It should be observed that the principle we have announced does not apply to a trespass committed under circumstances of aggravation upon the home of a person. When a man's home is invaded, after a request to desist, the owner may resort to such means as are necessary in the exercise of a reasonable judgment to expel the intruder."

So where an attack was made by a rioting mob, it was held that the use of firearms was justified. *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428. 11 L.R.A. 138, wherein the court said: "We think the charge is faulty because it did not point out to the jury the essential difference between an assault by one person and by a body of rioters. An assault in the latter case always inspires more terror and is attended with greater danger than in the former: for, as defendant's counsel says, when a number of men combine to do an unlawful act a kind of emulation is excited which leads one after another to go to greater and greater excesses and to resort to more flagrant acts, so that a person assaulted by a mob in that way is necessarily, from the nature of the case, subject to greater

terror and apprehension than when the assault is made by an individual, and the assaulted party may act with more promptness and resort to more forcible means to protect himself and suppress the riot than in the latter case. Here the rioters were firing guns, blowing horns, drumming on pans, and making all kinds of hideous noises (76 Wis. 301), and kept up this tumultuous uproar for hours, until his wife and youngest daughter were nearly frightened to death. The defendant could not tell when they would attack his dwelling house, or shoot him, or personally assault him; and in the excitement and confusion the law would justify or excuse him in the use of fire-arms for the safety of himself and family, when such means might not be resorted to in the case of an assault by an individual. This idea, or difference between an assault by one and by a larger number, is embraced in the eleventh and twelfth and some of the other instructions asked by the defendant, and the point should have been clearly and emphatically impressed upon the minds of the jury, for the difference is great, and common experience teaches that the danger to life and property is immeasurably greater in one case than in the other. The trial court should have charged in the language of the eleventh request, or in some equivalent language, that 'a riot is regarded in law, always, as a dangerous occurrence because when rioters have convened in a tumultuous and disorderly manner, and have actually begun to accomplish an unlawful act, to the terror or disturbance of others, the prompting of one rioter is contagion to another, and it is impossible to conjecture or ascertain beforehand to what extremities of lawlessness or crime the excitement and confusion may lead. . . . A private person, who cannot otherwise suppress them or defend himself from them, may justify or excuse the use of fire-arms or other deadly weapons, because it is both a right and a duty to protect one's self and family, and to aid in preserving the peace.'"

Under the *Georgia* statute (Penal Code 1910, § 72) which provides that it shall be justifiable to shoot, and even kill, to prevent a forcible attack or invasion on the property or habitation, it has been held that where one whose premises were invaded by a riotous mob, who laid siege to his habitation and continued their rioting, shot into the mob and wounded one of its members, he did not commit the offense of assault with intent to kill. *Rhodes v. State*, 10 Ga. App. 68, 72 S. E. 518.

But a person who pursues another who has been trespassing against his house, and inflicts serious bodily injury on him cannot claim that the assault is committed in de-

fense of habitation. *Wolf v. Crook*, 163 Ill. App. 511, 514, wherein it was said: "While the law recognizes a man's home as his castle and permits him to defend it against assault or against assault against any member of his family while therein, the evidence does not disclose that any such assault was made. At the time of the injury, plaintiff was not upon the premises of the defendant; the defendant had followed the plaintiff and his companions for a considerable distance after discovering them and began the attack without any provocation at that time from the plaintiff. The law does not permit a person to avenge himself of his grievances in this manner. There was no assault being made upon either defendant or his habitation at the time he committed the acts complained of; he had had time then to consider what had been done and realize and know that at the time he committed the assault upon the plaintiff he was in no danger personally of receiving any harm and his habitation or anyone therein was in no danger of being injured; his action in this regard was neither in defense of his habitation nor of himself and was wholly unjustifiable." So in *Hadley v. State*, 58 Ga. 309, it was said: "Shooting at a person after he has fought you in your shop, sixty yards from your dwelling, and when he has left the shop and is trying to avoid you by running toward his own home, is not shooting in defense of habitation."

A boat used for carrying passengers is not a dwelling within the rule that the owner may protect it by force from unlawful trespass. *People v. Bernard*, 125 Mich. 550, 84 N. W. 1092, 65 L.R.A. 559, wherein it appeared that the owner of a small boat used for hire shot and wounded an officer attempting to make a levy on the boat. The court said: "The claim made by counsel for respondent that this boat was a dwelling house, and that respondent was justified in resisting an attempt to enter it or seize it, finds no warrant in this record. The boat was a common carrier of passengers for hire. The fact that respondent slept at night on a seat in the boat could in no manner change the character of the boat and transform it into a dwelling house."

QUESTION FOR JURY.

Whether the force used by an owner of property in its protection against aggression was more than the attack thereon warranted is a question of fact for the jury to determine under proper instructions from the court. *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202; *Wharton v. People*, 8 Ill. App. 232; *Carter v. Sutherland*, 52 Mich. 597, 18 N. W. 375; *State v. Goode*, 130 N. C. 651,

41 S. E. 3. In *Souther v. State*, 18 Tex. App. 352, the court stated the rule as follows: "Violence does not amount to an assault when committed in defense of one's property against the unlawful violence of another offered towards said property . . . ; and where force is used to prevent such violence it is for the jury to say whether it was necessary to effect the purpose . . . or whether it was in excess of or disproportioned to the aggravation and impending danger to the property. If the intention of the defendant was only to protect and defend his property against threatened and impending violence, then, although unjustifiable means might have been resorted to, it was still a question for the jury to decide as to whether under all the circumstances the violence used was with intent to injure the party or for the purpose of protecting his property."

In *Dinan v. Gibbon*, 63 Cal. 387, wherein it appeared that the owner used a gun in a threatening manner in order to prevent the destruction of a shed on his premises, the court declaring to be erroneous an instruction telling the jury that "the very fact that the defendant used this unlawful weapon gives the plaintiff the right to recover," said: "The necessity of the force which was resorted to, to repel the 'encroachment' of the plaintiff upon the defendants' premises, and the question whether the defendants used more force and violence upon the person of the plaintiff than was necessary for the protection of their property should have been left to the jury. It was interfering with their constitutional right to determine all matters of fact, for the court to instruct them that the mere use of the weapon to resist the encroachment of the plaintiff gave him the right to recover."

It is proper that the jury in determining whether the amount of force used in the defense of property was justifiable, should consider all the surrounding circumstances, such as the relative size and age of the parties, etc. *Thomason v. Gray*, 82 Ala. 291, 3 So. 38, wherein it was said: "It was competent for the jury to look at the age and relative size of the parties, if satisfactorily proven, in determining the amount of force which was necessary to be used by the defendant in putting the plaintiff off of his premises. The jury might more readily conclude that a man of proportionally large size would be more culpable in resorting to the use of a knife for such a purpose, than a relatively small man might be under like circumstances." So in *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116, wherein it appeared that the owner was an old man weighing only one hundred and twenty-eight pounds and was in bad health while the trespasser was a man forty-

five years of age, weighing one hundred and seventy pounds, and in good health, the court said: "In determining such a question, due allowance should always be made for the difficulty which a reasonable man would have in measuring, under exciting circumstances, the exact amount of force necessary."

It has been held that where the evidence is clear and unmistakable, the court is warranted in holding as a matter of law that the force used in defending property was not unnecessary or excessive. Thus where it appeared that a burglar was caught in the act of reaching through a window, which he had previously broken, to remove articles therefrom, it was held that the court was justified in declaring that stabbing the arm and wrist of the burglar was not the use of excessive force. *Devor v. Knauer*, 84 Ill. App. 184.

Reality of Threatened Danger.

In order to justify an assault on the ground of defense of property it is not necessary that the aggression should be actually commenced, if from all the circumstances there is reasonable ground to believe that the attack is imminent and that the use of force is necessary to stop it. *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52. In *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L.R.A. 138, wherein it appeared that an attack was made by a riotous mob threatening to do the owner and his family and property serious harm, the court stated the rule as follows: "If a person is assaulted in such a way as to induce in him a reasonable belief of danger of losing his life or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, only apparent. Such a person will not be held responsible civilly or criminally if he acts in self-defense, from real and honest convictions induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. A person need not be in actual imminent peril of his life or of great bodily harm before he may shoot his assailant; it is sufficient if in good faith he has reasonable ground from the facts, as they appear to him at the time, to apprehend a design to commit a felony, or to do some great personal injury, and reasonable cause for believing that there is imminent danger of such design being accomplished." But in *Palmer v. Smith*, 147 Wis. 70, 132 N. W. 614, which was a similar action though it did not appear that the crowd was actuated by evil intentions or threatened any injury to the person or property of the owner, the court limited in a measure the rule as stated in *Higgins v. Minaghan*, supra, as follows: "True, there is language

used in *Higgins v. Minaghan*, 76 Wis. 298, 45 N. W. 127, to the effect that the defendant is justified in acting for his defense according to the circumstances 'as they appear to him.' But we do not understand that it was the intention of the court in that case to lay down any such general rule, nor do we understand it to be the law that the defendant would be justified in shooting on the arbitrary ground alone that it appeared to him necessary, if upon the facts and circumstances of the case, as they appeared at the time, there was no reasonable ground for such apprehension." In this connection the court held the following instruction to be a correct exposition of the law: "You should bear these instructions in mind and consider them in connection with the evidence as to the acts and intentions of the plaintiff and his companions, so far as they were known to the defendant, as well as the character of the individual members comprising the group, and their disposition toward him, whether friendly or otherwise, so far as known to him, in determining whether or not, at the time of the shooting of the plaintiff, the defendant had reasonable ground to apprehend a design to do him or his wife great personal injury, or to commit a felony against his property, and whether he had reasonable cause for believing that there was imminent danger of such design being accomplished."

Fear or mere suspicion that an intruder may encroach on his possession will not justify an assault as the owner cannot use force unless it is really necessary to prevent an injury to his property. *McAuley v. State*, 3 Greene (Ia.) 435.

An assault cannot be justified on the ground of the defense of property where the injury to the property has previously taken place and cannot be prevented. *Territory v. Drennan*, 1 Mont. 41, wherein it appeared that the user of water shot and wounded one who had cut off his supply. The court said: "It is true that when a party is in the act of committing a forcible trespass upon the person of another, or property of which he is in possession, force may be used by the assailed sufficient to repel the trespass. But it does not appear, from the testimony offered, that Patrick Dalton was in the act of committing a trespass upon the property of the defendant, of which at the time he was in possession, and that, to repel this trespass, he was compelled to use the force he did. The evidence goes to show that Dalton had already shut off the water from the defendant's claim, and deprived him of the use of it, when he sought to redress his grievance by shooting Dalton. It certainly does not appear that the defendant did this shooting in repelling a forcible trespass upon his

property, of which he was in the actual possession, which Dalton was at the time in the act of committing. If the defendant had offered to prove such facts, they would certainly have been admissible. The fact that the defendant, while he was in possession of, and working his mining claim, shot Dalton because he had shut off the supply of water in the gulch, which the defendant may have been entitled to, is surely no justification of the offense charged in the indictment."

Notice to Desist.

Unlike a mere trespasser, one who engaged in a forcible attempt to injure, destroy or carry away the goods or property of another may be expelled by force without notice or warning to desist. *Polkinhorn v. Wright*, 8 Q. B. 197, 115 Eng. Rep. (Reprint) 849; *Weaver v. Bush*, 8 T. R. 78, 101 Eng. Rep. (Reprint) 1276; *Tullay v. Reed*, 1 C. & P. 6, 11 E. C. L. 297; *Simpson v. Morris*, 4 Taunt. 821, 128 Eng. Rep. (Reprint) 555; *Green v. Goddard*, 2 Salk. 641, 91 Eng. Rep. (Reprint) 540; *Scribner v. Beach*, 4 Denio (N. Y.) 448, 47 Am. Dec. 265; *Filkins v. People*, 69 N. Y. 101, 25 Am. Rep. 143; *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L.R.A. 138. In *Scribner v. Beach*, supra, the rule was stated as follows: "Unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses, he should gently lay his hands on him for the purpose of removing him, and if he resist with force, then force sufficient to expel him may be used in return by the owner. . . . It is otherwise, if the trespasser enter the close with force; in that case the owner may, without previous request to depart or desist, use violence in return, in the first instance, proportioned to the force of the trespasser, for the purpose, only, of subduing his violence."

Holding that the owner of premises need not order a threatening mob about to attack his house to disperse before firing at them, the court in *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L.R.A. 138, stated the rule as follows: "We do not think the defendant was bound to notify the charivari party that their shooting, noise, and tumult were causing terror and fright to his wife and children, and were seriously injuring them in mind, body, and health. This was the third night these persons had been engaged in these unlawful and criminal proceedings. On the first night they came the defendant had warned them away, and directed them to desist. The rioters themselves knew, or

should have known, that their acts and conduct about the house, in the night, were well calculated to produce terror and fright, and injuriously affect the defendant's family. This was the direct, necessary, and almost inevitable consequence of their acts. If the defendant had again requested them to desist and go away, had told them they were causing serious bodily harm to his wife and children, his notice and warning would probably have been received with derision, insulting remarks, and vile abuse, as they had been on previous occasions. So we think it was error to charge that the defendant was bound to inform the charivari party of the fact that their riotous conduct was endangering the life of his wife and children, before taking effectual means, by shooting or otherwise, to drive them away. The circuit judge evidently held that the defendant had no right to fire into the body of rioters without notice and without having commanded them to disperse; but upon the undisputed facts of the case the law imposed upon him no such duty."

But it has been held that where the danger is only apparent, the owner must warn the offender to desist before he can justify an assault on the ground of the defense of his home. *Spires v. Barrick*, 14 U. C. Q. B. 420, wherein it was said: "The defendant states the threats used, and that he believed and had reason to believe that the plaintiff and the others were about to tar and feather him, and that being armed and riotously assembled they were apparently breaking into his house; and he relies on this as sufficient justification for his doing all that he is charged with doing; but we think it was necessary for him, according to adjudged cases, before he fired upon the plaintiff, to have warned the party to desist and to depart, or that he would fire. Such request to depart would not have been necessary, perhaps, if the defendant had been actually advancing upon the plaintiff in the attitude of assaulting him, and still less if any of them had actually struck him; but firing at another cannot be justified upon the ground of threats of personal violence merely, or by the fact of the defendant believing and having reason to believe that they would execute their threats, or by the plaintiff being apparently in the act of breaking into the house. If a man sees another, as he supposes, breaking into his house, and without notice fires at him and wounds him, it will not be a legal justification for him to allege that the man was apparently breaking into his house. Here there were threats accompanying the appearance; but still we consider that without something more that would not justify, without warning or requesting the party to desist."

So in *Howell v. Hopkins*, 8 Ky. L. Rep. 527, it was said: "And he should further show that he used all reasonable means to induce the plaintiff to leave his premises and refrain from committing the contemplated trespass before he resorted to force. Nor does the fact that the defendant had notified the plaintiff before the time of the assault not to commit the trespass dispense with the necessity of then and there endeavoring by peaceable means to prevent him from doing the act before resorting to force."

Where excessive force was used in the defense of property the question whether a warning to desist was given was held to be immaterial in *Rex v. Kinman*, 16 British Columbia 148, 18 Can. Crim. Cas. 139, 17 West. L. Rep. 439, wherein it was held that the law as stated in the following submission by the lower court was correct: "I made no finding upon the question as to whether or not warning had been given by the accused to Kumer before striking him with the club used on the occasion referred to in the evidence, considering it unnecessary, because I found that the assault was savage, hot-tempered and unnecessary, and therefore could not be justified by any warning even if such had been proven."

Persons Entitled to Defend Property.

As a general rule the owner or an occupant in lawful possession of property may defend it against aggression by the use of such force as may be reasonably necessary. Thus a mortgagee in possession of goods and chattels has a property in the same which he may defend in the same manner that he may that of which he is the absolute owner. *Wentworth v. People*, 4 Scam. (Ill.) 550. But where possession is retained by a mortgagor, the mortgagee temporarily taking possession in the absence of the mortgagor cannot defend a charge of assault on the mortgagor on the ground of defense of property as his possession is inferior to that of the mortgagor. *Perkins v. West*, 55 Vt. 265.

In the absence of a special agreement to the contrary a landlord retains such possession as will justify him in repelling by force any effort made to remove property by a cropper. *State v. Austin*, 123 N. C. 749, 31 S. E. 731. And a tenant has the same right as his landlord to defend the property in his possession. *Corey v. People*, 45 Barb. (N. Y.) 262.

It has been held that a guest in a house may be justified in the use of force in resisting the efforts of a sheriff to break into a house to levy process. *Curtis v. Hubbard*, 1 Hill (N. Y.) 336, wherein it was said: "The outer door being shut, is equally a protection, whether the owner or possessor

be within at the time or not. It is a general and unqualified protection against an officer having civil process, for the man, his family and goods. . . . And this includes every guest who is at the house, and also his goods, unless he has flown to the house, or carried his goods there, in order to avoid the process."

The finder of property may defend his possession by force against all but the true owner. *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

In *State v. Cleaveland*, 82 Vt. 158, 72 Atl. 321, it was held that one owning land adjacent to a highway did not lose possession because of the temporary removal of a fence to allow for excavation when he continually asserted his right to the strip of land involved, and so might justify an assault on a road commissioner on the ground of defense of property.

—
STATE
v.
SELENGUT.

Rhode Island Supreme Court—October 25, 1915.

38 R. I. 302; 95 Atl. 503.

Assault — Defenses — Defense of Property — Resisting Officer.

The owner of property may not maintain his possession thereof by force against an officer attaching it as the property of another.

[See note at end of this case.]

Exceptions from Superior Court, Providence and Bristol counties: SWEENEY, Judge.

Criminal action. Benjamin Selengut convicted of assault on officer and alleges exceptions. The facts are stated in the opinion. **AFFIRMED.**

Antonio A. Capotosto for state.
Frank H. Wildes for defendant.

[302] VINCENT, J.—The defendant was found guilty in the Superior Court, of an assault upon an officer and the case is now before us upon the defendant's exceptions.

On August 2, 1911, one Samuel Brown, a police constable, having power to serve civil process, was charged with the service of a writ of attachment issued against one Harry

Rubin at the suit of Benjamin Newman. Brown, in his capacity as a constable, proceeded to attach certain personal property which was pointed out to him by Newman as the property of Rubin, said property being at the time upon an express wagon standing in the public street.

[303] Upon learning that the property had been thus attached, the defendant, Selengut, asserted his title thereto and upon the refusal of the officer to release it from the attachment and permit him to take possession of it he endeavored to obtain possession thereof by force and in so doing committed an assault upon the officer.

The defendant, upon complaint duly made, was found guilty of assault and battery in the district court and taking an appeal was tried in the Superior Court, where a verdict of guilty was rendered by a jury. The defendant took several exceptions in the course of the trial in the lower court. The exception upon which the defendant now relies is to that portion of the charge to the jury in which the trial judge said that "a person claiming to be the owner of personal property and in the possession of the same is not justified in assaulting a known officer who attempts in good faith to attach the same upon lawful process running against a third person as the goods and chattels of said third person while the same are being transported on a public highway, although such assault is necessary to prevent the property from being taken by such officer."

This exception raises a question of law which does not appear to have been determined in this state and one upon which there is some conflict of authority. The state contends that in the interest of public peace and order the charge of the trial judge should be sustained and the defendant's exceptions overruled. On the other hand the defendant claims that this court should follow the doctrine laid down by the Massachusetts Court in the case of *Com. v. Kennard*, 8 Pick. 133, which holds that where an officer attempts to take goods belonging to A. and in A.'s possession upon a writ against B., A. may maintain his possession by force in the same manner as he might against any trespasser who is not an officer. In several of the states where this question has arisen, the decision of the Massachusetts Court has not been followed and in some it has been severely criticised as an unsafe, impracticable, and [304] unsound rule, having a tendency to promote disturbances of the peace.

In *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482, which seems to be the leading case in support of the contention of the state the court said: "It is well settled that one may defend the possession of his property against a stranger with such force as may be neces-

sary. But this right cannot be extended to the case of an officer whose duty it is to attach property whenever he is requested so to do. He may or may not require indemnity for the act. But it would be too much to say that he must decide all cases of doubtful property at his own hazard, or that if he attempted to make an attachment when the property was not in fact in the debtor, he might by the owner of the property be resisted to any extremity. . . . And if the owner of property may resist an officer in its defence, so may one who believes himself the owner; for it would not do to predicate crime upon so subtle a distinction as an abstract right of property. It must be something more tangible.

"We believe the better and safer and only practicable rule to be, that whenever the question of property is so far doubtful that the creditor and officer may be supposed to act in good faith in making the attachment, the owner of the property even cannot justify resistance, but must yield the possession and resort to his remedy by action. This is the only mode in which the question could be tried. And unless such a rule be adopted, no human sagacity is adequate to the decision of those nice questions which the duty of sheriffs and their officers involve."

In *State v. Fifield*, 18 N. H. 34, the court criticises the Massachusetts case as unsound and accepts the rule laid down in the case of *State v. Downer*, *supra*, and says: "The obvious tendency of the doctrine for which the defendant contends, to promote disturbances of the peace by emboldening parties, otherwise sufficiently disposed to be strenuous in cases of doubt, and to appreciate, in such cases, the benefits of actual possession and present use of the disputed [305] goods, suffices, of itself, to awaken the gravest doubt of its soundness."

In the case of *State v. Richardson*, 38 N. H. 208, 75 Am. Dec. 173, the doctrine laid down in *State v. Fifield* is affirmed and the reasons why the case of *Com. v. Kennard*, should not be followed are distinctly set forth. The court said: "To hold that an officer, duly qualified, and known to be so, may be resisted with impunity, while proceeding in good faith to attach property which he is directed to attach and indemnified for attaching as the property of the defendant in the process he is executing, by any person claiming to own that property, would impose upon every officer the necessity of investigating and deciding correctly at his peril every controversy in relation to the ownership of property shown to him as belonging to the debtor, before he could safely act. It is unnecessary to say how utterly impracticable and impossible this would be. No man who regarded his personal safety or pecuniary

interests would venture to attach personal property the title of which was in controversy, if such a rule were established and generally understood and practiced upon by the community. Besides, there is no occasion for such a rule. If the property of one person is taken upon a writ or execution against another, the law affords ample means of redress by a writ of replevin, an injunction, or other proceedings, without the owner's taking the law into his own hands. There is no such sacredness attached to personal property as can justify, in its defence, resistance to an authorized officer of the law, acting in good faith, under lawful process."

In the states of New York and Ohio the courts have followed the case of *State v. Downer* and expressly repudiated *Com. v. Kennard*. *People v. Hall*, 31 Hun (N. Y.) 404, *Faris v. State*, 3 Ohio St. 159. See also *Witherspoon v. State*, 42 Tex. Crim. 532, 61 S. W. 396, 96 Am. St. Rep. 812; *Mitchell v. State*, 101 Ga. 578, 28 S. E. 916.

In *State v. Cokely*, 4 Ia. 477, a case where the defendant assaulted a constable's assistant when he [306] attempted to levy an execution on property which the defendant claimed was exempt from seizure, the court said: "If the property was exempt as claimed, that fact furnished no justification to defendant for his assault on How, the constable's assistant. The legality of the levy was subject to be ascertained and determined by an appeal to the courts. The defendant had no right to take the law into his own hands, or to redress his own grievances by a resort to violence. The right to use force in defence of one's person and property does not authorize a defendant in execution to resist forcibly the officer in the discharge of his duty."

The defendant claims, in substance, that the title to the goods in question being in himself the officer was simply a trespasser whose aggressions he was justified in forcibly resisting to the same extent as he would have been justified in resisting those of any unofficial person. A sufficient answer to this contention is to be found in the case of *State v. Fifield*, *supra*, in which the court said: "It is true that the owner of goods in possession of them may, in general, resist a trespass designed to take them from his possession. It is also true, that the seizure of the goods of one person upon the process against another, is technically a trespass, for which the law has provided the same remedy as for wanton aggression of a stranger without color or excuse. But it does not necessarily follow that the two acts may not be distinguished in the particular under consideration. For one, preventive force is the only protection; for the other, the law has provided remedies so perfect as to take

away all excuse and all strong necessity or temptation for the exertion of such force."

We think that the rule established in the case of *State v. Downer*, supra, and recognized in and confirmed by the other cases cited should be followed by this court in the present proceeding. The officer charged with the service of a writ calling for the attachment of personal property, who attempts to discharge his duty in good faith, cannot reasonably be expected to assume the functions of a court of law and to [307] examine and determine the claims of others who assert title thereto. If their rights are invaded there are well known proceedings to which they may resort and through which they may obtain redress.

To say that anyone deeming himself to be the rightful owner of property may maintain his possession thereof, by force, as against an officer charged with the service of a writ of attachment, would be to promote breaches of the peace and would be against public policy.

The defendant's exceptions are all overruled and the case is remitted to the Superior Court for sentence.

NOTE.

The holding of the reported case to the effect that an owner of property cannot justify an assault on an officer attempting to seize it under a writ against a third person, is in accord with the rule in a majority of the jurisdictions in which this question has been determined. The cases discussing the defense of property as justification for an assault are reviewed in the note to *State v. Cessna*, reported ante, this volume, at page 289.

STATE

v.

FLANAGAN.

West Virginia Supreme Court of Appeals—
October 19, 1915.

76 W. Va. 783; 86 S. E. 890.

Assault — Defenses — Ejection of Trespasser.

A proprietor may order a trespasser off his premises and, if he refuses to go, he may use such reasonable force as may be necessary to expel him. But if he exceeds the bounds of reasonable force he is guilty of an assault.

[See note at end of this case.]

Ann. Cas. 1917D—20.

Same.

The right to eject an intruder is not limited to one's dwelling house, but applies to any property of which he has lawful possession.

[See note at end of this case.]

Error to Circuit Court, Doddridge county.

Criminal action. Walter N. Flanagan convicted of assault and battery and brings error. The facts are stated in the opinion. **REVERSED.**

M. K. Duty and *R. S. Blair* for plaintiff in error.

A. A. Lilly, *John B. Morrison* and *J. E. Brown* for defendant in error.

[783] WILLIAMS, J.—Defendant was indicted for a felonious assault upon Sylvester B. Waldo and was found guilty of simple assault and battery, fined \$100 and sentenced to thirty days in jail; and he brings error.

Hearing some shots fired in his woodland and suspecting that someone was hunting on his land, defendant called his nephew, Frank Flanagan, a boy fourteen years of age, and they went into the woods in search of the trespasser. Defendant went by one route and sent the boy by another. Presently defendant came in sight of the prosecuting witness, Waldo, who was carrying a gun. When he came within about twenty yards of Waldo, according to his own testimony, he called to him and asked him who had given him permission to hunt there, and Waldo replied, "I didn't know you didn't want me to hunt in here." A quarrel ensued, and defendant says Waldo cursed him, called him a liar, and grabbed his gun by [784] the muzzle and walked up to him; that he then called to his nephew to come there, and when the boy came, he said to Waldo, "Now, you get out of here," and that Waldo "swore he would not get out until he got damned good ready;" that he then put his hand against Waldo who grabbed the boy with both hands and shoved it up in his face; that he likewise took hold of the gun with both hands and a tussle ensued between them, he trying to wrest the gun from Waldo, and Waldo using all his force to retain possession of it; that in the scuffle over the gun Waldo cocked it and was trying to point it toward his stomach and he called the boy to get a club and hit him over the head, and that Waldo told the boy not to do that. Continuing, defendant says: "Somehow I threw the gun up and I struck him by the side of the head with my fist and knocked him back probably ten feet and he fell down and he was kind of kicking as I rushed up to him and he threw the gun right over towards me and I told the boy to hit him, and the boy hit him across

the forehead and kind of knocked him back, and he was raising with the gun again and I got the club and hit him over the arms or over the head, I don't know which, and in the tussle I got hold of the gun, dropped my club and got him down and I pulled the gun off, and he said, 'My God, boys, don't kill me, I will get out,' and I jerked the gun from him and he got up and said, 'Which way do you want me to go,' and I told him 'The quickest way you can get out of here.' He said, 'Give me the gun and I will go,' and I said 'No, I will take care of the gun,' and he started off, and I grabbed up the club in my left hand and had the gun in my right hand, and I told him to go, and he went out the way he said he came in."

The boy, Frank Flanagan, corroborates his uncle's statements. He says defendant put his hand on Waldo's shoulders and told him to go out; that Waldo said he was not going until he got ready, and turned around as if to hit his uncle with the gun, and his uncle grabbed it; that each was trying to get it out of the other's hands, and in the scuffle his uncle struck Waldo on the head and knocked him down; that when he started to get up he (witness) hit him across the forehead with a stick; that he tried to get up again and his uncle grabbed the stick out of his hand and hit him again.

[785] Defendant's evidence, on the material points, conflicts with that of the prosecuting witness, who says he was not hunting on defendant's land but was passing through on a near way home, and was approached by defendant and his nephew, one on each side of him; that he told defendant he would get off his land that he did not know he objected to his passing over it, but that defendant would not permit him to go; that he sprang at him and grabbed his gun, and he then took hold of it with both hands and tried to keep him from taking it away from him; that in the scuffle over the gun defendant fired the load out of it, and then called the boy to hit him; that he was struck and knocked down; that he had made no attempt or threat to use his gun on defendant; that when he was struck he was knocked down and became unconscious; that when he regained consciousness defendant was standing over him with a club, and he heard the boy say, "For God sake don't kill him," and that he was struck several times with the club while he was down. That he was badly cut about the head and arms, is proven by the testimony of both himself and the doctor who dressed his wounds, and is not denied.

Defendant's counsel do not contend that the verdict is not supported by the evidence, but they complain of the action of the court in giving certain instructions on behalf of the state and refusing to give certain others

asked for by defendant. The giving of the state's No. 1 is assigned as error. It reads as follows:

"There is no law to justify the proposition that a man may be the assailant, the aggressor, and bring on a fight, and then claim exemption from the consequences thereof, on the ground of self-defense; he cannot so act and then shield himself on the assumption that he was defending himself. And you are instructed that if you believe from all of the evidence beyond a reasonable doubt the defendant herein was the aggressor, that he provoked the difficulty, and made the assault testified to in this case, that before he can avail himself of self defense it must appear that he withdrew from the assault in good faith and clearly announced a desire for peace. And you are instructed that the burden of showing that he did retreat and announce a desire for peace after the trouble began, he must prove such defense by a preponderance of the [786] evidence. And that the jury should consider all of the evidence introduced by the state and the defendant in ascertaining whether there is such preponderance."

It is admitted that this instruction correctly states the law, but counsel insist that it is not applicable to the facts, and is confusing and misleading. If the testimony of the prosecuting witness is true, it proves that he did not refuse to go off defendant's land but that he was willing to go, and was prevented by defendant, who assaulted him and wounded him without cause. A trespasser, who is willing to depart peaceably, is not denied the right of self-defense when unlawfully assaulted by the proprietor of the premises. If the prosecuting witness' testimony is true, defendant's assault upon him was unlawful. The instruction is framed on his theory of the case and properly states the law.

The state's No. 3, complained of, is as follows:

"A land owner may order a mere trespasser walking across his land off, and, if he refuse to go, he must resort to his legal remedy to expel him, and he had no right to commit a breach of the peace in trying to expel him. And if he assault the trespasser the latter may defend himself so far as is necessary to prevent bodily harm. And you are instructed that trespass against property of another, not his dwelling house, is not sufficient provocation to warrant the owner in using a deadly weapon in its defense."

The first part of this instruction misstates the law. A proprietor may order a trespasser off his land, and if he refuses to go he may use such force, and only such force, as is reasonably necessary to expel him. If he exceeds this he becomes a wrongdoer himself. The law gives him no right to punish the tres-

passer, and if he strike and wound him when it is not necessary to do so in order to expel him from the premises, or to protect himself against bodily harm from the trespasser, he does an unlawful act.

"If one intrudes himself upon premises where he has no right to be, then the owner may order him away; and, if he refuses to go, then he may use such force as may be reasonably necessary to expel the intruder." *Canfield v. Chicago*, etc. R. Co. 59 Mo. App. 354. To the same effect are the following decisions: *State v. Martin*, 52 Mo. App. 609; [787] *Illinois Steel Co. v. Novak*, 84 Ill. App. 641; *Brebach v. Johnson*, 62 Ill. App. 131; *Townsend v. Briggs*, 90 Cal. 481; *Slingerland v. Gillespie*, 70 N. J. L. 720, 1 Ann. Cas. 886, 59 Atl. 162; *Carter v. Sutherland*, 52 Mich. 597, 18 N. W. 375; *Breitenbach v. Trowbridge*, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; *Drew v. Comstock*, 57 Mich. 176, 23 N. W. 721; *Harrison v. Harrison*, 43 Vt. 417, 1 Cooley on Torts (3d ed.) 291; and 1 *Kinkead on Torts*, Sec. 210.

"One who has commanded an intruder to leave his premises is authorized to use such means as may be reasonably necessary to enforce his command. But if in so doing he exceed the bounds of reasonable force he will be guilty of an assault." *Harshman v. Rose*, 50 Neb. 113, 69 N. W. 755.

Defendant admits he put his hand on Waldo's shoulder with a view to pushing him off or leading him off his land. This he had a right to do, if he refused to go when bidden; and, if Waldo offered resistance, defendant had a right to use enough force to overcome that resistance, but no more. The right to expel a trespasser, using no more force than is reasonably necessary therefor, is not limited to one's dwelling house, but applies to any property of which he has lawful possession. Hence, the giving of the state's instruction No. 8 was erroneous.

Defendant's No. 6 was properly refused, because it is misleading in that it fails to qualify defendant's right to eject Waldo, by stating that he should use only such force as is necessary for that purpose. If Waldo was willing to go he had no right to assault him. It is also objectionable because it does not state the cause for defendant's believing that he was in danger of losing his life or of suffering great bodily harm at the hands of the prosecuting witness was a reasonable cause. It must be such as will satisfy the mind of a reasonable man that he is in danger of death or bodily harm, in order to justify the use of a deadly weapon in self-defense.

Defendant's No. 7 is erroneous, in that it assumes that defendant employed the weapon with which the injury to the prosecuting witness was inflicted, only in defending him-

self, whereas there is evidence tending to show that he continued to strike him with the stick after he had been knocked down and was not in condition to injure him. If he did so punish him unnecessarily, he became a wrongdoer and is guilty of [788] assault and battery. The instruction, because of not submitting to the consideration of the jury this element of the case, and being in form binding, was properly rejected.

Defendant's No. 9 was properly refused because, being a binding instruction, it does not submit to the jury all the material facts. Moreover, it assumes that defendant was endeavoring to prevent a trespass upon his land, whereas the trespass had already been committed when the prosecuting witness was discovered on defendant's land. Even though Waldo was a trespasser, defendant would have no right to assault him, simply to prevent further trespass, and thereby cause prosecuting witness to offer resistance in self-defense, and then claim the right to use a deadly weapon in his own defense. If Waldo was willing to go off the land, defendant would have no right to punish him because he found him on it, and if he attempted to do so Waldo had a right to defend himself against bodily harm. But, if he was ordered off and refused to go, and defendant then undertook to put him off, using no more force than was reasonably necessary for that purpose, Waldo would have no right to resist. The right to eject a trespasser gives the proprietor no right to inflict unnecessary punishment.

The judgment will be reversed, the verdict set aside and the case remanded for a new trial.

Reversed and remanded.

NOTE.

Trespass as Justification of Assault and Battery.

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Persons Entitled to Repel Trespass, 313.

Introductory.

This note is intended to include only the recent cases dealing with the right of an owner or occupant of land to justify an assault on the ground of his right to repel trespassers generally. The earlier cases on this subject are collected in the notes to

Slingerland v. Gillespie, 1 Ann. Cas. 886, and *Hannabalsen v. Sessions*, 93 Am. St. Rep. 250.

For a discussion of the defense of property as a justification for an assault, see the note to *State v. Cessna*, reported ante, this volume, at page 289.

General Rule.

As an incident to the ownership of property, a person may, after notice to a trespasser to depart and his failure to do so within a reasonable time, eject him by force, and this right reasonably exercised may be pleaded in defense of a charge of assault and battery.

England.—*Lewis v. Arnold*, 4 C. & P. 354, 19 E. C. L. 417.

Canada.—*Payson v. Hubert*, 34 Can. Sup. Ct. 400; *Madden v. Farley*, 6 U. C. Q. B. 210; *McKittick v. Sangster*, 3 Quebec Pr. 449; *Mitchell v. Warren* [1864–1874] Newfoundland L. Rep. 275; *Ex p. Estabrooks*, 19 N. Bruns. 283.

United States.—U. S. v. *Bartle*, 1 Cranch C. C. 236, 24 Fed. Cas. No. 14,531. See also *Johnston v. U. S.* 154 Fed. 445, 83 C. C. A. 290.

Alabama.—*Hyde v. Cain*, 159 Ala. 364, 47 So. 1014; *Jones v. Bynum*, 189 Ala. 677, 66 So. 639; *Hart v. Jones*, 14 Ala. App. 327, 70 So. 206, *certiorari denied*, *Ex p. Bellevue Highlands Land Co.* 195 Ala. 695, 70 So. 1012.

Arizona.—*Ryan v. Territory*, 12 Ariz. 208, 100 Pac. 770.

Delaware.—*McDermott v. Kennedy*, 1 Har. 143; *Thomas v. Black*, 8 Houst. 507, 18 Atl. 771; *State v. Lockwood*, 1 Penn. 76, 39 Atl. 589.

District of Columbia.—*Slater v. Taylor*, 31 App. Cas. 100, 18 L.R.A.(N.S.) 77.

Georgia.—*Pierce v. Hicks*, 34 Ga. 259.

Idaho.—*State v. Dixon*, 7 Idaho 518, 63 Pac. 801.

Illinois.—*Chicago, etc. R. Co. v. Doherty*, 53 Ill. App. 282; *Green v. Buckingham*, 122 Ill. App. 631; *Hayes v. People*, 146 Ill. App. 596; *People v. Hart*, 156 Ill. App. 523.

Louisiana.—*Stachlin v. Destrehan*, 2 La. Ann. 1019.

Massachusetts.—*Com v. Clark*, 2 Metc. 23; *Com v. Goodwin*, 3 Cush. 154.

Michigan.—*People v. Adams*, 52 Mich. 105, 17 N. W. 715; *Drew v. Comstock*, 57 Mich. 176, 23 N. W. 721; *Taylor v. Adams*, 58 Mich. 187, 24 N. W. 864; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. 138, 13 L.R.A. 848; *People v. Sutherland*, 104 Mich. 468, 62 N. W. 566. See also *People v. Upton*, 169 Mich. 31, 135 N. W. 108.

Minnesota.—*Souther v. Northwestern Telephone Exch. Co.* 118 Minn. 102, Ann. Cas. 1913E 472, 136 N. W. 571, 45 L.R.A.(N.S.) 601.

Missouri.—*State v. Kaiser*, 78 Mo. App. 575; *State v. Webb*, 163 Mo. App. 275, 146 S. W. 805.

Montana.—*State v. Howell*, 21 Mont. 165, 53 Pac. 314.

New Hampshire.—*Wood v. Gale*, 10 N. H. 247, 34 Am. Dec. 150.

New York.—*Wall v. Lee*, 34 N. Y. 141; *Brendlin v. Beers*, 144 App. Div. 403, 129 N. Y. S. 222; *Howe v. Oldham*, 69 Hun 615, 23 N. Y. S. 700.

Ohio.—*Corre v. State*, 8 Ohio Dec. 715, 9 Cinc. L. Bul. 242.

Pennsylvania.—*Lichtenwallner v. Laubach*, 105 Pa. St. 366.

Texas.—*Robey v. State*, 73 Tex. Crim. 9, 163 S. W. 713.

Vermont.—*Beecher v. Parmele*, 9 Vt. 352, 31 Am. Dec. 633.

Wisconsin.—*Bisewski v. Booth*, 100 Wis. 383, 76 N. W. 349. And see *Oleson v. Fader* reported, in full, post, this volume, at page 214.

In *Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 221, the court said: "We are aware of no rule of law that gives any person, not having a special irrevocable license, the right to enter and continue upon the premises of another when requested to depart. To permit all persons at their mere will to enter and to remain in another's house, or even his close, so long as they may choose, and this too after being requested to depart, would well nigh destroy the dominion of the owner over his property, and would render it almost useless as well as worthless. It would be monstrous to hold that a man's privacy may be so far infringed, that any and all persons may at will enter his dwelling and remain, after being requested to leave, until it suited their convenience to depart. Although it might not be so offensive to permit it on the close of the owner as his dwelling, it would be an outrage upon his rights. Such has never been the law, and so long as there is such a thing as individual ownership of property it is not probable that such will ever be."

The rule is applicable to a business house as well as to a dwelling or other premises. *Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 221; *Peagle v. Root*, 170 Ill. App. 608. In the case last cited the rule was stated as follows: "One has no right to go into or upon the premises of another, whether it is a business office, store, workshop, factory, or other place of business, when the owner has forbidden him to do so. When a person enters the premises of another, and is requested to depart and refuses so to do, the owner may eject him without incurring liability, providing he uses no more force than is reasonably necessary for that purpose."

However, where a person is rightfully on the premises of another, is creating no dis-

turbance, and is not interfering in any way with the use and occupation of the owner, he cannot be ejected forcibly as a trespasser. Thus it has been held that officers of a corporation who forcibly ejected a stockholder from a meeting could not defend an action brought for assault on the ground that the stockholder was a trespasser because his stock had not been properly transferred to him on the books of the company, where it appeared that the stockholder had done all that was required of him. *Noller v. Wright*, 138 Mich. 416, 101 N. W. 553.

In *O'Hara v. King*, 52 Ill. 303, it was held that a person conducting himself properly might enter a public office, though from motives of curiosity alone, at such hours as the office was open for the transaction of public business, and those in charge could not defend an action for assault in ejecting him on the ground that he was a trespasser.

In *O'Hara v. State*, 21 Ind. App. 320, 52 N. E. 414, it was held that one attending a public meeting who was in no way interfering with the proceedings could not be ejected by order of the president of the meeting because he happened to be *persona non grata* to him.

Likewise where it appeared that the keeper of a store was also the public rate collector it was held that he could not order out a woman who was there for the purpose of attending to her rates and who was guilty of no act amounting to a breach of the peace. *Oickle v. Oickle*, 9 East. L. Rep. (Nova Scotia) 301.

It has been held that members of a board of school trustees could not justify a charge of assault in removing a teacher where it appeared that she was lawfully in possession of the school. *White v. Kellogg*, 119 Ind. 320, 21 N. E. 901.

Similarly, where two persons were cropping land on shares it was held that neither could eject the other as a trespasser. *Com. v. Rigney*, 4 Allen (Mass.) 316.

In *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 336, 70 S. W. 878, 94 Am. St. Rep. 740, it was held that the proprietor of an amusement park had no right to use force to eject the finder of a lost purse who refused to give it up, as he was entitled to possession.

In *People v. McKeehan*, 11 Cal. App. 443, 105 Pac. 273, it was held that the proprietor of a billiard room had no right to eject one who was creating no disturbance, as the place was a semi-public one.

But a person in charge of a place used for the entertainment or convenience of the public may use reasonable force in ejecting one who persistently violates the proper and reasonable regulations adopted for the general good. *Com. v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; *People v. McKay*, 46 Mich. 439, 9 N. W. 486, 41 Am. Rep. 169;

State v. Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L.R.A. 516. In *Com. v. Power*, supra, the rule was applied to the case of an innkeeper who had persistently violated the rules forbidding the solicitation of guests in a railroad depot and who was ejected by the superintendent although he was in possession of a ticket and was there for the purpose of riding on a train, the court holding under the circumstances that the innkeeper should have stated that he held a ticket.

It has been held that while a man has a right to enter premises for the purpose of demanding wages due him, the owner has the right to order him off, and if he does not leave when so ordered the owner may use sufficient force to remove him. *People v. Osborn*, 1 Wheel. Crim. (N. Y.) 97.

So a servant occupying a house as a mere incident to the service and not as a tenant may be removed by the use of force. *Hanford v. People*, 7 N. Y. Wkly. Dig. 528, wherein the rule was stated as follows: "If the jury had found that Jones occupied as tenant, then the defendant in the indictment might properly have been found guilty of the offense charged. But if it had found that Jones was the mere servant of Mrs. Hanford, and was allowed to reside in the house as a mere incident to the hiring and for the convenience of performing his work, then the master might at any time terminate the employment and remove the servant from the house. The legal possession being in the master, he or his agent had the right to use all necessary force to remove such servant."

But an instruction that the superintendent of a railroad depot might forcibly remove any person who in his opinion had violated a regulation was held to be erroneous in *Hall v. Power*, 12 Metc. (Mass.) 482, 46 Am. Dec. 698, the court stating that only proof of a violation of the regulations would sustain the plea of justification for the assault on that ground. And in *People v. Moore*, 50 Hun 356, 3 N. Y. S. 159, it was held that a public corporation which had built a village and laid out streets for the use of its employees had no right to eject a milk peddler, as the use of the streets was incident to the employees' welfare and convenience, and the corporation had relinquished control over them to that extent.

It has been held that a person operating a gambling room could not defend a prosecution for an assault on one refusing to leave when requested on the ground that he was a trespasser. *Pierce v. State*, 21 Tex. App. 540, 1 S. W. 463, wherein the court said: "As to the right of the defendant to forcibly eject the injured party from the gambling room, we are of the opinion that he had no such right under the facts of this case, and

cannot justify his assault upon that plea. The law knows no reasonable rules or regulations for the protection of a gambling room, and games played in violation of law."

The exercise of the right to remove a trespasser by reasonable force is not affected by the motive which actuates the owner. *Davis v. Lennon*, 8 U. C. Q. B. 599; *Glass v. O'Grady*, 17 U. C. C. P. 233. Thus, where the jury were instructed that if they believed the owner acted from malicious and wanton motives they could give additional damages by way of punishment, the court, in *Kiff v. Youmans*, 36 N. Y. 324, 40 Am. Rep. 543, holding the instruction to be erroneous, said: "The defendant was upon his own premises. The plaintiff entered for the purpose, deliberately formed, of doing an act which, if persisted in, would impose a burden upon the land and impair the defendant's enjoyment of his own property. The natural event of such a trespass was to incite resistance, and so lead to a disturbance of the public peace.

It was not accidental; the positive misconduct of the plaintiff originated and promoted it. Instead of submitting the right which he asserted, and the defendant denied, to the proper decision of the courts, he took its administration in his own hands, adjudged the right in his own favor, and undertook its enforcement. Properly invoked, the law has pronounced against him, declared him to be a wrongdoer, instead of an executor of a just judgment, and therefore the aggressor in the strife which followed. It finds, therefore, that his adversary was justified in repelling the enforcement of that self-asserted right, but that he exceeded the bounds of proper passion in so doing, and for this excess should answer in damages. It was thus assumed in the very frame of the issue presented to the jury that some force was necessary, and that the defendant might lawfully lay hands upon the plaintiff. Up to that point, therefore, including the exercise of force sufficient to remove the plaintiff, the defendant was without fault. Whatever injury the plaintiff sustained resulted, in part, at least, from its application, and so much the plaintiff brought upon himself. But all acts of the defendant upon this occasion were directed to the removal of the aggressor. Nothing more than this is suggested, or can be gathered, from the instructions of the court. And, whether, in requiring that removal, the defendant was instigated by wantonness or malice is immaterial. The exercise of a legal right cannot be affected by the motive which controls it. . . . It is true, as has been urged in support of the judgment, that the owner of land, when removing a trespasser, might take an opportunity, under pretense of right, to inflict on him a wanton and malicious assault. But the attention of the jury was not directed to such a ques-

tion. They were not asked to inquire whether this was, in fact, the purpose of the defendant. If it had been, and they had so found, it is not necessary to deny that under adjudged cases the charge, in the respect objected to, could be upheld. But, on the contrary, it was assumed that the object of the defendant was to stop a trespass, and restrain a trespasser. Yet the jury might well have understood the charge as applying to the whole procedure of the defendant, and to the motive with which any degree, as well as the excessive force, was applied. In that aspect it is clearly erroneous. Let us take another view of the charge. Assume that it relates simply to the excess of force, and that the jury were called upon to determine whether it was applied wantonly or maliciously. Still the intention of removal was lawful, and the injury was done in executing it. The wilful and deliberate act of the plaintiff, which constituted him a trespasser, was its proximate cause. . . . Yet it must be conceded that the defendant was nevertheless bound to confine the force used by him to reasonable limits, defined by the necessity of the case. If he used more he became responsible for all consequences of the excess; . . . or to present the point more distinctly, let us concede for that purpose that inasmuch as the law gave authority to the defendant to repel with only necessary force the intruder, he, by excess abusing that authority, became a trespasser ab initio. It still remains that the plaintiff provoked the trespass, was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant. . . . it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass . . . and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely, to increase them."

So in *Brothers v. Morris*, 49 Vt. 460, it was said: "Under the pleadings and the facts developed upon the trial, the question was, whether the defendant was justified in removing the plaintiff from the building in the manner he did; and this, of course, depended upon the question whether, under the circumstances of the case, he had the legal right to do so. If he had, and exercised that right in a proper manner, using no unnecessary force, then he is justified; and his justification does not depend upon the motive or the spirit in which the legal act was done. He may have been influenced by spite, ill will, or malice; but if he only did that which he had a right to do, he is not liable."

Where a person lawfully in a place of business is ordered out solely for the purpose of provoking a difficulty, the owner cannot jus-

tify an assault committed in attempting to remove him. *State v. Shea*, 104 Ia. 724, 74 N. W. 687; *Watrous v. Steele*, 4 Vt. 629, 24 Am. Dec. 648. In the case last cited it was said: "It is a well-settled principle, that the occupant of any house, store, or other building, has a legal right to control it, and to admit whom he pleases to enter and remain there, and that he has also a right to expel any one from the room or building who abuses the privilege which has thus been given him; and if the occupant finds it necessary, in the exercise of his lawful rights to lay hands on him to expel him, he can legally justify the assault. But no man can invite or permit another to enter his dwelling for the purpose of abusing or assaulting him; and if a person enter lawfully, the owner or occupier is not permitted to irritate or insult him for the purpose of having an occasion to abuse him, or as an excuse for assaulting him; in either case his plea of justification will be unavailing. It is a correct maxim, that no man shall take advantage of his own wrong."

Degree of Force.

GENERALLY.

While the force that may be used in ejecting a trespasser depends on the circumstances surrounding each particular case, the rule as stated in the reported case to the effect that the owner of premises is justified in the use of such means, short of taking human life or the infliction of great bodily harm, as in the exercise of a reasonable judgment are necessary to prevent the trespass and remove the trespasser from the premises, finds universal support from the adjudicated cases, as will be seen from the cases cited in the foregoing subdivision. In *Newcome v. Russell*, 133 Ky. 29, 117 S. W. 305, 22 L.R.A. (N.S.) 724, the rule was stated as follows: "The person aggrieved by a trespass of this nature may resort to such means, not involving life or limb, as may be necessary to prevent the trespass and remove the trespasser from the premises. If these means do not accomplish the desired result, he must resort to the orderly and peaceable methods afforded by the law for the redress of such wrongs." And in *State v. Crook*, 133 N. C. 672, 45 S. E. 564, it was said: "The true rule which should have controlled the conduct of Frank upon the evidence on the point was that he had the right in the first place to direct Jeff to leave his premises; that in case of refusal he might have laid his hands on him gently, for the purpose of removing him from his premises; and if that course did not bring about the desired result, then he might have used sufficient force under all the circumstances to put him off. The law would not

authorize one to use excessive force in removing a trespasser from one's premises, but the jury should not weigh in golden scales the amount of force used for such a purpose. In following such a course it would make no difference that the owner of the premises should become angered at such an invasion of his home. It was but natural that such a feeling should be aroused."

But to beat violently a mere trespasser, who refuses or does not immediately leave on being ordered to depart, cannot be justified under the rule that the owner or lawful occupant of premises may use such force as is reasonably necessary for the removal of trespassers. *Oakes v. Wood*, 2 M. & W. 791, 150 Eng. Rep. (Reprint) 977; *Davis v. Lennon*, 8 U. C. Q. B. 599; *Lavigne v. Lefebvre*, 14 Quebec Super. Ct. 275; *Arnold v. White-way* [1874-1884] Newfoundland L. Rep. 518; *Doucette v. Therio*, 38 Nova Scotia 402; *Canfield v. Chicago*, etc. R. Co. 59 Mo. App. 354; *State v. Kaiser*, 78 Mo. App. 575; *Hunt v. Caskey* (N. J.) 60 Atl. 42. See also *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52; *Werner v. State* (Tex.) 68 S. W. 681. In *Gregory v. Hill*, 8 T. R. 299, 101 Eng. Rep. (Reprint) 1400, it was said: "Though a plea of *molliter manus impositus* would justify what the law considers as an assault, such as might be necessary to have put the party out of the house, without outrage and violence, yet it never was considered as any answer to a charge, such as is contained in the declaration, of beating, wounding, and knocking the party down."

Thus where a man pushed a woman on a pile of stones with such force as to dislocate her shoulder, it was held to amount to more than reasonable force in removing a trespasser. *Laukea v. Cummings*, 9 Hawaii 558.

For an engineer to strike a boy on the head with a piece of coal in order to make him get off the footboard of a switch engine was held in *Chicago, etc. R. Co. v. Doherty*, 53 Ill. App. 282, to constitute the use of unnecessary force in removing a trespasser.

So, for a man thirty-five years of age and weighing one hundred and seventy-five pounds to strike an old man seventy years of age a violent blow on the head with his fist has been held to be the use of excessive force in removing a trespasser. *Green v. Buckingham*, 122 Ill. App. 631.

Likewise to attack a woman with a horse-whip in order to prevent her from driving her cattle across land has been held to be the use of unjustifiable force. *Burnell v. Bradbury*, 69 Kan. 444, 77 Pac. 85.

To throw a stick at a crowd of boys trespassing on the roof of a shed, whereby one of them lost the use of an eye, was held to be unjustifiable in *Talmage v. Smith*, 101 Mich. 370, 59 N. W. 656, 45 Am. St. Rep. 414.

So, to strike a small boy twelve years of age with a club and imprison him in a railroad car has been held to be the use of more force than was necessary to eject a trespasser. *Emmons v. Quade*, 176 Mo. 22, 75 S. W. 103.

Similarly it has been held that one who, after ordering boys who were bathing in a water tank to get out, and after they got out and were dressing, struck one of them with a stick with sufficient force to break his rib, used excessive force in expelling a trespasser. *Parrish v. State*, 32 Tex. Crim. 583, 25 S. W. 420.

It has been held that to strike a horse causing it to run away and injure the occupants of a vehicle could not be justified on the ground of expelling a trespasser. *Harris v. Burt*, 2 Ont. W. Rep. 474, *affirmed* 3 Ont. W. Rep. 400.

Where a trespassing boy was ejected from a building by being pushed through a window four feet above a platform, it was held to be error to fail to submit to the jury the question whether the door or window through which the boy was put out was a proper place to eject him. *Kelly v. Rhodes*, 18 Nova Scotia 524.

So it has been held that while an officer might enforce the reasonable regulations of a railroad company governing the use of its stations, platforms, etc., and might use such force as was necessary to expel persons violating the rules, he could not justify a brutal assault on one going to the car steps to meet his wife and family, on the ground that he had refused to leave when ordered away and was therefore a trespasser. *Deraon v. Sero*, 137 Wis. 276, 118 N. W. 839, 20 L.R.A. (N.S.) 842.

While the owner of premises may use reasonable force in expelling a trespasser he is not justified in imprisoning him. *Green v. Bartram*, 4 C. & P. 308, 19 E. C. L. 400; *Ball v. Axten*, 4 F. & F. 1019; *Emmons v. Quade*, 176 Mo. 22, 75 S. W. 103. In the case last cited the rule was stated as follows: "Although trespassers, these boys were guilty of no criminal offense, and there is no evidence that they were. There was not even a suspicion that they were guilty of any criminal offense which would justify the defendant or its servants in imprisoning them, and when Quade admits that he was endeavoring to imprison the plaintiff and his companions in order to turn them over to the officials of the law, and in his effort to do this so frightened plaintiff, that in his effort to escape he fell and broke his arm, he was guilty of an unlawful trespass against the plaintiff. His act was a wrongful and unlawful assault, and he and his principal were liable for the necessary and natural consequences of the unlawful effort to arrest him. The police officers would not have been authorized to arrest

plaintiff without a warrant for a misdemeanor not committed in their presence and it is not insisted there was the slightest suspicion that he had committed a felony." So in *Ball v. Axten*, 4 F. & F. (Eng.) 1019, it was said: "He had no right thus to seize and forcibly detain a person who had merely committed a bare trespass; and was so far from persisting in it that he was actually going away. No doubt a man might defend his possession of land; and the plaintiff might forcibly have opposed and resisted the entry of the hunters on his land; or if they were persisting in remaining on it against his will, he might, if he could, have forcibly expelled them after requesting them to withdraw. But when they were withdrawing he had no right to seize hold of any one of them and detain him by force to compel him to give his address, for such an act was calculated to lead to violence."

Where a trespass on the premises of another is accompanied by force or threats of violence, the owner may use force to meet force, and the strict rule does not apply. *State v. Lockwood*, 1 Penn. (Del.) 76, 39 Atl. 589.

USE OF DEADLY WEAPON.

A mere trespass on the lands of another, however wrongful it may be, if unaccompanied by such force as to make it a breach of the peace, will not justify or excuse resort to the use of a deadly weapon to drive the intruder off. *State v. Paxson* (Del.) 99 Atl. 46; *State v. Dixon*, 7 Idaho 518, 63 Pac. 801; *State v. Montgomery*, 65 Ia. 483, 22 N. W. 639; *James v. Hayes*, 63 Kan. 133, 65 Pac. 241; *Com. v. Goodwin*, 3 Cush. (Mass.) 154; *State v. Tripp*, 34 Minn. 25, 24 N. W. 290; *State v. Noeninger*, 108 Mo. 166, 18 S. W. 990; *State v. Hunakor*, 16 N. D. 420, 115 N. W. 996; *Cordes v. Mason*, 32 Ohio Cir. Ct. Rep. 530; *Dickinson v. State*, 3 Okla. Crim. 151, 104 Pac. 923; *Lewis v. Fleer*, 30 Pa. Super. Ct. 237; *Montgomery v. Com.* 98 Va. 840, 852, 36 S. E. 371, 37 S. E. 1. In *Newcome v. Russell*, 133 Ky. 29, 117 S. W. 305, 22 L.R.A. (N.S.) 724, the rule was stated as follows: "A mere trespass upon the premises of another . . . will not justify the owner of the premises in either shooting or wounding the trespasser, unless the trespass be accompanied by acts that amount to an assault upon the person of the owner such as would warrant him in exercising the right of self-defense to protect his person. . . . And when this right of self-defense exists, his act will be excusable or justifiable as the circumstances may appear—not on account of the trespass alone, but because of the attack upon the person."

In *State v. Taylor*, 20 Kan. 643, the following instruction was given to the jury: "A

person having charge of premises, and having authority of preventing persons from trespassing thereon, can, after first requesting the trespasser to leave the premises, and a refusal to do so on his part, use such force as is necessary to remove the trespasser; and if the trespasser use force in resisting the person in charge of the premises, then such person may use force sufficient to overcome the force used by the trespasser. On the other hand, if the defendant drew a loaded pistol, and presented the same to the prosecuting witness in such a manner as to create a reasonable apprehension of immediate danger in the mind of the said witness, the defendant is guilty of the assault charged, if the apprehension of danger arose from a reasonable cause, and the circumstances were such as to induce fear of immediate danger." Holding this to be a correct statement of the law the court said: "If one deliberately kills another with a deadly weapon, in order to prevent a mere trespass on his property, it is a felony. So, if one offers to strike with a deadly weapon, although he announces his purpose not to finish the act, and commit the homicide if his terms are instantly complied with (although the terms be such as he has a right to exact, and enforce by the *molliter manus imposuit*), he is guilty of an assault. The putting in use of a deadly weapon shows a wanton disregard of human life."

So, where a person had entered on the lands of another for the purpose of informing him that his cattle had strayed on the lands of the former, the owner of the premises was held not to be justified in the use of a deadly weapon because the trespasser did not depart at once on being told to leave. *Glassey v. Dye*, 83 Neb. 615, 119 N. W. 1128.

QUESTION OF FACT.

Whether the force used in removing a trespasser was greater than the circumstances required, is a question of fact to be determined by the jury, in view of all the surrounding facts and circumstances, under proper instructions from the court. *Hyde v. Cain*, 159 Ala. 364, 47 So. 1014; *Com. v. Clark*, 2 Metc. (Mass.) 23; *Com. v. Wright*, 158 Mass. 149, 33 N. E. 82, 35 Am. St. Rep. 475, 19 L.R.A. 206; *Com. v. Ribert*, 144 Pa. St. 413, 22 Atl. 1031. The rule was tersely stated in *Com. v. Clark*, 2 Metc. (Mass.) 23, as follows: "As the kind and degree of force, proper to remove a trespasser, must depend upon the conduct of the trespasser in each particular case, the question whether it was suitable and moderate in any particular case, is a question of fact to be left to the jury."

The jury, in determining whether the force used in any particular case was excessive, may take into consideration the comparative ages, sizes and physical condition of the parties. *Bogudski v. Backes*, 83 Conn. 208,

76 Atl. 540, wherein the court, declaring an instruction embodying the rule as stated to be correct, said: "As to the error claimed in the sixth paragraph, it is only necessary to say that had the court not so charged the jury, the jury themselves, as sensible, practical triers, would undoubtedly have contrasted and compared the boy plaintiff and the adult defendant, in estimating the amount of force that was reasonably necessary for the defendant to use upon the plaintiff. Both were in court; both were seen by the jury; they were the actors in this struggle; and the jury could not, as honest, sensible triers, shut their eyes to any disparity in size, or in apparent weight between these parties, and it would be entirely proper for the jury to have in mind such disparity, if any existed, and it was entirely permissible for the court to advise the jury that they might have in mind the factors of size and apparent weight of each."

Notice to Depart.

The right to use force, however slight, in ejecting a trespasser does not exist in the first instance, but the owner or occupant of premises must first request or notify the trespasser to depart before he will be justified in the use of force to compel him to leave. *Ballard v. Bond*, 1 Jur. (Eng.) 7; *Cox v. Cooke*, 1 J. J. Marsh. (Ky.) 360; *Emmons v. Quade*, 176 Mo. 22, 75 S. W. 103. In the case last cited, the rule was stated as follows: "Before the defendants were justified in using force to remove plaintiff from the car, it was their duty to have first ordered him to leave and given him a reasonable opportunity to do so, and even then they could only use such force as was necessary for that purpose."

While in order to relieve an owner from liability for assault it is necessary that the owner of premises should warn or request a trespasser to depart before resorting to force to remove him, the request or warning need not be couched in polite terms but is sufficient if it conveys clearly the order to leave, and so it has been held that an instruction that before a defendant would have been authorized to use force to remove the plaintiff from his place of business, he should have requested plaintiff to depart, was erroneous as inapplicable to the evidence where it appeared that the owner had said to the trespasser, "You get out of here or I will pound your head with a hammer," as the jury might have thought that the language used did not constitute a request within the meaning of the instruction. *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116.

Persons Entitled to Repel Trespass.

As a general rule the right to eject a trespasser by force extends to the owner or any other lawful occupant in possession of prop-

erty. *Cole v. Rowen*, 88 Mich. 219, 50 N. W. 138, 13 L.R.A. 848; *Wood v. Gale*, 10 N. H. 247, 34 Am. Dec. 150; *Howe v. Oldham*, 69 Hun 615, 23 N. Y. S. 700; *Liebstadter v. Federgreen*, 80 Hun 245, 29 N. Y. S. 1039; *Comstock v. Dodge*, 43 How. Pr. (N. Y.) 97. Thus it has been held that a carpenter and a bricklayer having possession of a building on which they were working might eject one who had no right to enter the building provided they did not use unnecessary force. *U. S. v. Bartle*, 1 Cranch, C. C. 536, 24 Fed. Cas. No. 14,531.

So it has been held that a guardian might use reasonable force to remove a woman of undesirable character from the premises of his ward after she refused to leave, and might even convey her some distance away to a village if that was found to be necessary to prevent her returning. *Wood v. Gale*, 10 N. H. 247, 34 Am. Dec. 150.

Likewise it has been held that a father, the owner of a house in which his son resided with the understanding that the father should retain entire control of the premises, was seized with actual possession sufficient to justify him in expelling a stranger after due request to depart. *Comstock v. Dodge*, 43 How. Pr. (N. Y.) 97. It has been held that a servant in the lawful possession of his master's premises may justify the use of reasonable force in removing a trespasser. *Chicago, etc. R. Co. v. Doherty*, 53 Ill. App. 282; *Howe v. Oldham*, 69 Hun 615, 23 N. Y. S. 700.

In *Cole v. Rowen*, 88 Mich. 219, 50 N. W. 138, 13 L.R.A. 848, it was held that a depot master instructed by a railroad company to assign places for hackmen on its grounds, could justify an assault with no more than necessary force in ejecting a hackman from a stand not assigned him.

But a landowner who has leased his property to a tenant has no right to order a trespasser off and to remove him forcibly if he refuses to go. *Suggs v. Anderson*, 12 Ga. 461; *Montgomery v. Com.* 99 Va. 833, 37 S. E. 841.

The mere actual physical possession of premises by a person is not sufficient to justify him in using force and violence to prevent the entry of the lawful occupant thereon, or, after he has entered, to eject him therefrom. *Liebstadter v. Federgreen*, 80 Hun 245, 29 N. Y. S. 1039, wherein it appeared that a landlord surreptitiously and wrongfully entered the premises of his tenant and barred the doors against him. It was held that he did not thereby acquire a lawful possession which would entitle him to eject his tenant by force and violence.

So in *Perkins v. West*, 55 Vt. 265, it was held that the grantee of a mortgage who obtained possession of the premises in the

temporary absence of the mortgagor who had actual possession, could not justify an assault on the mortgagor in an effort to remove him from the premises.

But it has been held that a master might put a servant out of a house furnished him as an incident to his service and not as a landlord. *Haywood v. Miller*, 3 Hill (N. Y.) 90.

In *Causee v. Anders*, 20 N. C. 388, it was held that a tenant in common had no right to eject forcibly his cotenant from the common premises.

In *Cooper v. McKenna*, 124 Mass. 284, 26 Am. Rep. 667, it was held that a priest about to administer an office of his religion to a sick person had no authority to exclude from the room by force any person who was lawfully there. In that case it was said: "It appears from the bill of exceptions that the plaintiff's husband was the keeper of the almshouse, and that she was in charge of it at the time of the difficulty. She was rightfully in the room at the time it happened, and the defendant was a mere visitor. Whether it would have been reasonable and proper, under the circumstances, for the plaintiff to leave the room on being requested, is a question which is not for us to decide, and upon which we need express no opinion. There was nothing, however, in the priestly character of the defendant, or in the offices of religion which he was about to perform, that gave him the control of the room, or any legal authority to exclude or remove from it by force any person lawfully there. The case presented to us raises no question except as to the strict legal rights of the parties; and we are bound to say that the facts relied upon by the defendant in justification of his conduct do not, as a matter of law, furnish any defense."

OLESON

v.

FADER.

Wisconsin Supreme Court—April 13, 1915.

160 Wis. 473; 152 N. W. 290.

Landlord and Tenant — Rights of Tenant — Particular Use of Premises — Occupying Premises at Night.

A lease of premises on shares, reserving to the lessor two rooms in the dwelling on the premises until a dwelling could be rented or a place secured for storage, under which the lessor's furniture, etc., was moved into

two rooms, and the key to the outside door of one of which was kept by him, did not give the lessor the right to occupy the rooms as a residence or for sleeping purposes, or any purpose, except to care for or remove the property during reasonable hours; and hence he had no right to be there with a lighted lamp between 7:30 and 8 o'clock in the evening to arrange the furniture for removal.

Assault — Defenses — Ejection of Trespasser.

In such case, the lessee, on the lessor's refusal to leave the premises, had a right to forcibly remove him, and will not be guilty of assault if he used no more force than was reasonably necessary to remove him but will be liable if he used unreasonable or excessive force.

[See note at end of this case.]

Same.

In a lessor's action against his lessee for assault, where it appeared that the lessee used considerable violence in removing the lessor from the premises, and there was evidence that the lessor's resistance was very violent, the question of the lessee's excessive force was for the jury.

[See note at end of this case.]

Instructions — Refusal of Requests Already Given.

There is no error in refusing requested instructions abstractly correct, where they had already been covered by the instructions given.

Appeal from Circuit Court, Grant county: CLEMENTSON, Judge.

Action by Isaac A. Oleson, plaintiff, against William Fader, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[474] Civil action for assault and battery. Plaintiff owned a farm in Grant county which, on March 19, 1913, he rented on shares to the defendant. The lease containing a statement that the lessor "reserves and retains to himself or his agent the right of entry upon said premises for the purpose of fall plowing any ground that may have been sown to small grain the spring or fall preceding, and at any and all times for any purpose of improvement, or for any purpose which the said first party may deem proper:" also the following clause: "Said first party reserves two rooms in the dwelling on said premises until a dwelling can be rented or a place secured for storage." Defendant moved into the dwelling house at once with his family. The parties selected the two west rooms as the rooms to be reserved, and the plaintiff's furniture and other household property was moved into them. The plaintiff kept the key to the outside door opening into one of the two rooms. From April 15th until September 1st plaintiff resided on another farm which he owned northeast of Belmont, La Fayette coun-

ty. On the last named date he rented a house in Belmont and moved into it during the first week in September. Prior to September 17th he took one load of furniture from the reserved rooms to his newly rented house in Belmont. On September 17, 1913, plaintiff went to the farm with his team and wagon and made some repairs on the silo. He took supper with his brother-in-law, Dick Allen, who lived in the immediate vicinity, and went back to the farm in question [475] after supper to unharness and feed his horses, which he had put in the barn. It was then quite dark, and after attending to the horses he went to the house and entered the reserved rooms. This was between 7:30 and 8 o'clock, and it had become very dark. Plaintiff says he was arranging some of the furniture, intending to take a load away the next morning. He had lighted a lamp, when defendant came into the room and asked plaintiff if he knew what the contract said about the rooms. The talk became excited. Defendant claims he ordered plaintiff out of the rooms and that he refused to go, whereupon he (defendant) attempted to put him out, using no more than necessary force; plaintiff claims that defendant attacked him and that he only defended himself. In any event there was a struggle, a number of blows struck, plaintiff got the worst of it, and was knocked down. He finally went away to his brother-in-law's house and spent the night.

The court charged the jury that under this reservation in the lease the plaintiff had no right to use the rooms except for the purpose of storage, and had no right at any time under any provision of the lease to occupy the rooms for sleeping purposes, and had no right to visit said rooms except at reasonable hours. The court further charged in effect that the defendant had a right to demand that plaintiff should retire from the rooms and the plaintiff should have departed; that when he did not do so the defendant had the right to use the force reasonably necessary under all the circumstances to eject the plaintiff, and was only liable to respond in damages if he used unreasonable or excessive force.

The court refused to give the following instructions requested by the plaintiff and exception was duly taken:

"1. If you find the plaintiff and the defendant at the time alleged fought with each other by mutual consent, and in anger; or, if you find that both were willing to fight and did fight, each of the parties is liable to the other for the actual damage caused by him.

[476] "2. If you find that the plaintiff was willing to fight with the defendant, and during such fight sustained injuries, the defendant would be liable for all damages actually resulting from such injuries. On the

other hand, if you find that the defendant was willing to fight with the plaintiff, and during such fight was injured, the plaintiff would be liable to him for the actual damages resulting from such injuries.

"3. In short, it is unlawful to fight, and a person who voluntarily engages in a fight is liable for the actual damages caused by him."

The jury returned a general verdict for the defendant, and the plaintiff appeals from judgment thereon.

M. S. Block and Fiedler & Fiedler for appellant.

Kopp & Brunckhorst for respondent.

WINSLOW, C. J.—Giving the reservation clause in the lease a fair and reasonable construction in the light of the surrounding circumstances, it evidently meant that the plaintiff was entitled to use the two rooms for storage purposes until he could rent a house or secure another place for storage. It did not confer the right to occupy the rooms as a residence or for sleeping purposes, or to enter and use the rooms except for purposes legitimately connected with the proper care or removal of the property therein during reasonable business hours. It seems probable that the right had ceased at the time of the alleged assault, because the plaintiff had rented and moved into another house about two weeks before that time. However this may be, the defendant had a right to demand that the plaintiff leave the rooms at the time in question because it was an unreasonable time of day for him to be there, and it was plaintiff's duty to leave on such demand being made.

It follows from this that upon the plaintiff's refusal to go [477] it was defendant's right to forcibly remove him, and the defendant would not be guilty of assault if he used no more force than was reasonably necessary to accomplish that purpose, but would be liable if he used unreasonable or excessive force.

The trial judge having charged the jury in accordance with these propositions, it is manifest that there was no error in the charge as given. Were it to be conceded that the instructions which the plaintiff requested were abstractly correct, there was no error in declining to give them, because the case had already been fully covered.

The only question upon which we have entertained doubt is the question whether the evidence does not show as matter of law that the defendant used more force than was reasonably necessary to remove the plaintiff from the rooms. He unquestionably used considerable violence and the verdict might well have been the other way. However, there

was evidence tending to show that the plaintiff's resistance was very violent, and we feel unable to say that the conclusion of the trial judge to the effect that the question was fairly a question for the jury was clearly wrong.

The errors which are claimed to exist in the rulings upon evidence do not seem to us substantial.

By THE COURT.—Judgment affirmed.

NOTE.

The holding of the reported case that one in the lawful possession of property may request an intruder to leave and if he refuses to do so may eject him by the use of such force as may be reasonably necessary, is in accord with the general rule as laid down by the great majority of cases, which are collated in the note to *State v. Flanagan*, reported ante, this volume, at page 305.

For a discussion of the defense of property as a justification of assault and battery, see the note to *State v. Cessna*, reported ante, this volume, at page 289.

GROVES

v.

BARDEN.

North Carolina Supreme Court—April 14, 1915.

169 N. Car. 8; 84 S. E. 1042.

Public Officers — Office and Employment Distinguished.

Const. art. 14, § 7, provides that no person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this state, or any other state, shall hold or exercise any other office or place of trust or profit under the authority of the state. Postal Laws and Regulations of 1913, which provides for the appointment of rural carriers by the Postmaster General, and requires such carriers to take oath to support the Constitution and to give bond for faithful performance of their duties, fixes the terms and duties of such carriers; it also inhibits rural carriers from holding any state, county, municipal, or township office. Const. U. S. art. 2, § 2, authorizes Congress to vest the appointment of inferior officers in the President alone, or in the heads of departments. It is held that, while the line between offices or places of trust and profit is not clear, an "office" is a public position to which a portion of the sovereignty of the country attaches for the time being, and which is exercised for the benefit of the public, and within the constitutional provision there is no distinction be-

tween "offices" and "places of trust or profit" with respect to the inhibition against double office-holding; hence a rural mail carrier was a "public officer," and his holding of a state office subjected him to the statutory penalties.

[See note at end of this case.]

Appeal from Superior Court, Duplin county. PEEBLES, Judge.

Action by J. H. Groves, plaintiff, against Frank Barden, defendant. Judgment for defendant. Plaintiff appeals. REVERSED.

[8] Action to recover a penalty of \$200, imposed by section 2365 of the Revisal upon any person who shall presume to hold any office or place of trust or profit contrary to Article XIV, section 7, of the Constitution of the State.

The statute confers the right of action to recover the penalty upon anyone who shall sue for the same.

The plaintiff offered evidence tending to prove that the defendant was an acting constable and was at the time a rural mail carrier.

His Honor being of opinion that the position of rural mail carrier was not a public office, entered a judgment of nonsuit, and the plaintiff excepted and appealed.

George R. Ward and John A. Gavin, Jr., for appellant.

Stevens & Beasley for appellee.

ALLEN, J.—The Constitution, Art. XIV, sec. 7, declares that "No person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this State, or under any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly."

[9] The line between "offices" and "places of trust or profit" within the meaning of the Constitution has not been clearly marked, principally because they approach each other so closely, and are in all essential features identical.

In *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677, the Court, speaking of this question, says: "It is apparent from the association that 'places of trust or profit' are intended which approximate to but are not offices, and yet occupy the same general level in dignity and importance. The manifest intent is to prevent double officeholding—that offices and places of public trust should not accumulate in any single person—and the superadded words of 'places of trust or profit' were put there to avoid evasions in giving too techni-

cal a meaning to the preceding words," and this was affirmed in *State v. Smith*, 145 N. C. 476, 59 S. E. 649, the Court adding in the latter case: "The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government. In this respect the terms 'office' and 'places of trust' as used in our Constitution are synonymous. *Doyle v. Raleigh*, 89 N. C. 136; *Barnhill v. Thompson*, 122 N. C. 495."

In determining whether a position is an office, place of trust or profit, or an employment, the authorities, which are collected in the valuable note to *Atty-Gen. v. Tillinghast*, 17 Ann. Cas. 452, attach significance to the fact that an oath to support the Constitution is required, or that a bond for the faithful performance of duties must be executed, or that the duties are prescribed by law, and not regulated by contract, or that the incumbent discharges independent duties and is not acting under the direction of others, or that the duties are continuing and permanent in their nature and are not occasional or intermittent, or that the term is fixed and continuing and not temporary, or that the position is named an office or an employment in the statute creating it; but in the absence of a constitutional provision these are only circumstances which are entitled to consideration, and are not determinative or conclusive.

The editor of the note says: "It may be stated as a general rule, fairly deducible from the cases discussing this question, that a position is a public office when it is created by law, with duties cast upon the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements."

Our Court is in line with the current of authority, having adopted and approved the definition of an office, that it is "a public position to [10] which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, which is exercised for the benefit of the public," and saying further: "The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government." *State v. Smith*, 145 N. C. 477, 59 S. E. 649.

If, therefore, there is no constitutional classification of offices and employments, and

a duty is imposed upon the incumbent of a position which requires him to perform a legislative, executive, or judicial act, he is a public officer, and otherwise an employee; and in determining the nature of the duty, the fact that the lawmaking power may have declared the position an office or an employment, although not conclusive, is entitled to consideration.

If these principles are properly applied, the position of rural mail carrier has all the indicia of a public office.

By reference to the postal laws and regulations of 1913, it will be seen (sec. 718) that rural carriers are appointed by the Postmaster General; that they are required to take an oath to support the Constitution (sec. 722), and to execute a bond to secure the faithful performance of their duties (sec. 723); that the oath is referred to as an official oath (sec. 722); his duties are designated as official duties (sec. 752), and mention is made of the official character of the carrier (sec. 740). His term and his duties are fixed by law and not by contract, and the duties are continuing and not intermittent, and affect the public generally. They are defined to be "the delivery into and collection from boxes on their routes of mail matter of all classes, serving of post-offices with mail whenever such service is authorized, sale of stamps and supplies, receiving and receipting for matter presented for registration, delivery of registered matter, the handling of registered matter in transit over their routes, taking of applications for money orders and the money therefor, the forwarding of mail addressed to their patrons and the transfer of mail of former patrons whose addresses have been changed to other routes, the erection of United States collection boxes, and the performance of such other duties as may be required of them by law and the regulations of the department, to administer oaths required of pensioners and their witnesses in the execution of pension vouchers."

It is also provided in section 741 that a rural carrier shall not hold any State, county, municipal, or township office, which is a prohibition usually imposed upon officers, and not upon employees.

We have thus dealt with the question with reference to public offices generally, and not as applied particularly to positions held under the Government of the United States, but as to the latter there seems to be [11] a dividing line marked by the Constitution itself between offices and employments.

The Constitution of the United States, Art. II, sec. 2, says the President "shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the

United States whose appointments are not herein otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments;" and in construing this section of the Constitution, the Court said, in *U. S. v. Germaine*, 99 U. S. 508, 25 U. S. (L. ed.) 482: "The Constitution, for purposes of appointment, very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But, foreseeing that when offices became numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment, there can be but little doubt."

It was held in this case that a surgeon appointed by the Commissioner of Pensions was not a public officer, because he was not appointed by the head of a department.

The two cases of *U. S. v. Hartwell*, 6 Wall. 385, 18 U. S. (L. ed.) 830, and *U. S. v. Smith*, 124 U. S. 525, 8 S. Ct. 595, 31 U. S. (L. ed.) 534, illustrate the application of this rule, making the character of the position to depend upon the source of the appointing power.

In the first it was held that a clerk in the office of the Assistant Treasurer of the United States, appointed with the approval of the Secretary of the Treasury, who was the head of the department, was a public officer, and in the second, that a clerk of a collector of customs, appointed by the collector, who was not the head of a department, was not an officer.

In the latter case the Court says: "A clerk of the collector is not an officer of the United States within the provisions of this section; and it is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. [12] The subject was considered and determined in *United States v. Germaine*, 99 U. S. 508, 25 U. S. (L. ed.) 482, and in

the recent case of *U. S. v. Mouat*, 124 U. S. 303, 8 S. Ct. 505, 31 U. S. (L. ed.) 463. What we have here said is but a repetition of what was there authoritatively declared. . . . The case of *U. S. v. Hartwell*, 6 Wall. 385, 18 U. S. (L. ed.) 830, does not militate against this view. The defendant there, it is true, was a clerk in the office of the assistant treasurer at Boston, but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the Court, rendered his appointment one by the head of the department within the constitutional provision upon the subject of the appointing power."

The question was again considered in *U. S. v. Mouat*, 124 U. S. 303, 8 S. Ct. 505, 31 U. S. (L. ed.) 463. and the same conclusion reached, the Court saying: "What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this Court in *U. S. v. Germaine*, 99 U. S. 508, 25 U. S. (L. ed.) 482. In that case it was distinctly pointed out that under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department, and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

The rural mail carrier is, as we have seen, appointed by the Postmaster General, a member of the Cabinet and the head of his department, and therefore comes within the classification of officers outlined in the Constitution as construed by the Supreme Court of the United States, and this position is not in conflict with *State v. Boone*, 132 N. C. 1108, 44 S. E. 595, in which it was held that a carrier of mails operating upon a star route was not a public officer, because the mail carrier in that case was occupying his position under contract with a contractor of the Government, and not by the appointment of the head of any department of Government, as is the rural mail carrier.

It was held in *U. S. v. McCrory*, 91 Fed. 295, 63 U. S. App. 359, 33 C. C. A. 515, that a letter carrier appointed by the Postmaster General was an officer.

We are, therefore, of opinion that his Honor was in error in holding that a rural mail carrier is not an officer.

Error.

NOTE.

Distinction between Office and Employment.

Introductory, 319.

General Rules:

Public Positions, 319.

Private Corporate Positions, 320.

Specific Grounds of Distinction:

Creation of Position, 320.

Powers and Duties, 321.

Tenure of Office, 322.

Official Bond, 322.

Oath of Office, 322.

Compensation, 322.

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Introductory.

It is the purpose of the present note to consider the recent cases discussing the distinction between an "office" and an "employment," or between an "officer" and an "employee." The earlier cases are reviewed in the notes to *Atty.-Gen. v. Tillinghast*, 17 Ann. Cas. 449, and *State v. Hoker*, 63 Am. St. Rep. 174.

General Rules.

PUBLIC POSITIONS.

It may be stated as a general rule, deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements.

United States.—*U. S. v. Heinze*, 177 Fed. 770; *Scully v. U. S.* 193 Fed. 185, 186.

Arkansas.—*Rhoden v. Johnston*, 121 Ark. 217, 181 S. W. 128.

Connecticut.—*State v. Brethauer*, 83 Conn. 143, 75 Atl. 705, 706; *Sibley v. State*, 89 Conn. 682, 96 Atl. 161, L.R.A.1916C 1087.

Illinois.—*People v. Toledo*, etc. R. Co. 267 Ill. 142, 145, 107 N. E. 879; *Fergus v. Russel*, 270 Ill. 304, Ann. Cas. 1916B 1120, 110 N. E. 130; *Illinois Industrial Home for Blind v. Dreyer*, 150 Ill. App. 574.

Kansas.—*Jones v. Botkin*, 92 Kan. 242, 139 Pac. 1196.

Kentucky.—*Page v. O'Sullivan*, 159 Ky. 703, 169 S. W. 542; *Bankers' Surety Co. v. Newport*, 162 Ky. 473, 172 S. W. 940.

Maryland.—*State Tax Commission v. Harrington*, 126 Md. 157, 94 Atl. 537.

Michigan.—*Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681.

Nevada.—*State v. Cole*, 38 Nev. 215, 148 Pac. 551.

New Jersey.—*Fredericks v. Board of Health*, 82 N. J. L. 200, 82 Atl. 528; *Sullivan v. McOsker*, 84 N. J. L. 380, 86 Atl. 497.

Ohio.—*Theobald v. State*, 30 Ohio Cir. Ct. Rep. 414, 415.

Oklahoma.—*Farley v. Board of Education*, 162 Pac. 797.

Oregon.—*Reising v. Portland*, 57 Ore. 295, Ann. Cas. 1912D 895, 111 Pac. 377, 378.

Pennsylvania.—*Evans v. Luzerne County*, 54 Pa. Super. Ct. 44; *In re Public Officers*, 20 Pa. Dist. 15.

Washington.—*Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

West Virginia.—*Blue v. Tetrick*, 69 W. Va. 742, 72 S. E. 1033.

Various positions have been considered by the courts and found to fulfil all of the requirements mentioned in the foregoing general rule as the attributes of a public office. Thus, the following positions have been held to be public offices: sheriff, *Sibley v. State*, 89 Conn. 682, 96 Atl. 161, L.R.A.1916C 1087, assistant state's attorney and assistant superintendent of schools, *People v. Toledo*, etc. R. Co. 167 Ill. 142, 145, 107 N. E. 879; treasurer of a public institution whose trustees were appointed by the governor by and with the advice and consent of the senate, *Illinois Industrial Home for Blind v. Dreyer*, 150 Ill. App. 574; delinquent tax collector, *Bankers' Surety Co. v. Newport*, 162 Ky. 473, 172 S. W. 940; prison guard, *Page v. O'Sullivan*, 159 Ky. 703, 169 S. W. 542; policeman, *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681; warden of a county jail, *Sullivan v. McOsker*, 84 N. J. L. 380, 86 Atl. 497; inspector appointed by a local board of health, *Fredericks v. Board of Health*, 82 N. J. L. 200, 82 Atl. 528; assistant clerk of orphan's court, *Evans v. Luzerne County*, 54 Pa. Super. Ct. 44; superintendent of construction, *In re Public Officers*, 20 Pa. Dist. 15; tax commissioner, *Blue v. Tetrick*, 69 W. Va. 742, 72 S. E. 1033.

The Federal Constitution provides that the President shall nominate and by and with the advice and consent of the Senate shall appoint all public officers of the United States whose appointments are not therein otherwise provided for and which shall be established by law; but Congress may, by law, vest the appointment of such superior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments. It has been held that a person appointed to a position in the service of the federal government in a mode different from those mentioned is not an officer but a mere employee. *Martin v. U. S.* 168 Fed. 198, 200, 93 C. C. A. 484; *Scully v. U. S.* 193

Fed. 185, 186, wherein it was held that one who serves the United States for a salary or for wages under a contract is an employee and not an officer. See also *U. S. v. Haas*, 167 Fed. 211, 214; *U. S. v. Heinze*, 177 Fed. 770.

PRIVATE CORPORATE POSITIONS.

A field manager of a corporation is not an officer of the company as he has no term of office, but is merely an employee. *Badger Oil, etc. Co. v. Preston (Okla.)* 152 Pac. 383. In *Abbott v. Lewis*, 77 N. H. 94, 88 Atl. 98, it was held that a corporate "employee" is a clerk or workman in the service of an employer, as distinguished from an official or officer, or one employed in a position of some authority, the court saying that while anyone employed by a corporation in any capacity may perhaps be considered an employee of the corporation such is not the meaning of the word as it is ordinarily used.

Specific Grounds of Distinction.

CREATION OF POSITION.

To constitute an office it is essential that the position shall be created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question. *Rhoden v. Johnston*, 121 Ark. 317, 181 S. W. 128; *State v. Brethauer*, 83 Conn. 143, 75 Atl. 705, 706; *People v. Toledo*, etc. R. Co. 267 Ill. 142, 145, 107 N. E. 879; *Fergus v. Russel*, 270 Ill. 304, Ann. Cas. 1916B 1120, 110 N. E. 130; *Illinois Industrial Home for Blind v. Dreyer*, 150 Ill. App. 574; *Jones v. Botkin*, 92 Kan. 242, 139 Pac. 1196; *Page v. O'Sullivan*, 159 Ky. 703, 169 S. W. 542; *Bankers' Surety Co. v. Newport*, 162 Ky. 473, 172 S. W. 940; *State Tax Commission v. Harrington*, 126 Md. 157, 94 Atl. 537; *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681; *State v. Cole*, 38 Nev. 215, 148 Pac. 551; *Fredericks v. Board of Health*, 82 N. J. L. 200, 82 Atl. 528; *Sullivan v. McOsker*, 84 N. J. L. 380, 86 Atl. 497; *Theobald v. State*, 30 Ohio Cir. Ct. Rep. 414, 415; *Farley v. Board of Education (Okla.)* 162 Pac. 797; *Reising v. Portland*, 57 Ore. 395, Ann. Cas. 1913D 895, 111 Pac. 377; *Evans v. Luzerne County*, 54 Pa. Super. Ct. 44; *In re Public Officers*, 20 Pa. Dist. 15; *Cross v. Fisher*, 132 Tenn. 31, Ann. Cas. 1916E 1092, 177 S. W. 43; *Bilger v. State*, 63 Wash. 457, 116 Pac. 19; *Blue v. Tetrick*, 69 W. Va. 742, 72 S. E. 1033.

Tested by the foregoing criterion, it has been held that the position of road overseer is not an office, *Rhoden v. Johnston*, 121 Ark. 317, 181 S. W. 128; that a clerk of the department of public works is a mere employee,

State v. Brethauer, 83 Conn. 143, 75 Atl. 705, 706; that a clerk in the inheritance tax office of the attorney general in counties of the third class is an employee, Fergus v. Russel, 270 Ill. 304, Ann. Cas. 1916B 1120, 110 N. E. 130; that a cell house man of a state penitentiary is an employee, Jones v. Botkin, 92 Kan. 242, 139 Pac. 1196; that engineers and firemen of a city water and light plant are employees, State v. Ottawa, 84 Kan. 100, 113 Pac. 391, that the general counsel to the state tax commission is a public officer, State Tax Commission v. Harrington, 126 Md. 157, 94 Atl. 537; that a policeman is an employee, State v. District Ct. 134 Minn. 26, 158 N. W. 790; that a superintendent of an exposition commission is a mere employee, State v. Cole, 38 Nev. 215, 148 Pac. 551; that supervisors are mere employees, Cross v. Fisher, 132 Tenn. 31, Ann. Cas. 1916E 1092, 177 S. W. 43; that commissioners appointed by a municipality to make an assessment of benefits are mere employees, Bilger v. State, 63 Wash. 457, 116 Pac. 19.

Where a position is created, not by force of law but by a contract of employment, the employment does not rise to the dignity of an office. Martin v. U. S. 168 Fed. 198, 93 C. C. A. 484; Rhoden v. Johnston, 121 Ark. 317, 181 S. W. 128; McAvoy v. Trenton, 82 N. J. L. 101, 80 Atl. 950; Farley v. Board of Education (Okla.) 162 Pac. 797.

In applying the rule that a position created by contract is a mere employment, it has been held that an allotment clerk does not fill an office, Martin v. U. S. 168 Fed. 198, 200, 93 C. C. A. 484; that the position of road overseer is not a public office, Rhoden v. Johnston, 121 Ark. 317, 181 S. W. 128; that a clerk of a street department is not an officer, McAvoy v. Trenton, 82 N. J. L. 101, 80 Atl. 950; that a city superintendent of public schools is not an officer, Farley v. Board of Education (Okla.) 162 Pac. 797.

POWERS AND DUTIES.

An indispensable element of a public office as distinguished from an employment is that the duties of the incumbent of an office shall involve an exercise of some portion of the sovereign power. People v. Toledo, etc. R. Co. 267 Ill. 142, 145, 107 N. E. 879; State Tax Commission v. Harrington, 126 Md. 157, 94 Atl. 537; Evans v. Luzerne County, 54 Pa. Super. Ct. 44; Blue v. Tetrick, 69 W. Va. 742, 72 S. E. 1033. By reason of the fact that their duties do not involve the exercise of sovereign powers, the following have been held not to be public officers; a clerk of the department of public works, State v. Brethauer, 83 Conn. 143, 75 Atl. 705, 706; and the general counsel to the state tax com-
Ann. Cas. 1917D—21.

mission, State Tax Commission v. Harrington, 126 Md. 157, 94 Atl. 537.

It has been held that the positions of assistant state's attorney and assistant superintendent of schools are public offices and not mere employments as they fulfil the test of exercising sovereign functions. People v. Toledo, etc. R. Co. 267 Ill. 142, 145, 107 N. E. 879. Likewise an assistant clerk of a separate orphan's court is a public and constitutional officer, Evans v. Luzerne County, 54 Pa. Super. Ct. 44; as is a tax commissioner, Blue v. Tetrick, 69 W. Va. 742, 72 S. E. 1033.

It is also an essential element of an office that the duties thereof shall be continuing and permanent in their nature and not occasional or intermittent. Rhoden v. Johnston, 121 Ark. 317, 181 S. W. 128; People v. Toledo, etc. R. Co. 267 Ill. 142, 145 N. E. 879; Bilger v. State, 63 Wash. 457, 116 Pac. 19. Thus commissioners appointed by a municipality to make an assessment of benefits have been held to be employees and not officers. Bilger v. State, 63 Wash. 457, 116 Pac. 19. But it has been held that an assistant state's attorney and assistant superintendent of schools are public officers, People v. Toledo, etc. R. Co. 267 Ill. 142, 145, 107 N. E. 879; and that a road overseer is not a public officer but an employee. Rhoden v. Johnston, 121 Ark. 317, 181 S. W. 128.

While the fact that the question whether the duties of a position are prescribed by law is not an absolute criterion by which to distinguish between an office and employment, that fact gives additional force to the determination that such position is an office. Scully v. United States, 193 Fed. 185, 186; U. S. v. Haas, 167 Fed. 211, 214; Rhoden v. Johnston, 121 Ark. 317, 181 S. W. 128; People v. Toledo, etc. R. Co. 267 Ill. 142, 145, 107 N. E. 879; Page v. O'Sullivan, 159 Ky. 703, 169 S. W. 542; State v. Cole, 38 Nev. 215, 148 Pac. 551; Farley v. Board of Education, (Okla.) 162 Pac. 797. Thus, the following have been held not to be public officers: a clerk whose duties are not prescribed by law, Scully v. U. S. 193 Fed. 185, 186; an expert accountant appointed as special assistant to a United States attorney by the attorney general, U. S. v. Heinze, 177 Fed. 770; an associate statistician, U. S. v. Haas, 167 Fed. 211, 214; a road overseer, Rhoden v. Johnston, 121 Ark. 317, 181 S. W. 128; a superintendent of an exposition commission, State v. Cole, 38 Nev. 215, 148 Pac. 551; a city superintendent of public schools, Farley v. Board of Education (Okla.) 162 Pac. 797.

A prison guard, inasmuch as his duties are prescribed by statute, has been held to be a public officer. Page v. O'Sullivan, 159 Ky. 703, 169 S. W. 542.

TENURE OF OFFICE.

In several recent decisions the presence of a definite tenure has been referred to as a circumstance tending to show that the position in question was an office, and in other decisions the absence of tenure has been considered with other circumstances in holding that the position was a mere employment. *U. S. v. Heinze*, 177 Fed. 770; *Scully v. U. S.* 193 Fed. 185, 186; *Rhoden v. Johnston*, 121 Ark. 317, 181 S. W. 128; *People v. Toledo*, etc. R. Co. 267 Ill. 142, 145, 107 N. E. 879; *State v. Ottawa*, 84 Kan. 100, 113 Pac. 397; *Jones v. Botkin*, 92 Kan. 242, 139 Pac. 1196; *Bankers' Surety Co. v. Newport*, 162 Ky. 473, 172 S. W. 940; *Fredericks v. Board of Health*, 82 N. J. L. 200, 82 Atl. 528; *People v. McAneny*, 144 N. Y. S. 121; *Bennett v. State (Okla.)* 150 Pac. 198; *Reising v. Portland*, 57 Ore. 295, 111 Pac. 377, 378, Ann. Cas. 1912D 895; *In re Public Officers*, 20 Pa. Dist. 15; *Cross v. Fisher*, 132 Tenn. 31, Ann. Cas. 1916E 1092, 177 S. W. 43; *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

OFFICIAL BOND.

The fact that a person occupying a position is or is not compelled to give a bond for the faithful performance of his duties does not seem to be an absolute criterion by which to distinguish between an office and an employment, but in several recent cases the presence or absence of a bond has been considered in connection with other circumstances. *Rhoden v. Johnston*, 121 Ark. 317, 181 S. W. 128; *Bankers' Surety Co. v. Newport*, 162 Ky. 473, 172 S. W. 940; *State Tax Commission v. Harrington*, 126 Md. 157, 94 Atl. 537; *Reising v. Portland*, 57 Ore. 295, Ann. Cas. 1912D 895, 111 Pac. 377, 378.

OATH OF OFFICE.

The duty to take an oath of office is a strong circumstance in distinguishing between an officer and an employee, and in a number of recent cases that circumstance is considered with others in determining the character of the position in question. *Scully v. U. S.* 193 Fed. 185, 186; *State Tax Commission v. Harrington*, 126 Md. 157, 94 Atl. 537; *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681; *Devlin v. New York*, 149 N. Y. S. 1061; *Theobald v. State*, 30 Ohio Cir. Ct. Rep. 414, 415; *Reising v. Portland*, 57 Ore. 295, Ann. Cas. 1912D 895, 111 Pac. 377, 378. The fact that an employee takes an oath of office does not make him an officer. *Scully v. U. S.* 193 Fed. 185, 186; *Jones v. Battle Creek (Mich.)* 159 N. W. 145; *Devlin v. New York*, 149 N. Y. S. 1061.

COMPENSATION.

While the compensation of a public officer is generally fixed by law, the manner in which the compensation of a position is fixed is not an absolute test to determine whether the position is an office or an employment, but is merely a circumstance to be considered in connection with other matters in determining the question. *U. S. v. Heinze*, 177 Fed. 770; *Rhoden v. Johnston*, 121 Ark. 317, 181 S. W. 128; *Sibley v. State*, 89 Conn. 682, 96 Atl. 161; *L.R.A.* 1916C 1087; *State Tax Commission v. Harrington*, 126 Md. 157, 94 Atl. 537; *In re Public Officers*, 20 Pa. Dist. 15; *Cross v. Fisher*, 132 Tenn. 131, Ann. Cas. 1916E 1092, 177 S. W. 43; *Blue v. Tetrick*, 69 W. Va. 742, 72 S. E. 1033.

MISCELLANEOUS.

The circumstance that a statistician is put in the list of clerks and employees in the department of agriculture raises the presumption that an associate statistician is a clerk and not a public officer within the meaning of the law. *U. S. v. Haas*, 167 Fed. 211, 214.

THOMSEN ET AL.

v.

CAYSER ET AL.

United States Supreme Court—March 6, 1917.

243 U. S. 66; 37 S. Ct. 353.

Appeal and Error — Dismissal — Grounds — Mandate of Court Below Executed.

A writ of error from the Federal Supreme Court to review a judgment of reversal with instructions to dismiss the complaint which a circuit court of appeals had entered on rehearing after it had recalled its mandate, previously issued, ordering a new trial, and had set aside the judgment of the court below, need not be dismissed, either because the trial court had theretofore entered judgment on the original mandate, and had adjourned for the term without any application made to recall such judgment, or any writ of error to review such judgment sought, or because the defendants in error in the circuit court of appeals, on whose petition the rehearing was granted, had waived therein any right to a new trial, and consented that the case be disposed of one way or the other.

Scope of Review — Questions of Fact — Combination in Restraint of Trade.

The facts are not still in controversy on a writ of error from the Federal Supreme

Court to a circuit court of appeals to review a judgment which reversed, with instructions to enter an order dismissing the complaint, a judgment in favor of plaintiffs in an action to recover treble damages for the injuries sustained as the result of a combination alleged to restrain foreign trade, contrary to the Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), where the case was decided in the circuit court of appeals upon the proposition of law that the combination charged was not an unreasonable restraint of trade, and that such character was necessary to make it illegal under that statute, both trial and appellate courts concurring as to the fact of combination and restraint and the means employed, and their conclusion not being clearly erroneous.

Monopolies — Violation of Sherman Act — Combination of Ocean Carriers.

Ocean carriers between New York and South African ports violate the prohibition of the Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), against combinations in restraint of foreign trade or commerce, by uniting, with the intention and result of restraining competition, in establishing a uniform freight rate which included a so-called "primage charge," to be refunded subsequently to shippers upon condition that they should ship exclusively by the lines of the combining carriers, and should not, directly or indirectly, be interested in any shipment by other vessels, and upon the further condition (afterwards revoked) that the consignees must also exhibit the same loyalty to the combining lines.

[See note at end of this case.]

Same.

A combination of ocean carriers to restrain competition is within the Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), although it was formed in a foreign country, where it affected the foreign commerce of the United States, and was put into operation in the United States by the carriers' local managers, who were more than simply agents, being participants in the combination.

[See note at end of this case.]

Remedies of Person Injured — Sherman Anti-trust Act — Recovery of Treble Damages.

Shippers who have been compelled to pay an unreasonable freight rate because of a combination of ocean carriers to restrain competition, contrary to the Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), have suffered damage to the amount of the excess over what was a reasonable rate, within the meaning of § 7 of that act, giving a cause of action to any person injured in his person or property by reason of anything forbidden by the act, and the right to recover threefold damages sustained by him.

Same.

The fact of combination need not be submitted to the jury in an action for threefold

damages, brought under the Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), § 7, where there is no conflict in the evidence, and nothing, therefore, for the jury to pass upon.

Same.

It cannot be said that the jury were permitted to consider supposititious profits as elements of damage in an action for threefold damages, brought under the Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), § 7, by shippers against ocean carriers who had combined to restrain competition, where there were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury, who were told that they ought not to allow any speculative damages, and were not required to guess as to what damages plaintiffs claimed to have sustained, and that the burden of proof was upon plaintiffs, and that from the evidence the jury should be able to calculate the damages—especially where plaintiffs alleged an overcharge, and the verdict of the jury was for the amount of such overcharge and interest.

Same.

Error, if any, in failing to charge the jury in an action for threefold damages, brought under the Anti-trust Act of July 2, 1890 (26 Stat. L. 209, c. 647, 7 Fed. St. Ann. 336), § 7, by shippers against ocean carriers, that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable, does not demand a reversal where the record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all the elements of judgment, and careful instructions by the court for their estimate.

Error to United States Circuit Court of Appeals, Second Circuit.

Action by Thomsen et al., plaintiffs, against Cayser et al., defendants. Judgment for plaintiffs in United States Circuit Court, Southern District of New York. Judgment reversed by Circuit Court of Appeals. Plaintiffs bring error. **REVERSED.**

[68] Action, brought in the Circuit Court of the United States for the Southern District of New York, by plaintiffs in error against defendants in error and others under the Sherman Act to recover damages for injuries sustained as the result of a combination in restraint of foreign trade.

The defendants, it is charged, being common carriers between New York and South African ports, did, under certain company names, sometime prior to December, 1898, enter into a combination and conspiracy in restraint of trade and commerce between New York and ports in South Africa to be

rendered effective by making certain discriminations in rates of freight to be charged which were calculated to coerce and prevent plaintiffs and other shippers and merchants similarly situated from employing such agencies and facilities of transportation as might be afforded them by other common carriers.

For such purpose they united under the name of "The South African Steam Lines" and distributed a circular¹ [69] (Exhibit A) promising to pay shippers by their lines 10% upon the net amount of freight at tariff rates received on shipments from the United States to Africa, the commission to be computed every six months up to the thirty-first of January and the thirty-first of July in each year and to be payable nine months after such respective dates, but only to shippers who shipped exclusively by their lines to certain African ports, and provided that the shippers directly or indirectly have not made or have not been interested in any shipments by other vessels.

The commission is not payable on the goods of any consignee who directly or indirectly imports goods by vessels other than those dispatched by the combining lines.

These terms, it is charged, are against public policy and in restraint of trade.

About the middle of the year 1901 the defendant Deutsche Dampschiffahrts Gesellschaft, Hansa, and the firm of Funch, Edye & Co., as its agent, offered to transport [70] merchandise to South African ports at reasonable rates and lower than those imposed by the other defendants. Thereupon the other defendants, for the purpose of avoiding the competition of the carriers accepted them into the scheme and combination and there was agreement between them to continue the monopoly, and another circular

was issued like the first, including only the additional announcement that the Deutsch Dampschiffahrts Gesellschaft, Hansa, had been added as one of the parties to the first-named agreement. The circular is attached to the complaint as Exhibit B.

Subsequently the defendants adopted a verbal agreement that altered the circulars to the effect that the so-called "loyal" consignees could collect the so-called rebates regardless of whether the shippers were also loyal; but on the condition that where the shippers and consignees were both loyal the rebates would be paid to the shippers, while if the consignee alone were loyal the rebate would be paid by the defendants in London direct to the so-called loyal consignee.

Defendants have not dispatched steamers to African ports at stated and regular dates but have placed steamers on berth to receive general cargo only at such times and for such ports in South Africa as they deemed best for their private gain and profit.

By reason of the monopoly so created by defendants, shippers—among whom are plaintiffs—have been compelled to submit to hardships and inconvenience, and to pay unreasonable and higher rates to such extent as to leave at the present time in the possession of defendants collectively, as plaintiffs are informed, about one and one-half million dollars representing the extortion of their rates, and that of such amount £1,112, 7s. 11d. has been extorted from plaintiffs.

Two steamship companies, the Prince Line and the Houston Line, have since the spring of 1902 offered to [71] carry from the United States to South African ports merchandise for a reasonable and remunerative rate lower than that exacted by defendants.

Defendants, to prevent such steamers from

¹ "THE SOUTH AFRICAN STEAM LINES.

"Notice to Shippers in the United States.
"Commission in Respect of Shipments by
Steam and Sailing Vessels.

"London, 31st December, 1898.

"1. Shippers to all Ports of the Cape Colony and of Natal, and to Delagoa Bay, are hereby informed that until further notice, and subject to the conditions and terms set out herein each of the undernamed Lines will pay Shippers by their Line a commission of ten per cent., calculated upon the net amount of freight at tariff rates received by such Line from such Shippers on their shipments from the United States to South Africa.

"2. The said Commission to be computed every six months up to the 31st January and 31st July in each year, and to be payable nine months after such respective dates to those shippers only who, until the date at which the Commission shall become payable shall have shipped exclusively by vessels despatched by the undernamed Lines respectively from the United States to Ports of the Cape Colony, Natal, and Delagoa Bay, provided that

such shippers, either as Principals or as Agents, have not directly or indirectly made or been interested in any shipments to any of the aforesaid Ports by vessels other than those despatched by the under-named, and also provided that the Statement of Claim for such commission shall be made in the annexed form, within twelve months of the date of shipment, to the Line which shall have carried the goods in respect of which the Commission is claimed.

"3. The above commission is not payable on the goods of any Consignee who directly or indirectly imports goods by vessels other than those despatched by the under-named Lines.

"(Subscribed) AMERICAN & AFRICAN STEAMSHIP LINE.

UNION-CLAN LINE.

"All previous notices to Shippers or Consignees with reference to returns on Freight are cancelled.

"Note.—The above Commission will be payable to the Shippers whose names appear on the Bills of Lading or to their Order."

competing, have, in addition to the terms imposed on the South African trade by the circulars above mentioned, imposed further conditions which, while they ostensibly reduced the lower rate of freight and announced that defendants would pay the greater difference arising therefrom, by them called a special commission, they still exacted the payment of the higher rates, by them called tariff rates, at the time of shipment and imposed the following further conditions: (1) Precedent to the payment of such difference they require all shippers to be loyal to them. (2) Each shipper to disclose the name of his consignee. (3) The difference in rates to be computed only on those steamers which would come into direct competition with the steamers of either the Prince Line or the Houston Line, called by defendants "fighting steamers." (4) The special commission or rebate to be granted only on limited amounts of freight room, to be allotted at the will and discretion of defendants, additional freight room to be paid for at the higher rate under the conditions expressed in the circulars.

These additional conditions are intended to further restrain trade and in fact have prevented shippers who had already shipped goods under the original conditions imposed by the circulars from further exporting as much merchandise to South African ports at reasonable rates offered other shippers.

To further secure the monopoly of the carrying trade to such ports and oust competition defendants have threatened to withhold and have withheld by way of forfeit the repayment of the so-called rebates from all those, among whom are plaintiffs, so-called by them "loyal shippers" and "loyal consignees," as aforesaid, [72] "who would not continue to remain loyal under the additional conditions superimposed as aforesaid."

For illustration plaintiffs adduce two instances when they were obliged to pay higher rates on a portion of the shipments, which rates were higher than those offered by the opposition lines, and defendants threatened, if plaintiffs made the shipments over the latter lines upon the more favorable terms, to withhold from repaying plaintiffs all sums previously so compulsorily paid by plaintiffs.

Plaintiffs are informed and believe that since the opposition lines have offered to carry freight to South African ports defendants have, by reason of their conspiracy, refused to allot uniform and proportionate freight room on their steamers and have arbitrarily discriminated between several shippers and even against the so-called "loyal" shippers and consignees, with the unlawful intent that the moneys so held by them would be sufficient security to prevent such shippers or consignees from making

shipments of or importing their goods by the competing vessels.

By reason of the conspiracy plaintiff and others similarly situated have been compelled either not to ship at all and to lose a great deal of their trade or to ship on defendants' steamers a small portion of merchandise at the lower rates and the remainder, of the same class and even of the identical lot of merchandise, at the higher rates, which is practically prohibitive of any trade whatever by reason of the fact that the substantial difference between the two rates would be a discrimination against the various consignees and customers of plaintiffs and the various shippers and customers of other shippers by the same steamer.

The conspiracy violates the laws of the United States and especially the Act of July 2, 1890 (7 Fed. St. Ann. 336) entitled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies."

[73] Plaintiffs allege damages in the sum of £1,112, 7s. 11d., equal to \$5,660, for which they pray as the excess over a reasonable rate, and the further sum of \$10,000 damages, and the trebling of these sums.

The defendants, by their company names, filed separate answers in which they deny some of the allegations of the complaint and admit others. They deny conspiracy and combination for the purpose or with the effect set out in the complaint. They admit the making and issuing of the circulars designated A and B in the complaint, but deny that they have the effect or were intended to have the effect ascribed to them.

They admit the refusal to pay plaintiff certain claims as rebates, but deny the distinction between loyal shippers and loyal consignees and all of the inferences and assertions in regard thereto.

As a separate defense they allege that all freight carried by them for plaintiffs was carried on bills of lading, each of which contained on its face the statement of the amount of freight to be paid and in respect to which in every instance plaintiffs either paid the freight or agreed to pay the amount of freight stated in the bill of lading and in each instance gave a due bill which was subsequently paid; that the payments were made freely and voluntarily and without protest; and that so far as any of the payments were made pursuant or with reference to the printed circulars plaintiffs co-operated knowingly in such transactions and cannot now be entitled to any relief on account of payments of freight made thereunder.

It was prayed that the complaint be dismissed.

Upon the issues thus formed there were two trials. At the conclusion of the testimony on the first trial the court considered

that no cause of action was established under the Sherman Law and upon motion of defendants dismissed the complaint. 149 Fed. Rep. 933.

[74] The judgment was reversed by the Circuit Court of Appeals (October, 1908). 166 Fed. Rep. 251.

Upon the return of the case to the Circuit Court it was tried to a jury, resulting in a verdict for plaintiffs against the defendants composing the firms of Cayer, Irvine & Company; Barber & Company; and Norton & Son, the action as to the other defendants having abated or been dismissed by the court.

The judgment recites that the action was brought under the Act of Congress of July 2, 1890, and that a verdict had been rendered against the defendants above named for the sum of \$5,600, with interest in the sum of \$1,973.06, in all \$7,573.06; that thereupon the court directed the clerk to treble the amount of the verdict pursuant to the terms of the act of Congress, making the amount \$22,719.18, and that, the parties consenting, the court fixed \$2,500 as an attorney's fee. The judgment was reversed by the Circuit Court of Appeals, one member dissenting (July 1911). 190 Fed. Rep. 536.

The Circuit Court at the first trial (Judge Hough sitting) was of opinion that the testimony did not establish that the combination charged against defendants was in unreasonable restraint of trade. The Circuit Court of Appeals expressed a different opinion. The court said that the substance of the complaint was that defendants were engaged as carriers in South African trade and had entered into a combination in restraint of foreign trade and commerce in violation of the act of Congress by means of a scheme under which they united as "The South African Lines," fixed rates, and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate, which they should receive back in case—and only in case—they refrained from shipping by other lines. And the court said the evidence showed the existence of a "conference" for the purpose of fixing and maintaining rates and a return "commission" to "loyal" [75] shippers. The manifest purpose of the combination and its effect were, it was further said, to restrain competition and that it was therefore in contravention of the Federal Anti-trust Act.

The court considered that whether the restraint was reasonable or unreasonable was immaterial under the decisions of this court, or whether the combination was entered into before or after plaintiffs commenced business, the statute applying to continuing combinations, or whether the combination was formed in a foreign country, as it affected the foreign commerce of this country and was put into

operation here. And as the plaintiffs had alleged damage, the court decided that they were entitled to an opportunity to prove it and remanded the case to the Circuit Court.

Upon the second appeal the court declared a change of view, saying: "When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial," and that it was "also apparent from the record that the Circuit Court upon the second trial in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law." And further: "In the light of the recent decisions of the Supreme Court in the Standard Oil and Tobacco Cases, the construction so placed upon the statute by this court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this court can now determine the legality of the combination."

The court then said that it was impossible to hold that the record disclosed a combination in unreasonable restraint of trade, but that it would be unduly prejudicial to plaintiffs to reverse the judgment with instructions to [76] dismiss; that as the plaintiffs had presented their case in view of the decision of the court that the reasonableness of the restraint was immaterial, it would be unjust to them to dismiss the complaint because their proof did not conform to another standard, and that upon another trial the plaintiffs might be able to "produce additional testimony tending to make out a case within the Supreme Court decisions referred to." Accordingly, the court remanded the case for a new trial.

Subsequently a rehearing was granted on petition of plaintiffs, who waived any right to a new trial and consented that the case should be disposed of one way or the other. As a result of the rehearing the mandate was recalled and the judgment reversed with instructions to enter an order dismissing the complaint.

This writ of error was then allowed.

A. Leo Everett and Lorenzo Ullo for plaintiffs in error.

J. Parker Kirlin, Thomas Thatcher and Charles R. Hickox for defendants in error.

[82] McKenna, J. (*after stating the facts*).—A motion to dismiss the writ of error is made, two grounds being urged: (1) The Circuit Court of Appeals was without jurisdiction to allow the writ on March 15, 1912, for the reason that its judgment had

become executed and the judgment entered thereon in the Circuit Court November 24, 1911, had become final and irrevocable before the petition for the writ was filed and the order allowed. (2) The judgment of the Circuit Court was entered in the form finally adopted at the request of plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent.

The argument to support the motion is somewhat roundabout. It gets back to the Circuit Court and charges that because that court had entered judgment on the original mandate and had adjourned for the term without any application having been made to recall that [83] judgment and because no writ of error to review it was sought, the judgment became a final disposition of the case.

We are not concerned with what the Circuit Court might have done, but only with what the Circuit Court of Appeals did and the jurisdiction it possessed. It received and granted a petition for rehearing, ordered a recall of the mandate previously issued, set aside the judgment of the Circuit Court, and remanded the case with directions to dismiss the complaint. The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.

Subsequently a petition for the writ of error was filed and allowed and all further proceedings upon the part of the defendants for the enforcement of the judgment were suspended and stayed until the final determination by this court upon the writ of error, in return to which the record was properly furnished. *Atherton v. Fowler*, 91 U. S. 143, 23 U. S. (L. ed.) 265.

The motion to dismiss is denied.

The case in the courts below had a various fate, victory alternating between the parties but finally resting with defendants.

The plaintiffs, dissatisfied, have brought the case here. We are confronted at the outset, in view of the proceedings in the courts below, with contentions as to what questions of law or fact are before us.

Notwithstanding two trials and two appeals and reviews in the Circuit Court of Appeals, defendants insist the facts are yet in controversy. We cannot assent.

It will be observed from the excerpts from the opinions of the Circuit Court of Appeals that the case was decided upon the proposition of law that the combination charged against defendants was not in unreasonable restraint of [84] trade and that such character was necessary to make it illegal under the Federal Anti-trust Act. As to the fact

of combination and restraint and the means employed both trial and appellate courts concurred, and their conclusion is not shown to be erroneous.

There is a contention that "there is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting of firms, the identity of whose members is not established, operated steamers in the trade from New York to South African ports without competing with one another." But more than that appears, and it cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution. The contention did not prevail with the courts below, and we are brought to the consideration of the grounds upon which the Circuit Court of Appeals changed its ruling, that is, that it was constrained to do so by the *Standard Oil and Tobacco Cases*, 221 U. S. 1, 106, Ann. Cas. 1916D 734, 34 L.R.A.(N.S.) 834, 31 S. Ct. 502, 632, 55 U. S. (L. ed.) 619, 663.

It is not contended that the facts of those cases or their decision constrained such conclusion, but only that they announced a rule which, when applied to the case at bar, demonstrated the inoffensive character of the combination of defendants. In other words, it is contended that it was decided in those cases that "the rule of reason" must be applied in every case "for the purpose of determining whether the subject before the court was within the statute," to quote the words of the opinion, and, as explained in subsequent cases, it is the effect of the rule that only such contracts and combinations are within the act as, by reason of their intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the [85] course of trade. *Nash v. U. S.* 229 U. S. 373, 376, 33 S. Ct. 780, 57 U. S. (L. ed.) 1232; *Eastern States Retail Lumber Dealers' Assoc. v. U. S.* 234 U. S. 600, 609, 34 S. Ct. 951, 58 U. S. (L. ed.) 1490, L.R.A.1915A 788.

But the cited cases did not overrule prior cases. Indeed, they declare that prior cases, aside from certain expressions in two of them (*U. S. v. Trans-Missouri Freight Assoc.* 166 U. S. 290, 17 S. Ct. 540, 41 U. S. (L. ed.) 1007; *U. S. v. Joint-Traffic Assoc.* 171 U. S. 505, 19 S. Ct. 25, 43 U. S. (L. ed.) 259), or asserted implications from them, were examples of the rule and show its thorough adequacy to prevent evasions of the policy of the law "by resort to any disguise or subterfuge of form" or the escape of its prohibitions "by any indirection." And we have

since declared that it cannot "be evaded by good motives," the law being "its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties and, it may be, of some good results." *Standard Sanitary Mfg. Co. v. U. S.* 226 U. S. 20, 49, 33 S. Ct. 9, 57 U. S. (L. ed.) 107; *International Harvester Co. v. Missouri*, 234 U. S. 199, 34 S. Ct. 859, 58 U. S. (L. ed.) 1276, 52 L.R.A. (N.S.) 525.

The rule condemns the combination of defendants, indeed, must have a stricter application to it than to the combinations passed on in the cited cases. The defendants were common carriers and it was their duty to compete, not combine; and their duty takes from them palliation, subjects them in a special sense to the policy of the law.

Their plan of evasion was simple and as effective as simple. They established a uniform freight rate, including in it what they called a *primage* charge. This charge was refunded subsequently, but only to shippers who shipped exclusively by the lines of the combining companies and who had not directly or indirectly made or been interested in any shipment by other vessels. And there was the further condition that the rebate was not [86] payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those of the "conference"—to use the word employed by the witnesses to describe the combining companies. This loyalty on the part of the consignees was subsequently not exacted, but loyalty upon the part of shippers was continued to be required and its reward was the refunding of the *primage* charge. That the combination was effective both the lower courts agreed. Upon its extent they differed, the Court of Appeals considering that while it was in restraint of trade the restraint was reasonable and therefore not obnoxious to the law.

The Court of Appeals has not given us its reason for its conclusion. Counsel for defendants say that the *Standard Oil* and *Tobacco Cases* furnish the explanation, and that they support what the history of the act establishes, that it was the "clear intent upon the part of Congress not to condemn contracts and combinations merely because they are in restraint of competition or merely because they operate to raise the cost of commodities to consumers."

The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it,

and that it was a beneficial and not a detrimental agency of commerce.

We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. They assert first that they are voluntary agencies of commerce, free to go where they will, not compelled to run from New York to Africa, and that, "unlike railroads, neither law, nor any other necessity, fixes them upon particular courses;" and therefore, it is asked, "who can say that otherwise than under the plan adopted, any of [87] the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint?" The resultant good of the plan, it is said, was "regularity of service, with steadiness of rates;" and that "the whole purpose of the plan under which the defendants acted was to achieve this result."

We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade others might have done so and been willing to serve shippers without constraining them, been willing to compete against others for the patronage of the trade. And it appears from the testimony that certain lines so competed until they were taken into the defendants' combination.

Nor can it be said that under defendants as competitors or that under competing lines service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so.

That the combination was intended to prevent the competition of the lines which formed it is testified, and it cannot be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of "fighting ships" to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the "fighting ships." And it finds no justification in the fact that defendants' "contributions to trade and commerce" might "have been withheld." This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the [88] conduct of property embarked in the public service is subject to the policies of the law.

It is contended that the combination, if there was one, was formed in a foreign coun-

try and that, therefore, it was not within the act of Congress; and that, besides, the principals in the combination and not their agents were amenable to the law. To this we do not assent. As was said by the Circuit Court of Appeals, the combination affected the foreign commerce of this country and was put into operation here. *U. S. v. Pacific, etc. Ry. etc. Co.* 228 U. S. 87, 33 S. Ct. 443, 57 U. S. (L. ed.) 742. It, therefore, is within the law, and its managers here were more than simply agents—they were participants in the combination.

It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover threefold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas, etc. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 436, 9 Ann. Cas. 1075, 27 S. Ct. 350, 51 U. S. (L. ed.) 553. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion.

The next contention is that the fact of combination should have been submitted to the jury and not decided as a matter of law by the court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the court properly assumed the decision of what was done and its illegal effect.

It is next contended that the jury was permitted to consider as elements of damage supposititious profits. The [89] record does not sustain the contention. The profits were not left to speculation. There were different sums stated, resulting from the loss of particular customers, and the fact of their certainty was submitted to the judgment of the jury. They were told that they "ought not to allow any speculative damages," that they were not "required to guess" as to what damages "plaintiffs claim to have sustained." And, further, that the burden of proof was upon plaintiffs and that from the evidence the jury should be able to make a calculation of what the damages were. Besides, plaintiffs alleged an overcharge, and the verdict of the jury was for its amount and interest.

Two other contentions are made: (1) The court should have charged the jury that the burden was on the plaintiffs to show that the rates on their shipments were excessive and unreasonable. (2) The court erred in per-

mitting plaintiffs to amend their complaint so as to set up a new cause of action.

(1) If there was error in this its effect is not appreciable. The record shows a most painstaking trial of the case on the part of counsel and the court, a full exposition of all of the elements of judgment and careful instructions of the court for their estimate. It would be going very far to reverse a case upon the effect of the bare abstraction asserted by the contention, even granting it could be sustained.

(2) Permitting the amendment of the complaint was not an abuse of the discretion which a court necessarily possesses.

The above are the main contentions of defendants. They make, besides, a contention comprehensive of all of the rulings against them; but to give a detail review of such rulings would require a reproduction of the record, and we therefore only say that they have been given attention and no prejudicial error is discovered in them.

Judgment of the Circuit Court of Appeals is reversed and that of the Circuit Court is affirmed.

NOTE.

In the reported case a combination of steamship lines operating between New York and certain South African ports is held to be a combination in restraint of trade within the prohibition of the Sherman Anti-trust Act (Act of July 2, 1890, 7 Fed. St. Ann. 336). It appears that the members of the combination exacted from shippers a deposit of ten per cent over and above the freight rate, to be returned after a certain period if the shipper did not in the meantime patronize any rival carrier. As a result a large number of shippers were placed in a position where they could not without serious loss avail themselves of the services of any competing line, and a substantial monopoly was secured. In the course of its discussion the court elaborates somewhat the "rule of reason" announced in previous cases, holding that if a restraint of competition results it is immaterial that the purpose of the combination is to promote "regularity of service with steadiness of rates." The contention that without the combination "contributions to trade and commerce might have been withheld" the court declares "has long since been worn out." The cases passing on the question what are illegal combinations within the Sherman Anti-trust Act are reviewed in the notes to *Monongahela River Consol. Coal Co. v. Jutte*, 2 Ann. Cas. 951; *Jayne v. Loder*, 9 Ann. Cas. 294; *Standard Oil Co. v. U. S. Ann. Cas. 1912D 734*; and *United Shoe Machinery Co. v. La Chapelle*, Ann. Cas. 1913D 715. As to what combinations constitute unlawful

trusts generally, see the note to *Harding v. American Glucose Co.* 74 Am. St. Rep. 189, 235.

SMITH

v.

BARNES ET AL.

Montana Supreme Court—June 7, 1915.

51 Mont. 202; 149 Pac. 963.

Actions — Legal or Equitable — Equitable Defense to Action at Law.

A complaint presenting an action at law is not changed by the fact that equitable defenses have been interposed or equitable rights suggested.

Appeal and Error — Review — Theory of Trial Below.

Where the complaint was not attacked by demurrer or motion of any kind, resort may be had to the subsequent proceedings to ascertain on what theory the cause was tried in the court below.

Same.

The supreme court will review a case upon the theory on which it was tried in the court below.

Presumptions in Favor of Ruling — Order Denying New Trial — Denial by Substitute Judge.

Where the motion for a new trial was heard and denied by a judge called in, his order cannot be aided by those presumptions indulged in favor of a like order made by the trial judge.

Scope of Review — Verdict on Conflicting Evidence.

A verdict based upon substantial, though conflicting, evidence, will not be disturbed on appeal.

Alteration of Instruments — Evidence of Alteration Sufficient.

Evidence, in an action for breach of a contract for the sale and purchase of stock with provision that upon payment of the respective instalments of money a proportionate amount of the stock should be delivered to the purchaser, is held to sustain a finding that the parties did not so contract, but that their contract was changed to the terms pleaded, after execution, and without defendant's knowledge or consent.

Effect of Alteration.

In an action for breach of contract, plaintiff has the burden of establishing the contract substantially as alleged; and where the declaration was upon a contract without regard to alterations, and a vitiating alteration is alleged and proved by defendant, the action fails.

Effect of Spoliation.

In the case of a spoliation of a contract, the plaintiff must declare upon the contract

as originally made, and it is fatal if the contract pleaded is not, by reason of spoliation, the agreement of the parties.

[See 18 Ann. Cas. 223; 86 Am. St. Rep. 102.]

Distinction between "Alteration" and "Spoliation."

An "alteration" occurs when a written contract is intentionally changed in a material respect after execution by or at the instance of one of the parties and without the consent of the other, while a "spoliation" is the unauthorized change of a written contract by a stranger.

Effect of Alteration — Right of Party Affected to Enforce Original Contract.

Under Rev. Codes, § 5069, declaring that the material alteration of a written contract by a party entitled to any benefit thereunder extinguishes all executory obligations of the contract in his favor against parties who do not consent, the party procuring an alteration of a written contract cannot maintain any action upon the contract in either its original or altered form, but the nonconsenting party loses no right, and is not required to rescind or repudiate the contract as it was actually made, and may hold the other party to the terms of the original contract; and the effect of a spoliation is that the contract stands as originally made, without regard to the change.

[See 86 Am. St. Rep. 122.]

Waiver or Ratification of Alteration.

Ratification and waiver of alteration of contract are in the nature of estoppel, and, to be available, must be pleaded when an opportunity to make such plea is presented.

[See note at end of this case.]

Same.

Where a written contract has been altered, the nonconsenting party, entitled to stand upon the contract as made and not required to avoid it, may retain the first payment, permit the other party to perform the contract, and forfeit the payment if the other party fails to perform, and cannot be estopped by any action or inaction amounting to only less than an acceptance of the change.

[See note at end of this case.]

Jury — Duty to Follow Instructions.

The instructions of the court, right or wrong, are binding upon the jury, if applicable within the issues.

Instructions — Applicability to Issues.

In an action at law for breach of contract, wherein defendant set up the alteration of the contract, but there was no evidence that defendant retained any benefit received under the contract as changed, with knowledge of the change, instructions touching ratification by reason of such retention are inapplicable because not within the issues.

Alteration of Instruments — Evidence of Alteration.

In an action at law for breach of a contract for the sale and purchase of the stock of a milling company, wherein defendant al-

leges that plaintiff materially altered the contract after its execution, evidence of the change of the contract after its execution is admissible.

Appeal from District Court, Fergus county: CRUM, Judge.

Action by D. F. Smith, plaintiff, against John P. Barnes et al., defendants. Judgment for defendant Barnes. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

H. G. & S. H. McIntire and *O. W. Belden* for appellant.

James A. Walsh and *E. C. Russell* for respondents.

[203] SANNER, J.—The complaint alleges that on June 7, 1910, the defendant Barnes, as party of the first part, entered into a written agreement with the plaintiff Smith and the defendant McCullough, as parties of the second part (they acting for themselves and [204] one Stack), the material provisions of which agreement are as follows:

"The party of the first part hereby agrees to sell and the parties of the second part agree to purchase all of the stock of the Judith Basin Milling Company, a corporation of the state of Montana, . . . for the sum of \$80,000, payable in the manner following, to wit: Ten thousand (\$10,000) dollars cash upon the signing of these presents, receipt whereof is hereby acknowledged; five thousand (\$5,000) dollars December 1, 1910, ten thousand (\$10,000) dollars January 1, 1911, ten thousand (\$10,000) dollars January 1, 1912, ten thousand (\$10,000) dollars January 1, 1913, and ten thousand dollars on the first day of each succeeding January until the total of said consideration shall have been paid, except as to the last payment, falling due January 1, 1916, which shall be fifteen thousand dollars.

"And it is further agreed and understood that the said stock properly indorsed shall be placed by the said party of the first part in escrow in the Empire Bank & Trust Company in the hands of the cashier thereof at Lewiston, Montana, to be by him delivered upon the payment in full and according to their terms and tenor, notes representing the said deferred payments.

"And it is further agreed and understood by and between said parties that said notes shall bear and draw interest at the rate of eight (8) per cent per annum, interest payable annually, and upon the full payment of each of said notes, a proportionate amount of said stock shall be delivered by the cashier of said bank to said second parties, but upon the failure of the second parties to make

payments or any of them, or the interest accrued on any of said payments, then the first party shall have the right and option to demand of said bank and upon demand said bank shall deliver to him said certificates so placed in escrow, and thereupon the second parties shall forfeit to the first party all sums theretofore paid as liquidated damages under this contract."

[205] After explaining that the interest of Stack has been assigned to the plaintiff, and that McCullough is made a defendant because of his refusal, after demand, to join the plaintiff in the action, the complaint further alleges (paragraph 5): "That said contract or writing does not fully or plainly set forth the understanding and agreement of the parties thereto as it should in that the true understanding and agreement of said parties at and prior to the execution thereof was that upon payment of the respective installments of money provided for in said contract or agreement, and at the time of such payments, a proportionate amount of the stock therein mentioned should be delivered to and become the absolute property of said parties of the second part, and in this regard said writing is contradictory and ambiguous; the true intent, understanding, and agreement of the parties thereto being that, for every \$1,000 paid on account of the purchase price, there should be delivered to said parties of the second part one-eighteenth of the total capital stock of the Judith Basin Milling Company, a corporation organized and doing business under and by virtue of the laws of the state of Montana, agreed to be sold thereby, to wit, 1,000 shares of the par value of \$100 each." Following this paragraph are allegations to the effect that the sum of \$10,000, acknowledged by the agreement, was in fact paid, and the notes for the deferred installments were actually executed as required thereby; that at the maturity of the note due December 1, 1910, plaintiff tendered the amount thereof, with interest, to the Empire Bank & Trust Company, coupled with a demand for the delivery of a proportionate amount of said stock, but this tender and demand were, at the instance of defendant Barnes, rejected and refused; that at the maturity of the note due on January 1, 1911, plaintiff offered to pay the full amount thereof, with interest, coupling said offer with a like demand, which offer and demand were similarly rejected and refused; that Barnes has failed and refused to deliver or cause to be delivered any of said stock to the plaintiff or to return the said sum of \$10,000 paid under the contract, or to return or cause to be [206] returned the promissory notes executed and delivered to him under the agreement, and has incapacitated himself from performing

his agreement, by selling and transferring said stock to a stranger; that said stock is now worth \$100 per share, and, in consequence of the acts of Barnes, plaintiff has sustained damages which he prays in the sum of \$30,000, and "such further relief in the premises as may be meet and equitable."

McCullough and Barnes filed separate answers; that of Barnes being quite elaborate. The effect of them, so far as we deem it material to the purposes of these appeals, is to deny the agreement, as set out in the complaint; to admit the execution of an agreement similar in terms, save that it provided for the delivery of the stock only upon the full payment of the entire consideration; to plead that the words "each of," before the words "said notes," and the words "a proportionate amount of," before the words "said stock," were interlined and inserted in said agreement after its execution and delivery, and without the knowledge or consent of Barnes; to deny any tender or offer to pay under the contract as it was actually made; to aver that, of the first payment of \$10,000 made upon the execution of the contract, \$8,500 were the proceeds of property belonging to the Judith Basin Milling Company, sold at the instance of plaintiff and his associates; and to claim default on their part in the payments due December 1, 1910, and on January 1, 1911, in consequence of which Barnes exercised the option vested in him by the contract to withdraw said stock from the Empire Bank and to declare a forfeiture of all the money actually paid thereon. The affirmative allegations of the answers are controverted by reply.

The cause was tried before Honorable C. L. Crum, sitting with a jury. Verdict was for the defendant Barnes, and judgment went accordingly. Plaintiff's motion for a new trial was heard by Honorable Roy E. Ayers, who by order denied the same. From that judgment and order plaintiff appeals and seeks a reversal upon three grounds, *viz.*: Insufficiency of the evidence to justify the verdict; that the verdict is contrary to the instructions [207] and therefore against law; and that certain errors of law were committed in rulings admitting evidence, refusing instructions offered by the plaintiff, and giving others at the instance of the defendants.

1. As affecting the importance of the instructions to the jury, the respondents insist that this is a suit in equity and not an action at law. This is said to be so because of the allegations of paragraph 5 of the complaint, coupled with the prayer for equitable relief; because the answer of Barnes pleads equitable defenses, is grounded on an equitable right, and asks equitable relief; and because the appellant treats the cause as

in equity by presenting the evidence to this court in the form of question and answer. So far as the argument is based upon the character of the answer and the state of the transcript, the response is easy. If the complaint presents an action at law, its nature is not changed by the fact that equitable defenses have been interposed or equitable rights suggested (*Chessman v. Hale*, 31 Mont. 577, 587, 3 Ann. Cas. 1038, 68 L.R.A. 410, 79 Pac. 254; *Wisner v. Ocumpaugh*, 71 N. Y. 113, 116); and, whatever inference might otherwise be deducible from the form of the transcript, it is sufficient to say that in this instance counsel for appellant have followed the express order of the trial judge. We confess, however, that the complaint has given us some difficulty. Apart from the allegations of paragraph 5, the cause presented is clearly an action at law to recover damages for the alleged failure of Barnes to carry out the terms of the contract annexed to the complaint; but paragraph 5, without averring mutual or any mistake, and without asking a reformation, asserts that the contract annexed to the complaint does not set forth the understanding or agreement of the parties (in other words, is not the contract between them). How the appellant could recover damages for the breach of a contract which, unreformed, is not the contract of the parties, it is difficult to understand; and it is no less difficult to perceive how equitable relief could be granted upon the unaided allegations of this paragraph. The complaint, however, was not attacked [208] by demurrer or motion of any kind. Resort may therefore be had to the subsequent proceedings to ascertain on what theory the cause was tried in the court below. So doing, we ascertain beyond question that the cause was treated and considered, in every respect, by everyone, as an action at law. Paragraph 5 was ignored; no attempt being made by the appellant to assert any right or to present any evidence under it. A jury was called as of course, to whom no special findings but a general verdict was submitted. Instructions covering every supposed aspect of the law were asked, refused and given after settlement in the manner appropriate to an action at law. We shall therefore accept the appellant's contention that the cause is before us as an action at law.

And it is as well for the respondents that this is so, for, though the importance of the instructions is thereby augmented, this court is shorn of its power to weigh the evidence, and must confine itself to the determination whether a sufficient *quantum* of evidence exists to justify the verdict. We note, in passing, the suggestion of appellant that, since the motion for new trial was heard and de-

nied by a judge called in, his order cannot be aided by those presumptions which are indulged in favor of a like order when made by the judge who tried the case. (In re Williams, 50 Mont. 142, 145 Pac. 957; Gibson v. Morris State Bank, 49 Mont. 80, 140 Pac. 76.) This is true, and its effect is to deprive the verdict of any support in consequence of the order; but it does not authorize a departure from the rule that, in an action at law, the verdict of the jury, based upon substantial, though conflicting, evidence, will not be disturbed by this court on appeal.

2. Treating the cause as an action at law, we premise our discussion of the evidence by remarking that, under his complaint, the execution of the particular contract pleaded was a necessary thing to be established by the appellant, since, as his counsel say in their belief, the allegations of paragraph 5 were wholly abandoned. It matters not what form the issue took, the appellant could not prevail unless he established the [209] execution of the contract as pleaded by him; and, needless to say, he could not prevail if, at the close of the case, the evidence should justify the conclusion that, though there was a contract between the parties touching the same subject matter, it was essentially different in terms. And this is the form taken by the issue in both the pleadings and the proof. It is conceded that the contract, as originally drafted and submitted to the parties, was typewritten and required the delivery of the stock upon full payment of the notes; that by pen interlineations it was changed to require the delivery of a proportionate amount of stock upon the payment of each of the notes; and that the change is a material one. This being true, the circumstances under which the change was made, as regards the consent or knowledge of Barnes, and as regards the time of making, were fundamentally important to the case viewed from either side. Touching these circumstances, the testimony of Smith, supported in great measure by that of Stack and Chase, is to the effect that the change was made on the evening of June 7, 1910, before delivery of the check for the first payment, before final delivery to the depository of the papers for escrow, in the presence and with the consent of Mr. Barnes. It must therefore be acknowledged that the jury could, with warrant in the evidence, have so determined.

The verdict implies the opposite conclusion, and for it the record contains the following support: Mr. Barnes testified that the contract for the sale of the stock to plaintiff and his associates was drafted by attorney De Kalb, and was executed in triplicate on the evening of June 7; that the change in

question had not then been made and did not then appear on any one of the three copies composing the set; that he did not know when the change was made, but, after the contract was signed, he rejected a suggestion of plaintiff for such a change; that, as the contract was executed, it provided for holding all the stock until all was paid for, and was satisfactory to him; that, as changed, it was not satisfactory; that he never did consent to the change, and first learned of it when in California in the [210] latter part of December, 1910, or early in January, 1911. Mr. De Kalb says, in effect, that the contract, as typewritten, was prepared by him and presented for execution on the evening of June 7, 1910, at a meeting at which Smith, Barnes, McCullough, Chase and himself (possibly another person) were present; that he witnessed the signing of the contract, and would not have done so unless it had been signed by the parties; that the change in question had not then been made, and he does not recall that it was discussed in his presence; that he left the meeting before Mr. Barnes did, but everything was then complete, and the papers for escrow had been delivered to Chase, as agent for the bank; that the change had not been made when he left, and he first learned of it some time later, when asked by the cashier of the Empire Bank to construe the contract.

Mr. McCullough testified: "The contract was signed . . . by Smith and Barnes and myself and a witness. . . . It was read over in the presence of all the above-mentioned persons by Chase, to the best of my recollection. . . . Thereupon Smith, Barnes, and I signed it, as did Mr. De Kalb. . . . It is impossible for me to state definitely whether or not the words 'each of' and the words 'a proportionate amount of' . . . were interlined at our meeting referred to and before the contract was signed, or whether they were interlined afterward. I did not know and do not know now whether Mr. Barnes knew of the interlineations before or after signing the contract. . . . I have no recollection of hearing anything said between Barnes and Smith and myself or anyone else regarding the interlineations or the effect thereof. I do not know of anything being done by the defendant Barnes, or the plaintiff, or myself, in regard to these interlineations. . . . I cannot now recall anything being said as to when or how the stock was to be delivered, and I do not think I had any definite understanding on that phase of the contract, excepting that the contract, as it was signed and delivered, was then satisfactory to me." Finally, the contract, as changed, contains the requirement that, upon the payment of each of the notes, a proportionate [211] amount of the stock

should be delivered to the purchasers by the escrow depositee; but the record shows the stock was deposited in such shape that compliance with this provision was impossible.

This evidence, given its full effect, was amply sufficient to warrant the conclusion implicit in the verdict that the parties did not contract as alleged in the complaint, but that the contract they did make was changed in the manner asserted by Barnes, after execution and without his knowledge or consent.

It seems to us that this is decisive. The manual act of making the change was performed, it is true, by Chase, which fact gives rise to much discussion. For the purpose of claiming a failure of proof, appellant contends that no fraud or procurement on his part is shown, and he characterizes the change as a mere spoliation, not a fraudulent alteration as alleged; but this distinction, if accepted, cannot aid him. To prevail, he was obliged to maintain his own case, essential to which was the establishment of the contract substantially as alleged. Where the declaration is upon an instrument without reference to alterations, and a vitiating alteration is alleged and proved by defendant, the action must fail. (2 C. J. 1259.) So, too, it is fatal if the contract pleaded is not, by reason of spoliation, the agreement of the parties. In the case of a spoliation the plaintiff must declare upon the contract as it was originally made. (2 C. J. 1259; *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770; *Perkins Windmill, etc. Co. v. Tilman*, 55 Neb. 652, 75 N. W. 1098; *Union Nat. Bank v. Roberts*, 45 Wis. 373.) Nor can the distinction invoked injure the respondents. Technically speaking, an "alteration" occurs when a written contract is intentionally changed in a material respect after execution, by or at the instance of one of the parties, and without the consent of the other, whereas a "spoliation" is the unauthorized change of a written contract by a stranger. (1 R. C. L. 966; 7 Words and Phrases, p. 6615.) The legal effect of an alteration is to extinguish all the executory obligations of the contract in favor of the party responsible as against [212] the parties who do not consent (Rev. Codes, sec. 5069); and the appellant, if the change was an alteration procured by him, could not maintain this action, nor maintain any action, upon the contract, in either its original or its altered form (*Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261). But the nonconsenting party loses no right. He is not obliged to rescind or repudiate the contract as it actually was made. He may ignore the change. Because it does not express his contract, and hold the other party to the contract according to its original terms (*Bishop on Contracts*, sec. 748; *Dia-*

mond v. Inter-Ocean Newspaper Co. 29 Okla. 323, 116 Pac. 773; *Somers v. Miller*, 32 S. D. 133, 142 N. W. 174; *Lane v. Pacific, etc. R. Co.* 8 Idaho 230, 67 Pac. 656; *Glover v. Green*, 96 Ga. 126, 22 S. E. 664; *Cutts v. U. S.* 6 Fed. Cas. No. 3,522, 1 Gall. 69); and this, a right peculiar to the nonconsenting party in the case of an alteration, is the final effect of a spoliation as to both parties. The contract stands as originally made, without regard to the change. (3 Page on Contracts, sec. 1515.) So that, whether the change in question was an alteration or a spoliation, the right of Barnes to do what he seeks to do, and what the allegations of fraudulent procurement were clearly intended to entitle him to do, cannot be assailed.

It is insisted in this connection, however, that Barnes cannot stand upon the contract as it was actually made, because of ratification or waiver. This ratification or waiver is claimed because of his retention of the first payment after knowledge of the change, and "because of his failure to examine his own copy or that of the bank, or to do anything to avoid the contract until May, 1911." There is no room for this contention in the pleadings. Ratification and waiver are in the nature of estoppel, and, to be available, they must be pleaded when an opportunity to make such plea is presented. (*Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593; *Erickson v. Oakland First Nat. Bank*, 44 Neb. 622, 48 Am. St. Rep. 753, 28 L.R.A. 577, 62 N. W. 1078.) Not only is there no such plea, but in point of fact there [213] could be none, because the issues were made upon the character of the contract as executed: But this claim of ratification or waiver also betrays a misconception of Barnes' position. If, as we have held, he could ignore the change and stand upon the contract as made, he was certainly not required to avoid it. It was his right to retain the first payment, to permit the appellant to perform the contract, and to forfeit the payment, if the appellant failed. Unless Barnes received something from the appellant under the contract as changed, with knowledge of the change, his rejection, through the bank, of appellant's tenders, gave notice of his refusal to abide the change. As he was not required to avoid the true contract, and as he could ignore the change until something occurred to compel him to accept or reject it, he could not be estopped by any action or inaction which amounted to anything less than an acceptance of the change.

3. The verdict is assailed as contrary to the court's instructions numbered 6, 7, 8, 9, 10, 12 and 15. According to appellant, these instructions, except No. 15, "relate to and

NOTE.

Ratification or Waiver of Alteration of Instrument.

Ratification or Waiver by Party Sought to Be Charged:

Generally, 335.

Essentials of Ratification or Waiver, 337.

Particular Acts as Constituting Ratification or Waiver, 342.

Persons Bound, 345.

Pleading and Practice, 345.

Ratification by Party Enforcing Instrument, 345.

Ratification or Waiver by Party Sought to Be Charged.

GENERALLY.

It may be stated as a general principle that where an instrument is altered by one of the parties thereto with the consent of the other parties, the alteration, although material, will not vitiate the instrument. 1 R. C. L. tit. *Alteration of Instruments*, p. 987. And on the principle that a person may subsequently ratify any act which he previously could have lawfully authorized it is generally held that the alteration of an instrument may be subsequently ratified or waived by the party to be charged by the alteration. *Linington v. Strong*, 107 Ill. 295; *State v. Paxton*, 65 Neb. 110, 90 N. W. 983; *Shiffer v. Mosier*, 225 Pa. St. 552, 17 Ann. Cas. 756, 74 Atl. 426, 24 L.R.A. (N.S.) 1155; *Gray v. Williams* (Vt.) 99 Atl. 735; *Kilkelly v. Martin*, 34 Wis. 525. See also *Whitehead v. Emmerich*, 38 Colo. 13, 87 Pac. 790. And see the cases cited throughout this note.

The prevailing rule seems to be that the alteration of a sealed instrument may be subsequently ratified by the party to be charged the same as may the alteration of any other written instrument. *Woodbury v. Allegheny*, etc. R. Co. 72 Fed. 371 (alteration of mortgage); *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290 (inserting place of payment in bond); *Union Oil Co. v. Mercantile Refining Co.* 8 Cal. App. 768, 97 Pac. 919 (changing bond from "joint" to "joint and several" obligation); *Oswego v. Kellogg*, 99 Ill. 590 (alteration of appeal bond); *Tucker v. Allen*, 16 Kan. 312 (completion of deed by adding name of grantee); *Mattingly v. Riley*, 49 S. W. 799, 20 Ky. L. R. 1621 (alteration of bond to conform to intention of parties); *Reed v. Morton*, 24 Neb. 760, 40 N. W. 282, 8 Am. St. Rep. 247, 1 L.R.A. 736 (filling blanks in deed as to grantee, date and amount of consideration); *Hagler v. State*, 31 Neb. 144, 47 N. W. 692, 28 Am. St. Rep. 514 (erasure of name of surety in bond); *Camden Bank v. Hall*, 14 N. J. L. 583 (changing sole bond to joint bond); *Stahl v. Berger*,

cover the principle of law that a party to a contract is bound by it whether it has been altered without his consent or not, if he retains any benefit received under it, after knowledge on its part of any alteration in it; in other words, that retention of benefits constitutes a ratification of the contract as altered." We agree that the instructions of the court, right or wrong, are binding upon the jury (*Lynes v. Northern Pac. R. Co.* 43 Mont. 317, Ann. Cas. 1912C 183, 117 Pac. 81), with the qualification, however, that they are applicable within the issues (*Babcock v. Maxwell*, 29 Mont. 31, 36, 74 Pac. 64); but, under the statement of counsel, this attack must fail, for it is not a necessary deduction from the evidence that Barnes retained any benefit received under the contract as changed, with knowledge of the change, and the instructions touching ratification by reason of such conduct were inapplicable because they were not within the issues. Instruction 7 "contains the feature that there must be promptness had on the part of one who wishes [214] to disaffirm a contract;" but as no rescission or disaffirmance of the contract made between the parties is sought in this case, this instruction cannot be said to have been defied by the verdict. Special emphasis is laid upon instruction No. 15, which charges the jury in effect to ignore the financial affairs of the Judith Basin Milling Company and the relations of appellant to the same; but the verdict, having sufficient basis in the fact that appellant failed to maintain the execution of the contract as alleged, does not imply that this instruction was not duly observed.

4. A reversal cannot be justified by the errors of law pressed upon our attention. In view of the fact that the cause rested primarily upon the identity of the contract sued on in this case, we do not regard as important the rulings admitting evidence of the source of the first payment, and we cannot agree that error was committed in receiving evidence of the change in the contract after its execution. We find no admissions in the pleadings precluding the reception of this evidence. Appellant's offered instructions, 4, 5 and 13, were under the pleadings properly refused. If what we have said above regarding the right of a party to a contract which has been changed after execution without his consent, to ignore the change and stand upon the contract as made, is correct, there was no substantial error in the court's instructions 2 and 3, so far as appellant is concerned. The complaint against instructions 4 and 5 is, in our opinion, without any merit.

The judgment and order appealed from are affirmed.

Affirmed.

Brantly, C. J., and Holloway, J. concur.

10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666 (bill single); *Hill v. Scales*, 7 Yerg. (Tenn.) 410; *Janes v. Ferd Heim Brewing Co.* (Tex.) 44 S. W. 896 (erasing name of one of sureties on bond); *Matson v. Jarvis* (Tex.) 133 S. W. 941 (erasing name of surety on bond); *Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067 (correction and additions in deed); *North v. Henneberry*, 44 Wis. 306. See also *Cutler v. Rose*, 35 Ia. 456; *Dover v. Robinson*, 64 Me. 183; *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492 (inserting name of grantee in blank in deed). Compare *Sans v. People*, 3 Gilman (Ill.) 327 (changing amount of penalty in recognizance); *Cleaton v. Chambliss*, 6 Rand. (Va.) 86 (holding, however, that action could be maintained against obligor of altered bonds on promise to pay made to person buying them after alteration).

In several cases it has been held that there is a waiver or ratification of an alteration in a sealed instrument, where after the alteration there is a redelivery of the instrument, by the party charged thereby or acts equivalent to a redelivery. *Malarin v. U. S.* 1 Wall. 282, 17 U. S. (L. ed.) 594 (redelivery of deed after alteration); *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Blackwell v. Lane*, 20 N. C. 245, 32 Am. Dec. 675 (alteration of bond); *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9 (blank in note under seal filled up by adding name of payee); *Styles v. Scotland*, 22 N. D. 469, 134 N. W. 708 (formal acknowledgment of mortgage after alteration of date therein); *Nesbitt v. Turner*, 155 Pa. St. 429, 26 Atl. 750 (alteration of bond of cashier); *Henderson v. Vermilyea*, 27 U. C. Q. B. 544 (alteration in deed). See also *Hoffecker v. New Castle County Mut. Ins. Co.* 4 Houst. (Del.) 306; *Davenport v. Sleight*, 19 N. C. 381, 31 Am. Dec. 420 (holding however that acknowledgment of bond after its alteration was not sufficient where it was not presented to obligor or seen by him); *Henning v. Werkheiser*, 8 Pa. St. 518. In *Byers v. McClanahan*, supra, in holding that a bond which had been filled out after it was signed and sealed was adopted by the obligor, the court said: "The proof is, that a blank piece of paper with the signature and seal of Byers attached to it, was carried by Lind to Lane; that Lane wrote the bond upon it with the consent of Lind, conditioned for the payment of \$10,500; that the bond thus written was at the request of Lane, with Lind's acquiescence, carried by Watson to Byers, for the purpose of getting him to acknowledge it as his bond; and Watson proves that Byers, when the bond was presented to him, acknowledged his hand and seal, over which the same was written: he swears he cannot recollect whether he acknowledged it as his bond,

either in words or substance, nor can he say whether he read it, but he made no objection to it as his bond. He further proves expressly, that Byers subsequently told him he knew the contents of the bond when he presented it to him. Byers admits in his answer that Watson informed him that he came with the bond at the instance of Lane, and that when the bond was presented to him by Watson, he acknowledged the signature to be in his handwriting. If he knew, as he admits he did, that Watson came to him with the bond, as the agent of Lane, for the purpose of getting him to acknowledge his seal and signature, the conclusion was natural and irresistible, that the object of his visit was to get from him such an acknowledgment, as would make the bond legally obligatory upon him. If he did not mean to be bound by his signature and seal, and to consider the bond as valid and binding upon him, it was his duty so to have declared at the time it was presented to him. He must have known the object of Lane to have been, to get such an acknowledgment as would make it legally efficient and obligatory; which circumstances, we think, amounted in legal construction to an adoption of the bond, as his act and deed, and a delivery of it, after it had been signed and sealed, and filled up. It is true, that delivery is essential to the legal validity of a deed; but such delivery may be either actual or verbal, that is, by doing something and saying nothing, or by saying something and doing nothing. *Shep. Touch.* 57. A deed, then, it is clear, may be delivered by words, and no particular form of words is essential for such purpose. It is sufficient that there be an intention, or assent of the mind to treat it as his deed; to clothe it with the attributes of a legal instrument. Can there be a doubt then, that Byers meant so to treat it, when he declared to the known agent of Lane that it was his seal and signature, especially when he knew, as he must have known, that the object of Lane was to get from him such an acknowledgment as would make it legally obligatory. We think, if such was not his intention, good faith and fair dealing required at his hands an explicit declaration to the contrary. We must therefore come to the conclusion that the conduct of Byers was sufficient to make the bond legally efficient, and to bind him to the performance of all the stipulations contained in it."

A number of cases support the rule that where the alteration of an instrument is equivalent to a forgery, the alteration cannot subsequently be ratified or waived by the party to be charged. *Conklin v. Wilson*, 5 Ind. 209; *Fletcher v. Minneapolis, F. etc. Mut. Ins. Co.* 80 Minn. 152, 83 N. W. 29; *Lance v. Calvert*, 21 Pa. Super. Ct. 102;

Hibert v. La Banque Nationale, 40 Can. Sup. Ct. 458. *Compare* Ofenstein v. Bryan, 20 App. Cas. (D. C.) 1; Marks v. Schram, 109 Wis. 452, 84 N. W. 830. In Conklin v. Wilson, supra, it was held that the fraud of the purchaser of a bill of exchange in filling up the blanks therein contrary to the instructions of an accommodation maker prevented him from relying on the implied assent of the accommodation maker in an action on the bill. But in Ofenstein v. Bryan, supra, it was said that a person could bind himself by his promise to pay without any new consideration an altered or forged instrument provided the paper was in the hands of one who had no connection with the forgery and the promise was not involved in an attempt to compound a felony.

It has been held that there may be a ratification or a waiver by the party to be charged of an alteration in each of the following kinds of instruments:

—bill of exchange, Tarleton v. Shingler, 7 C. B. 812, 62 E. C. L. 812, 137 Eng. Rep. (Reprint) 322; Paton v. Winter, 1 Taunt. 420, 127 Eng. Rep. (Reprint) 896; Jacob v. Hart, 6 M. & S. 142, 105 Eng. Rep. (Reprint) 1196 (altering date); Hunt v. Mitchell, 4 Thomp. & C. (N. Y.) 57; Ratcliff v. Planters' Bank, 2 Sneed (Tenn.) 425 (obliteration of portion of figure in date by flourish of pen).

—contract by executors for sale of land belonging to estate of decedent, Shippen v. Clapp, 29 Pa. St. 265.

—insurance policy, Fletcher v. Minneapolis F. etc. Mut. Ins. Co. 80 Minn. 152, 83 N. W. 29. *Compare* Campbell v. Christie, 2 Stark. 64, 3 E. C. L. 318.

—lease, Barnsdall v. Boley, 119 Fed. 191; Janney v. Goehring, 52 Minn. 428, 54 N. W. 481.

—promissory note, Wilson v. Jamieson, 7 Pa. St. 126; Montgomery v. Crossethwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L.R.A. 140 (maker adding words "& Co." to his signature); Inglish v. Breneman, 9 Ark. 122, 47 Am. Dec. 735; Pelton v. Prescott, 13 Ia. 567 (correction of mistake by changing date); Limestone Bank v. Penick, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136; Fanning v. Farmers', etc. Bank, 8 Smedes & M. (Miss.) 139; King v. Hunt, 13 Mo. 97 (alteration by payee of date of payment); Evans v. Foreman, 60 Mo. 449 (adding words "after due, 10 per cent"); Lance v. Calvert, 21 Pa. Super. Ct. 102; Jacobs v. Gilreath, 45 S. C. 46, 22 S. E. 757; McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567; Gray v. Williams (Vt.) 99 Atl. 735; Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 Am. Rep. 768; Fitch v. Kelly, 44 U. C. Q. B. 578.

—subscription contract, Davis v. Shafer, 50 Fed. 764; Workman v. Campbell, 57 Mo. Ann. Cas. 1917D—22.

53; Landwerlen v. Wheeler, 106 Ind. 523, 5 N. E. 888.

ESSENTIALS TO RATIFICATION OR WAIVER.

The acts or conduct of a party to an instrument relied on to operate as a ratification or waiver of an alteration in the instrument must be done with a knowledge of the alteration by the party to be charged thereby.

England.—Bell v. Gardiner, 4 M. & G. 11, 43 E. C. L. 16, 134 Eng. Rep. (Reprint) 5.

Canada.—Westloh v. Brown, 43 U. C. Q. B. 402.

United States.—Martin's Case, 5 Ct. Cl. 215. See also Washington Bank v. Way, 2 Cranch C. C. 249, 2 Fed. Cas. No. 957.

Alabama.—Payne v. Long, 121 Ala. 385, 25 So. 780.

Arkansas.—State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880.

Delaware.—Hollis v. Vandergrift, 5 Houst. 521.

District of Columbia.—Ofenstein v. Bryan, 20 App. Cas. 1; Towles v. Tanner, 21 App. Cas. 530.

Illinois.—Benedict v. Miner, 58 Ill. 19. See also Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858, affirming 112 Ill. App. 13.

Indiana.—Koons v. Davis, 84 Ind. 387; Owens v. Tague, 3 Ind. App. 245, 29 N. E. 784.

Iowa.—Cutler v. Rose, 35 Ia. 456.

Kentucky.—Limestone Bank v. Penick, 2 T. B. Mon. 98, 15 Am. Dec. 136.

Maine.—See Dover v. Robinson, 64 Me. 183.

Michigan.—Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904.

Missouri.—German Bank v. Dunn, 62 Mo. 79; State v. McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L.R.A. 735; State v. Findley, 101 Mo. 368, 14 S. W. 111; State v. Chick, 146 Mo. 645, 48 S. W. 829; Lammers v. White Sewing Mach. Co. 23 Mo. App. 471; Ver Steeg v. Becker-Moore Paint Co. 106 Mo. App. 257, 80 S. W. 346.

Montana.—McMillan v. Hefferlin, 18 Mont. 385, 45 Pac. 548.

Oklahoma.—Wayne County Nat. Bank v. Kneeland, 161 Pac. 193.

Pennsylvania.—Kennedy v. Lancaster County Bank, 18 Pa. St. 347; Nesbitt v. Turner, 155 Pa. St. 429, 26 Atl. 750; Shiffer v. Mosier, 225 Pa. St. 552, 17 Ann. Cas. 756, 74 Atl. 426, 24 L.R.A. (N.S.) 1155.

Tennessee.—McDaniel v. Whitsett, 96 Tenn. 10, 33 S. W. 567.

Vermont.—Gray v. Williams, 99 Atl. 735. Thus in State v. McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L.R.A. 735, the refusal of an instruction that the sureties on an officer's bond were estopped from defending an action on the bond by reason of an alteration therein was held to

be proper under the facts of the case, the court saying: "The plaintiff insists that the court erred in refusing an instruction, to the effect that if the bond was approved by the court on the fourth of August, 1885, and the defendants knew that Reid occupied the office of collector, and collected the revenues for the years 1885 and 1886, and made no objection thereto, then they are estopped from making the defense that the bond was altered by the erasure of Dailing's name. There is an abundance of evidence tending to establish all facts stated in this refused instruction, but there is not a word of evidence tending to show that the defendants during this time knew that Dailing's name had been erased. The only evidence to which our attention is called is that they knew nothing about the erasure. An estoppel cannot arise until it is shown that they knew of the alteration and thereafter made no objection to the performance by Reid of official duties by virtue of having given the bond in question. No such state of facts is shown or hypothetically stated in the instruction, and it was, therefore, properly refused."

In *Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904, the court held that an indorser was not estopped from defending an action on a note on the ground that it had been raised from \$500 to \$3,500, saying: "The evidence disclosed that, after the purchase of the note, plaintiff had an interview with defendant Hardin, in the course of which he stated to him that he had taken a \$3,500 note to Mr. Sanborn, with his (Hardin's) indorsement. Hardin said that he did not remember of indorsing a note for that amount, but that, if his name was on the back of it, it was good, and would be paid. He also asked plaintiff when the note was due, which plaintiff could not then tell, but did later, when defendant said that he was glad that plaintiff had that note, and wanted him to take other paper at that time. He also stated that he should indorse no more paper for Sanborn. Plaintiff's counsel contended that this constituted an estoppel, and the question was left to the jury. . . . We cannot believe that what passed can justly be held to amount to an estoppel. It was more in the nature of incidental talk. If the statement, 'I have Sanborn's note for \$3,500, indorsed by you,' can be construed as a question, the answer was as well calculated to arouse suspicion upon the part of plaintiff as the statement was to disturb the defendant. Yet he gave no sign, and when asked to give the date, and duration of the period it was to run, he waited 12 days before doing so. . . . If the plaintiff was, in good faith, seeking information about the genuineness of the note, he should, after being told that de-

fendant could not remember such, have shown it to the defendant, and asked explicitly for information; but he chose to rely on what had passed. He cannot be allowed to rely upon a part, but must act upon the whole, conversation, which gave him to understand that defendant would pay the note if he had signed it. Unfortunately, it turns out to have been forged, to the surprise of both. He did not say that he would pay a forged note, or a raised note; and, instead of telling plaintiff that he had indorsed a \$3,500 note, it was the plaintiff who was asserting the fact, and defendant was expressing doubts. We fail to find in defendant's conduct that gross negligence that constitutes constructive fraud. To hold that the facts in this case constitute an estoppel, merely because defendant allowed plaintiff to convince him that he had indorsed such a note, would be to make the doctrine of estoppel a sword, and not a shield, which is its proper office. The jury should have been instructed to render a verdict for the defendant."

So in *State v. Chick*, 146 Mo. 645, 48 S. W. 829, it appeared that a county clerk's bond was altered after its execution and before its approval by changing the amount recoverable from \$10,000 to \$5,000. In its altered state it was approved by the proper authorities and an account of the approval was published as a news item in a newspaper, the item stating the amount of the bond as approved and the names of the sureties on the bond. It was held that this was insufficient to charge the sureties with a knowledge of the alteration of the bond, although they might have seen the paper in which the item was published.

Likewise in *German Bank v. Dunn*, 62 Mo. 79, it appeared that a note was altered by erasing the name of the payee and substituting the name of another payee without the consent of the maker. The maker saw the note after the alteration and "made no objection." In holding that a ratification of the alteration was not shown the court said: "It is true that Mrs. Dunn might have assented to the alteration; but the mere fact that she saw the notes afterwards and 'made no objection' is not, when taken in connection with her own testimony that her attention was only directed to her signature, and not to the name of the payee, such an unequivocal act as would warrant us in presuming that she intended to give sanction to the charge which had been made."

Similarly in *Benedict v. Miner*, 58 Ill. 19, it appeared that after the alteration of a note a payment was made thereon by a surety who had no knowledge of the alteration. The payment was credited on the note in the surety's presence, but the note was not read over by

the surety. In holding that there was no ratification of the alteration by the surety the court said: "In this case, the date from which a note was to draw interest, was altered by the payee, from the 1st of May, to the 1st of April, without the knowledge of the surety. It is admitted this avoided the note as to him, unless he ratified it, which it is claimed he did, by subsequently paying \$10,000 upon it, and by receiving from the principal a mortgage to secure him from loss on his liability, which describes the note as drawing interest from April 1st. We do not regard either or both of these transactions as amounting to a ratification. The payment might well have been made, as the surety swears it was, without reading the note over, or doing anything further than simply be satisfied that the person to whom he paid the money indorsed it on the paper signed by him as security. A glance at the signatures would satisfy him of that. As to the mortgage, the proof is, that the principal in the note made the mortgage, had it recorded, took it from the recorder's office and kept it in his possession, and that the security did not know of its existence until months afterwards. We do not see how ratification of the altered note is to be inferred from this."

In *State v. Churchill*, 48 Ark. 426, 3 S. W. 352, 880, it was held that the mere fact that one of the sureties on a treasurer's bond had observed the alteration in the bond when the bond was presented to him in his capacity as governor of the state for approval did not estop him, when sued on the bond, from setting up the alteration of the bond as a defense.

It has been held in a number of cases that in order to charge a party on an altered instrument on the ground of his ratification of the instrument by his acts, there must have been an intent to ratify the alteration. *Perring v. Hone*, 4 Bing. 28, 13 E. C. L. 328, 130 Eng. Rep. (Reprint) 678, 2 C. & P. 401, 12 E. C. L. 189; *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567; *Gray v. Williams* (Vt.) 99 Atl. 735; *Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. 1093, 24 L.R.A. 795; *Kilkelly v. Martin*, 34 Wis. 525. See also *Cutler v. Rose*, 35 Ia. 456; *State v. Findley*, 101 Mo. 368, 14 S. W. 111. Thus in *Fairhaven v. Cowgill*, supra, an action was brought against the sureties on a marshal's bond to recover the amount of the principal's default. It appeared that the bond was altered after the sureties had signed it by the erasure of the name of one of the sureties and the insertion of another name instead. In holding that the alteration was not ratified by the remaining sureties under the circumstances disclosed the court said: "There remains to be considered but one matter, viz.,

the claim of appellant that there was a ratification of the bond by the respondents after the name of Evans had been substituted for that of Wilson. After the defalcation of the marshal, and his departure, it was some two weeks before the state of his accounts became known. Investigation showed that he was short upwards of \$10,000, and that this bond was in existence. Respondents, by some means, were then made aware for the first time that Evans was their co-obligor. They also learned that a sum of money was credited upon the books of one of the local banks to W. S. Parker. Knowing themselves to have signed the bond, they, with Evans, endeavored to secure the money in the bank for their benefit in case their liability should be established. The bank acceded to their demands, and for a few days Parker's balance was formally subject to their control. But upon taking legal advice, and upon inspection of the bond, they became satisfied that they were not legally bound by its provisions, and they relinquished all claim to the bank balance, and from that time denied their liability. The fact of their interference with the deposit to Parker's credit is claimed to have amounted to a ratification of the bond with Evans as cosurety. Upon this point it might be stated as a conclusive answer to the proposition that the action of respondents amounted to a ratification, that the court submitted that question to the jury and their verdict in that respect ought to stand. But were it otherwise, we do not think the fact proven tended in any manner to show ratification. The default had occurred and the principal had absconded and the action of the respondents in endeavoring to protect themselves from what they feared might be a heavy liability ought not, under such circumstances, to be charged to them as ratification, unless it should be made to appear that they intended to operate with that effect. Up to that time it did not appear that the city had made any claim upon them, or that their action was anything else than such as men unversed in the law governing sureties might reasonably take, without its being charged against them that they were intending to admit the full measure of their apparent liability on the bond."

In *Kilkelly v. Martin*, 34 Wis. 525, it was held that the unaccepted offer of a surety on a note to give his own note if the holder would grant an extension of time was not a ratification of an alteration of the note. To the same effect see *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567. In *Kilkelly v. Martin*, supra, the court said: "It being established that the note would have become valid and obligatory upon the subsequent verbal assent of the defendant that he would be

bound by it as altered, the next point of inquiry is, whether there was any evidence of such assent to justify the submission in manner as made by the court to the jury. The jury were instructed that 'if, after the defendant became aware of the alteration, he sanctioned the alteration by agreeing to pay the note, the plaintiff can recover; otherwise not.' The bill of exceptions, certified to contain all the evidence, shows that there was no testimony upon which to found such instruction, and that the submission in that form was unauthorized. There was no evidence that the defendant ever agreed to pay the note in suit or to be bound by it. The only evidence was that the defendant offered to give his note, payable in sixty days, with security, if the plaintiff would wait, which offer the plaintiff refused to accept. Such was the testimony of both plaintiff and defendant, in which they entirely agreed, and there was no other evidence upon the subject. This was at most only an offer on the part of the defendant to become bound for the payment of the debt in a particular way. It was a conditional offer or proposition for a settlement, and not a promise, conditional or otherwise, to pay the note in suit or to be bound by that note. Considering that the defendant, who was but a surety in the note for the principal and so owed nothing except as he was bound in the capacity of joint maker, had been released from all obligation of payment because of the alteration which had been made without his assent, and that the note had become as to him of no more efficacy than a piece of blank paper without a signature, it follows as a necessary consequence that he was at liberty, in assuming a new obligation to pay, or in ratifying the previously unauthorized alteration, to make such terms and conditions as he saw fit and unless they were complied with he remained as before, discharged and free from all liability to the plaintiff in the premises. This proposition is too plain to require further exposition."

Where an intent to ratify or waive an alteration is shown it seems that actual knowledge of the alteration is unnecessary. *State v. Paxton*, 65 Neb. 110, 90 N. W. 983, wherein it appeared that before an official bond had been approved the sureties signed an agreement whereby they consented to the addition of other sureties on the bond. Additional sureties had already signed the bond after its execution and it was held that the sureties signing the agreement ratified the alteration, the court saying: "We think it is . . . clear that sureties upon an official bond which has been delivered, but not yet approved, who desire to have the bond approved and the principal retained in his of-

fice, may, to that end, ratify and adopt generally all alterations which may be required for the purpose; and if they choose to do so, and expressly agree to remain bound notwithstanding, their knowledge of the exact condition of the bond when they so agree becomes immaterial. This case presents, in substance, such a condition. The written waiver signed by the original sureties is set forth in full in the opinion in *Paxton v. State*, 59 Neb. 460, 471. It was carefully considered in that opinion, and its proper construction was determined. It is the law of this case that the instrument imports on its face that the bond remained incomplete and undelivered, and gave the original sureties notice of such fact. If such was the fact at the time the waiver was executed, it clearly could not matter whether the names of further sureties were added to the bond before or after said date. *Paxton v. State*, *supra*. But, even though the bond had been delivered and filed, yet if the sureties believed it to be incomplete and undelivered, so that they might withdraw at any time, whether there had been an alteration or not, and in this belief they made no attempt to withdraw, but took steps to remain bound, it is strong evidence that their purpose and intent was to ratify, adopt and approve all alterations—by adding other names—which their principal might have to make in order to procure approval and acceptance of his official bond. The terms of the waiver itself strongly confirm this view. Although in form a consent to the addition of any names that might be procured in the future, it contains also a provision that the original sureties 'are held liable the same as if said names had not been added,' which is of no apparent force or meaning unless it was intended to meet alterations already made. Under the circumstances surrounding its execution, we think the fair interpretation of the instrument is that the sureties not only agreed generally to the addition of any further names that might be procured, until the bond was satisfactory to the state and was approved, but also ratified and adopted generally any and all alterations by addition of other names that had been made at the time they signed such waived. This being so, whether the additional sureties signed the bond before or after execution of the waiver was immaterial. If the bond had been filed but not approved, and the sureties, in order to procure its approval and prevent forfeiture of the principal's office, adopted and ratified an alteration made by adding other sureties after delivery, there was a sufficient consideration therefor, if a consideration were to be held necessary, and the sureties would remain bound."

The act of a party although done in ignorance of the fact that the instrument has been altered may estop him from setting up the alteration in an action on the instrument, where he has misled an innocent third person by his act. *Harrison v. Luce*, 64 Ark. 583, 43 S. W. 970, wherein it appeared that after a note had been altered without the consent of the maker it was bought by a third person who before buying it showed it to the maker who looked at it, said it was all right and promised to pay it. The maker did not notice the alteration, but it was held that he was estopped from setting up the alteration as a defense to an action by the third person.

The view supported by the weight of authority is that no new consideration is necessary to make binding the ratification of an alteration of an instrument by the party to be charged thereby. *Montgomery v. Cross-thwait*, 90 Ala. 563, 8 So. 498, 24 Am. St. Rep. 832, 12 L.R.A. 140; *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784; *Holyfield v. Harrington*, 84 Kan. 760, 115 Pac. 546, 39 L.R.A. (N.S.) 131; *State v. Paxton*, 65 Neb. 110, 90 N. W. 983; *Matson v. Jarvis* (Tex.) 133 S. W. 941. But it has been held that the promise of a surety to pay an altered note is not binding if the promise is not based on a new consideration. *Mulkey v. Long*, 5 Idaho 213, 47 Pac. 949; *Warren v. Fant*, 79 Ky. 1. It has, however, been held that forbearance is a sufficient consideration for a promise to pay an altered note. *Prouty v. Wilson*, 123 Mass. 297. Compare *Decorah First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952. In *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L.R.A. 196, it was held that there could be no ratification of an alteration amounting to a forgery without a new consideration, the court saying: "With reference to a new trial, it becomes proper to consider the effect of Douglas's so-called ratification of the alleged alteration. The court found that upon the discovery of it he denounced the alteration as fraudulent and unauthorized, and did not acquiesce therein. This is not justified by the evidence. While it appears that, upon being shown the note by the bank—then the holder—he asserted that it had been altered since he delivered it, yet, so far from repudiating it, according to his own admissions, he repeatedly paid interest on it, voluntarily and without objection. If the alteration was capable of ratification, this would, according to all the authorities, amount to a ratification or adoption, whichever it may be called. If the alteration was a mere spoliation by a third party, or if made by the holder by mistake or accident, or innocently and without fraudulent intent, so that it did not destroy the

note, or at least did not extinguish the debt of which it was the evidence, it would not invalidate or affect the mortgage, which can only be discharged by the payment or extinction of the debt secured by it. In such case the question of ratification would be wholly immaterial. But suppose the alteration was fraudulently made, amounting in law to a forgery. The question remains, could this be subsequently ratified by Douglas, so as to make the note in its altered form his contract? . . . In the large majority of the cases usually cited in support of the proposition that a forgery can be ratified, it will be found that the question was presented in connection with circumstances creating an estoppel, or that there was in fact no fraudulent making or altering, but merely a lack of sufficient authority; and hence such cases are not in point. Where the ratification is made to a third party—the holder of the instrument, who was not a party to the forgery—we are not called upon to decide whether or not such ratification would create a valid liability on the instrument. All the authorities cited by appellant to the effect that a forgery may be ratified are of this class. But we have found no case where it has been held that a forged instrument can be ratified so as to give the forger himself a right of action upon it. It is legally impossible in such a case that the relation of principal and agent could exist between the parties, for one man cannot be the agent of another to make a contract with himself. Hence it would seem that the doctrine of ratification can have no application to such a case. If the entire instrument was a forgery, in the popular sense, it would require no argument to prove that a mere assent to or ratification of it in the hands of the forger would be a mere nudum pactum. But in law there is no distinction between a forgery in making and a forgery by altering. The altered instrument is not the contract of the maker, and in legal contemplation is as entirely a forgery as the other. If the alteration was not fraudulent, so that it did not destroy the instrument, or at least did not extinguish the debt, we can see how a subsequent assent to it would create a liability on the instrument as altered. Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new. And what a party may assent to when done he may assent to afterwards, so as to bind himself, if there be a consideration to support it. But where there has been a fraudulent alteration of a written contract, which not only destroys the instrument but extinguishes the debt, it seems to us clear on

principle that a subsequent assent to the alteration, given to the party who made it, without any new consideration, is, in any view of the case, a mere naked promise."

PARTICULAR ACTS AS CONSTITUTING RATIFICATION OR WAIVER.

Where a party charged by an instrument yields his assent to it, or recognizes his liability thereon, with knowledge of a previous alteration, he will be held to have waived or ratified the alteration. *Divide Canal, etc. Co. v. Tenney*, reported in full, post, this volume, at page 346; *Gardiner v. Harback*, 21 Ill. 129; *Limestone Bank v. Penick*, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136; *Prouty v. Wilson*, 123 Mass. 297; *Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348; *Janney v. Goehringer*, 52 Minn. 428, 54 N. W. 481; *King v. Hunt*, 13 Mo. 97; *Evans v. Foreman*, 60 Mo. 449; *Hunt v. Mitchell, 4 Thomp. & C. (N. Y.)* 57 (acceptance of draft); *Lance v. Calvert*, 21 Pa. Super. Ct. 102; *Ratcliff v. Planters' Bank*, 2 Sned (Tenn.) 425; *Gray v. Williams (Vt.)* 99 Atl. 735. See also *King v. Bush*, 36 Ill. 142; *Collins v. Makepeace*, 13 Ind. 448; *Fanning v. Farmers', etc. Bank*, 8 Smedes & M. (Miss.) 139.

A promise to pay an altered instrument made with a knowledge of the alteration constitutes a ratification or waiver of the alteration. *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L.R.A. 140; *Goodspeed v. Cutler*, 75 Ill. 534; *Scott v. Bibb*, 48 Ill. App. 657; *Feeney v. Mazelin*, 87 Ind. 226; *Emerson v. Opp*, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24; *Browning v. Gosnell*, 91 Ia. 448, 59 N. W. 340; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Stringfellow v. Petty*, 14 N. M. 14, 89 Pac. 258; *National State Bank v. Rising*, 4 Hun (N. Y.) 793; *Marks v. Schram*, 109 Wis. 452, 84 N. W. 830. See also *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; *Conable v. Keeney*, 61 Hun 624 mem. 16 N. Y. S. 719, *affirming* 61 Hun 185, 15 N. Y. S. 924; *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

Applying for an extension of time on an obligation with a knowledge that it has been altered constitutes a ratification of the alteration. *Tarleton v. Shingler*, 7 C. B. 812, 62 E. C. L. 812, 137 Eng. Rep. (Reprint) 322; *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290; *Bell v. Mahin*, 69 Ia. 408, 29 N. W. 331.

It has been held that the act of the maker of a note in advising its purchase after it was altered constituted a ratification of the alteration, in an action on the note by the purchaser. *Grimstead v. Briggs*, 4 Ia. 559.

Where a party makes a payment on a note with knowledge that the note has been

altered, he thereby ratifies the alteration. *Cariss v. Tattersall*, 2 M. & G. 890, 40 E. C. L. 677, 133 Eng. Rep. (Reprint) 1004; *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Richardson v. Mather*, 77 Ill. App. 626, *affirmed* 178 Ill. 449, 53 N. E. 321; *Prouty v. Wilson*, 123 Mass. 297; *Johnson v. Johnson*, 66 Mich. 525, 33 N. W. 413; *Springfield First Nat. Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397; *Wright v. Buck*, 62 N. H. 656; *Ohio Valley Bank v. Lockwood*, 13 W. Va. 392, 31 Am. Rep. 768. *Compare* *Bakke v. Melby*, 119 Minn. 504, 138 N. W. 950. But it is otherwise, where at the time of making the payment the party has no knowledge of the alteration. *Payne v. Long*, 121 Ala. 385, 25 So. 780; *Fraker v. Cullum*, 21 Kan. 555; *Fraker v. Little*, 24 Kan. 598, 36 Am. Rep. 262.

The ratification or waiver of the alteration of an instrument may be shown by acts or conduct implying an assent as well as by an express ratification. *Tarleton v. Shingler*, 7 C. B. 812, 62 E. C. L. 812, 137 Eng. Rep. (Reprint) 322; *Divide Canal, etc. Co. v. Tenney*, reported in full, post, this volume, at page 346; *Jackson v. Johnson*, 67 Ga. 167; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Linington v. Strong*, 107 Ill. 295; *Limestone Bank v. Penick*, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136; *Pulliam v. Withers*, 8 Dana (Ky.) 98, 33 Am. Dec. 479; *Renville County v. Gray*, 61 Minn. 242, 63 N. W. 635; *Fanning v. Farmers', etc. Bank*, 8 Smedes & M. (Miss.) 139 (execution of deed of trust to secure altered note); *Hagler v. State*, 31 Neb. 144, 47 N. W. 692, 28 Am. St. Rep. 514; *Stringfellow v. Petty*, 14 N. M. 14, 89 Pac. 258; *Bradford Nat. Bank v. Taylor*, 75 Hun 297, 27 N. Y. S. 96; *Tilt v. La Salle Silk Mfg. Co.* 5 Daly (N. Y.) 19; *Shippen v. Clapp*, 29 Pa. St. 265; *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770; *James v. Ferd Heim Brewing Co. (Tex.)* 44 S. W. 896; *Matson v. Jarvis (Tex.)* 133 S. W. 941; *Gray v. Williams (Vt.)* 99 Atl. 735. See also *Washington Bank v. Way*, 2 Cranch C. C. 249, 2 Fed. Cas. No. 957; *Andrews v. Burdick*, 62 Ia. 714, 16 N. W. 275; *Mohlis v. Trauffer*, 91 Ia. 751, 60 N. W. 521 (acquiescence for long period after knowledge of alteration of deed); *Barrett v. Effenberg*, 29 Okla. 679, 119 Pac. 135. *Compare* *Conklin v. Wilson*, 5 Ind. 209. Thus in *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770, in holding that a surety was estopped to rely on an alteration of the note sued on, the court said: "When a man who holds the money of another for investment on certain terms that are made known to the parties seeking the loan of such funds, and when a note is presented

to evidence the terms of the loan, and the agent discovers that the note is not in accordance with the terms of such investment, and makes known wherein such note is defective, and declines to accept such note or part with the money, until there is a compliance with the terms in question, and thereupon one of the proposed borrowers says, 'We will fix that,' and both principal and surety thereupon go with the agent into a private place or office, where the principal writes a compliance, and the surety says nothing, and the agent then accepts the note and pays over the money, can the personal representative of the surety, who dies after the transaction and before action brought on such contract, altered as it was, successfully interpose the defense in such suit, that his intestate (the surety Bagwell here) was released from such contract by such alteration? We think not. We feel that the circuit judge was right when in his charge he said: 'It is a question of good faith, gentlemen. You cannot act in such a way as to deceive a man, and induce him to believe a thing, and act upon that thing which your conduct induced him to believe, and then claim you are not bound by it.' Nor can the statute of frauds be invoked to protect such wrong-doing. Very fortunately, the note in question was signed by the surety, and the alteration of the note so written and signed by him was made in his presence virtually by his agent duly authorized thereunto."

So in *Renville County v. Gray*, 61 Minn. 242, 63 N. W. 635, the court held that sureties on a bond given to the board of county commissioners to secure the deposits of public funds were estopped to object to an alteration in the bond, saying: "The evidence was conflicting, but there was evidence in the case tending to show that the defendant Welter, the last surety to sign, assented to the change, and that both of these defendants learned within a short time after the bond was delivered, and before the deposits here in question were made, that the alteration in the penal sum had been made; but neither of them informed the plaintiff, or any of its officers, of the change, or objected thereto. There is no evidence that the conduct of the plaintiff was influenced by their silence, but it will be presumed, for the presumption is that the board of auditors would have done their duty, and required a new bond, if they had been informed that the bond in question had been materially altered. G. S. 1894, sec. 729. The defendants are presumed to have known the law, yet they remained silent, and permitted the county to deposit its funds with the depository in reliance on the altered

and void bond. If a party is silent and fails to speak when the facts and circumstances of the case make it his duty to speak, and the opposite party is misled thereby to his injury, he is equitably estopped from asserting the existence of the fact which he ought seasonably to have disclosed."

Similarly in *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888, in holding that a party sought to be charged on a church subscription ratified an alteration therein by the insertion of the name of the payee, the court said: "The evidence very strongly tends to show that after the subscription list had been completed, the bishop of the diocese visited the church, and at a meeting where the subscribers, including appellant, were present, announced that the object of his visit was to examine the subscription list, and thereby determine as to whether or not a new house could be and should be built; that the bishop, before reading the subscription paper aloud, announced that if there was any subscriber who did not intend to pay his subscription, he wanted him to answer to his name, and give the reasons for not paying; that after making this announcement the bishop read aloud the subscription paper in its present form, and called the names of the subscribers, and that appellant made no response, nor did any other subscriber; that, relying upon the subscriptions and the good faith of the subscribers, debts were subsequently contracted, and the house built; that the whole amount subscribed is needed in the payment of the debts contracted in the building of the house; and that some months after the above meeting, appellant, at different times, promised and agreed to pay the amount of his subscription. Finally, and after the church had incurred debts in the erection of the house upon the faith of the subscriptions, appellant refused to pay, upon the ground that there was a disagreement between his wife and the priest. . . . It is enough that long before this action was commenced he ratified and adopted the contract as it now exists, and by his silence when he ought to have spoken, and by his promises when he might have objected, he made the contract as it now exists, his contract. Upon the faith of this contract, the other party has expended money and incurred debts in the building of the house. It is too late now for appellant to repudiate the contract and escape liability, upon the sole ground that appellee's name as payee and treasurer was inserted in the blank after he had made his subscription."

In *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120, it was held that the negligence of the maker of a note in leaving a blank un-

filled so that the amount of the note was increased together with the fact that soon after its alteration and negotiation the purchaser wrote him a letter stating that he had bought the note, and naming the date and its amount, estopped the maker from setting up the alteration as a defense in an action by the purchaser.

In *Jackson v. Johnson*, 67 Ga. 167, it appeared that an administrator's bond for the sum of \$150 was altered shortly after its execution by its obligee so as to make the amount of the bond \$150,000. The sureties on the bond signed it with the knowledge and understanding that the bond was to be for the larger amount and the administration was allowed to proceed for a period of ten or fifteen years without any objection. A recovery on the bond against the sureties, for a sum exceeding the sum for which the bond was originally made was affirmed on the ground of estoppel and that the alteration was the mere correction of a clerical error.

Likewise in *Hagler v. State*, 31 Neb. 144, 47 N. W. 692, 28 Am. St. Rep. 514, it appeared that a public officer's bond was altered before its approval by the erasure of the name of a surety. The remaining sureties with knowledge of the change in the bond received securities from the principal to indemnify them after he had made a defalcation. It was held that they adopted and ratified the bond as altered.

The act of a party in accepting and retaining benefits under a contract with knowledge that it has been altered will amount to a ratification of the alteration. *Martin's Case v. U. S.* 5 Ct. Cl. 215; *Davis v. Shafer*, 50 Fed. 764; *Barnsdall v. Boley*, 119 Fed. 191; *Union Oil Co. v. Mercantile Refining Co.* 8 Cal. App. 768, 97 Pac. 919; *Oswego v. Kellogg*, 99 Ill. 590; *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769, *affirming* 16 Ill. App. 558; *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492; *Reed v. Morton*, 24 Neb. 760, 40 N. W. 282, 8 Am. St. Rep. 247, 1 L.R.A. 736. See also *Emerson v. Opp*, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24. Compare *Decorah First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952. In *Union Oil Co. v. Mercantile Refining Co.* *supra*, in holding that the alteration of a bond was ratified under the circumstances disclosed, the court said: "The action is upon a bond given to secure the payment by the Mercantile Refining Company to the plaintiff of the consideration for oil furnished by the latter to the former. Plaintiff had judgment, from which and the order denying their motion for a new trial certain of the sureties have appealed. The main controversy in the cause grows out of the fact that an alteration was made in the bond

after it had been signed, but before it was delivered to and accepted by plaintiff. The change was made by one of the sureties—not an appellant—who added the word 'severally' making the bond in form 'joint and several' instead of 'joint' as before the addition. . . . Again, it is found by the court and the evidence is sufficient to support it 'that on said 2d day of February, 1903, and while deliveries as aforesaid were being made by plaintiff to defendant corporation, said defendants and each of them knew that plaintiff was ignorant of the facts connected with the said alteration, but believed that said alteration had been made by the authority and with the consent and knowledge of all of said defendants. That said defendants did not nor did any or either of them notify or inform plaintiff that any alteration had been made in said bond without their knowledge or authority, or against their consent, or that said bond was for any reason invalid, or any of the facts or claims respecting the said alteration therein other than the alteration was made with the authority of all persons signing said bond,' etc. In other words, we have a familiar illustration of the principle of estoppel. It is sufficiently pleaded—if necessary to plead it in anticipation of the possible defense of unauthorized modification of the original bond—it is warranted by the evidence and properly found by the court. The rule is just and supported by the authorities that where a document has been altered and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it at once, or within a reasonable time after learning thereof, or they are bound by the document as altered. . . . It is plain here that since plaintiff was furnishing the oil on the strength of the bond it was the duty of appellants to notify respondent immediately of any change in the terms of the bond within their knowledge and not authorized by them." And in *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492, it was held that a grantor ratified the alteration of a deed by the insertion in a blank therein of the name of a grantee. The court said: "Even if the blanks were filled up after delivery, the grantor, if he claimed the benefit of accompanying and related contracts, would thereby make the deed as completed his own and preclude himself from objecting to the invalidity afterwards."

So in *Oswego v. Kellogg*, 99 Ill. 590, it was held that the obligors in an appeal bond ratified an alteration therein by availing themselves of the appeal.

It has been held that where a party to an altered instrument denies his liability on

specified grounds, which do not include a denial of its validity because of the alteration, he will be estopped from defending an action on the instrument on that ground. *Davis, etc. Bldg. etc. Co. v. Dix*, 64 Fed. 406. See also *Isaacs v. Grothe*, 29 N. Bruns. 420. "One who refuses to carry out a contract on the ground of specified misrepresentation would be estopped from afterwards raising the objection that the contract had been altered." *Davis, etc. Bldg. etc. Co. v. Dix*, supra.

PERSONS BOUND.

A ratification or waiver of the alteration of an instrument binds only the parties who have participated in the ratification or waiver. *Paton v. Winter*, 1 Taunt. 420, 127 Eng. Rep. (Reprint) 896; *Smith v. U. S.* 2 Wall. 219, 17 U. S. (L. ed.) 788; *Inglis v. Breneman*, 9 Ark. 122, 47 Am. Dec. 735; *Limestone Bank v. Penick*, 2 T.B. Mon. (Ky.) 98, 15 Am. Dec. 138; *Matlock v. Wheeler*, 29 Ore. 64, 40 Pac. 5, 43 Pac. 867; *Shiffer v. Mosier*, 225 Pa. St. 552, 17 Ann. Cas. 758, 74 Atl. 426, 24 L.R.A.(N.S.) 1155.

PLEADING AND PRACTICE.

Where a party seeks to hold another liable on an altered instrument by reason of the latter's waiver or ratification of the alteration, he must set up the ratification in his pleadings. *Sibley v. Fisher*, 7 Ad. & El. 444, 34 E. C. L. 139; *Erickson v. Oakland First Nat. Bank*, 44 Neb. 622, 62 N. W. 1078, 48 Am. St. Rep. 783, 28 L.R.A. 577; *Wayne County Nat. Bank v. Kneeland* (Okla.) 161 Pac. 193; *Bolt v. State Sav. Bank* (Tex.) 179 S. W. 1119. And see the reported case. See also *Whitesides v. Northern Bank*, 10 Bush (Ky.) 501, 19 Am. Rep. 74.

The burden of proof to show the ratification or waiver of the alteration of an instrument is on the party relying on it. *Washington Bank v. Way*, 2 Cranch C. C. 249, 2 Fed. Cas. No. 957; *Towles v. Tanner*, 21 App. Cas. (D. C.) 530; *Eggemann v. Nutter*, 155 Ill. App. 390; *Bell v. Mahin*, 69 Ia. 408, 29 N. W. 331; *State v. Findley*, 101 Mo. 368, 14 S. W. 111.

Where a bond sued on and pleaded contained interlineations and its execution was admitted by the defendants it was held that they could not afterwards be heard to deny its execution. *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733.

In *Towles v. Tanner*, 21 App. Cas. (D. C.) 530, it was held that evidence that the maker of a note sued on was the agent of the indorsers of the note for the purpose of raising money for an enterprise in which they were all interested was inadmissible on

the issue as to the acknowledgment of the validity of the note by the indorsees after its alteration by the makers.

The ascertainment of the facts relied on to show a waiver or a ratification of an alteration in an instrument is for the jury. *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290; *Holyfield v. Harrington*, 84 Kan. 760, 115 Pac. 546, 39 L.R.A.(N.S.) 131; *Lammers v. White Sewing Mach. Co.* 23 Mo. App. 471; *Wilson v. Jamieson*, 7 Pa. St. 126; *Gray v. Williams* (Vt.) 99 Atl. 735; *North v. Henneberry*, 44 Wis. 306. But it is for the court alone to pass on the legal sufficiency of the facts to constitute a ratification. *Dickson v. Bamberger*, 107 Ala. 293, 18 So. 290. So the legal effect of a writing relied on to show a ratification is a question of law for the court. *Holyfield v. Harrington*, 84 Kan. 760, 115 Pac. 546, 39 L.R.A.(N.S.) 131.

Ratification by Party Enforcing Instrument.

While an alteration by a stranger does not ordinarily avoid the instrument (see 1 R. C. L. tit. *Alteration of Instruments*, p. 983) a person by suing on an instrument in its altered form thereby ratifies and affirms an alteration thereof by a stranger and cannot recover on the instrument if the alteration was made without the consent of the party sought to be charged. *Eckert v. Louis*, 84 Ind. 99; *Dover v. Robinson*, 64 Me. 183; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Bremen Bank v. Umrath*, 42 Mo. App. 525; *Paul v. Leeper*, 98 Mo. App. 515, 72 S. W. 715; *Perkins Windmill, etc. Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098; *Fulmer v. Seitz*, 68 Pa. St. 237, 8 Am. Rep. 172; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. 1131. And see the reported case. See also *Collins v. Makepeace*, 13 Ind. 448; *American Trust, etc. Bank v. Perkins*, 108 Miss. 834, 67 So. 481. Thus in *Dover v. Robinson*, supra, in applying the foregoing principle the court said: "Upon the testimony here reported the question seems to be whether the inhabitants of a town can maintain an action against the sureties upon a collector's bond originally given in the penal sum of twenty-five hundred dollars when said penal sum has been altered by the principal in the bond, since its delivery, with the knowledge and consent of the selectmen of the town, from twenty-five hundred to twenty-five thousand dollars, without the knowledge of the sureties, and in the absence of all proof of a subsequent ratification by them. . . . Whatever might have been thought of the elaborate and ingenious effort of counsel to establish the position, that the inhabitants of the town ought not to be affected by what he claims to have been the unauthor-

ized act of their agents, if they had brought suit on the bond as originally given, it can hardly avail when we find that the first count in the writ asserts the giving of a bond by the defendants in the sum of twenty-five thousand dollars. The plaintiff corporation seems to have been ready to avail itself of the alteration if it passed unnoticed. They can do so only at the hazard of losing the benefit of their bond altogether. Asserting a claim here upon the bond in its altered condition, they must be held to have ratified the act of their selectmen in permitting the alteration and to stand in the same position as a private corporation or an individual does, in bringing suit upon an altered instrument."

But the rule heretofore stated that a person by suing on an instrument in its altered state thereby adopts an alteration thereof by a stranger and avoids the instrument does not apply where he has no knowledge of the alteration at the time of the bringing of the suit. *Orlando v. Gooding*, 34 Fla. 244, 15 So. 770; *Bucklen v. Huff*, 53 Ind. 474; *Roenig v. Duff*, 13 W. N. C. (Pa.) 127; *Port Huron Engine, etc. Co. v. Sherman*, 14 S. D. 461, 85 N. W. 1008; *Bigelow v. Stilphen*, 35 Vt. 521. Nor does the rule apply where the action is brought on the instrument as it was originally executed. *Kingan v. Silvers*, 13 Ind. App. 80, 37 N. E. 413; *Wyckoff v. Johnson*, 2 S. D. 91, 48 N. W. 837; *Port Huron Engine, etc. Co. v. Sherman*, 14 S. D. 461, 85 N. W. 1008. See also *Fry v. Jenkins*, 173 Ill. App. 486, wherein it appeared that after the execution of a note and mortgage they were sent for inspection and recordation to the attorney of the holder of the mortgage. The attorney discovered a mistake in the dates of the instruments and without any direction by either of the parties thereto changed the dates. It was held that a suit on the instruments, the bill setting forth the facts and circumstances of the alteration, praying a correction of the mistake and a foreclosure of the mortgage or in the alternative a foreclosure of the original mortgage, was not a ratification of the alteration making the instruments void.

DIVIDE CANAL AND RESERVOIR COMPANY

v.

TENNEY.

Colorado Supreme Court—February 2, 1914.

57 Colo. 14; 139 Pac. 1110.

Alteration of Instruments — Ratification of Alteration.

A material alteration in a written instrument may be expressly or impliedly ratified after it has been executed and delivered, and, if so ratified, will bind the parties.

[See note at end of this case.]

Same.

Plaintiff, in May, 1902, quitclaimed to defendant's assignor all plaintiff's interest in a right of way for the C. ditch, with all rights to the appropriation of water and any and all interests therein. Thereafter plaintiff executed a written contract by which it assigned unto the D. Ditch Company the entire one-third interest in and to all the rights, privileges, and franchises pertaining to and secured for the appropriation of water from Sand and Deadman creeks in Larimer county (and also all of the rights, privileges, and franchises pertaining to and secured by the appropriation of water from the C. creek in such county). By the same contract the ditch company agreed to deliver to plaintiff sufficient water to irrigate his lands and to pay plaintiff for one-third of the water carried by the C. and the D. ditches, except that furnished plaintiff. Before delivery of the contract, the portion in parenthesis was erased by the president of the ditch company for the reason that it "was never in the agreement." Plaintiff recorded the contract and the letter accompanying it, and for four years thereafter made no claim to any interest in the water flowing in the C. ditch, during which time the ditch company's project was continued to completion. It is held that plaintiff was thereafter estopped to object to the alteration of the contract.

[See note at end of this case.]

Estoppel — Inducing Belief in Consent.

Where a party by conduct has intimated that he consents to an act which has been done or will offer no opposition thereto, though it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the action to the prejudice of those who have acted on the fair inference to be drawn from his conduct.

Irrigation — Contract for Water Rights — Construction.

Plaintiff transferred to an irrigation company certain water rights under a contract providing that the purchaser agreed to measure the water which might be secured by certain ditches, determine what was the full

one-third thereof, and pay plaintiff annually \$6 per million cubic feet for all of the third of the water delivered by these ditches in excess of the one amount furnished for the irrigation of plaintiff's land. It is held that, under such contract, plaintiff was only entitled to one-third of the water derived from the appropriations which he transferred, and hence could not object to the ditch company's deduction from the volume carried by one of the ditches for water derived from another appropriation.

Contracts — Pleading — Plea by Defendant of Change in Contract.

In an action on a contract, defendant was not required to plead evidence to establish the contract, but, having pleaded the instrument claimed by it to establish the contract, was entitled to show that such instrument was prepared and assented to, with the changes therein, after the contract relied on by plaintiff had been executed.

Appeal from district court, Larimer county:
GAMBLE, Judge.

Action by Rollin Q. Tenney, plaintiff, against Divide Canal and Reservoir Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. MODIFIED.

James W. M'Creery and Donald C. M'Creery for appellant.

Lee & Aylesworth for appellee.

[15] GABBERT, J.—Appellee, as plaintiff, brought suit against appellant, as defendant. His complaint included several causes of action. There was judgment for plaintiff and defendant appeals.

The first cause of action was to quiet plaintiff's title to an interest which he claimed in water delivered by means of the Columbine ditch, and was based on a contract between plaintiff and the Divide Ditch Company, dated November 21st, 1901, wherein it was recited that the ditch company, in consideration of certain acts therein specified to be performed by plaintiff, agreed to deliver him, free of all expense, water sufficient for the irrigation of lands particularly described. The contract further recited that the company agreed to measure the water which might be secured by the Divide and Columbine ditches and determine what was the full one-third of such water and pay plaintiff annually on the 1st day [16] of November of each year \$6.00 per million cubic feet for all of the one-third of the water delivered by these ditches in excess of the amount furnished for the irrigation of plaintiff's land. The contract also recited that plaintiff, in consideration of the covenants on the part of the defendant:

"By these presents does sell, convey and assign unto the said Divide Ditch Company the entire undivided one-third interest in and to all of the rights, privileges and franchises pertaining to and secured by the appropriations of water by said company from those streams known as Sand creek and Deadman creek in said Larimer county (and also all of the rights, privileges and franchises pertaining to and secured by the appropriation of water from the Columbine creek in said Larimer county)."

This contract is somewhat inartificial and ambiguous but it appears therefrom, and from the testimony, that plaintiff was the owner of an interest in the property conveyed, and that the consideration for such conveyance was the covenant on the part of the Divide Ditch Company to deliver him one-third of the water annually derived from the appropriations mentioned in the contract, for the irrigation of his land therein described, and in case he did not use or require all of this volume he was to receive \$6.00 per million cubic feet for the difference between the amount he used to irrigate his land, and the full one-third of the water obtained and diverted each year from these sources. About February 15th, 1904, the Divide Ditch Company transferred the rights acquired under the contract to the defendant company. The defendant denied the contract as pleaded, which was set out, *hæc verba*, in the complaint, and set up as the contract between the parties an agreement which contains no reference to the Columbine ditch. It appears from the testimony that the contract set out by the plaintiff was taken by the late Governor Eaton, then the president of the Divide Ditch Company. November 4th, 1902, plaintiff wrote a letter to Eaton, in which he stated:

[17] "I am compelled to again ask you for the contract relative to the Sand Creek ditch."

A few days later Eaton replied:

"Inclosed please find contract as requested. I went to the County Clerk's records this morning and failed to find the recorded contract. Then I came up here and found the contract that I had and in that contract the Columbine was included and I have taken the liberty to scratch it out as that was never in our agreement."

The erasures made covered that portion of the contract as above quoted enclosed in parenthesis and also all reference to the Columbine ditch in other parts of the instrument. January 11th, 1907, plaintiff recorded the contract sent by Eaton with the erasures as made by him and also the letter written by Eaton. The only difference between the contracts pleaded by the respective parties is that in the one relied upon by plaintiff it is pleaded as though no erasures had been

made while on the part of the defendant it was claimed that the contract between them was the one in which the erasures were made. The question thus presented is, which was the true contract between the parties, that is, whether the contract as changed by the erasures is the one by which the plaintiff is bound, or whether the defendant is bound by the contract as originally drafted. This becomes important, for the reason that plaintiff, under the contract as originally drafted was entitled to one-third of all the water carried annually by the divide ditch, from the appropriations he conveyed, including the volume diverted through the Columbine ditch, from its appropriations, when, under the contract after the erasures were made all consideration of that ditch and its appropriations would be excluded. Whether then plaintiff was or was not entitled to one-third of the water diverted by the Columbine ditch depends upon whether he is bound by the contract after it was changed by the erasures made by Eaton. This must be determined from the facts and the principles of law applicable thereto.

Plaintiff and one Wilson commenced the construction [18] of a ditch, the purpose of which was to divert water from the creeks named in the contract into the Cache La Poudre river. Before this work was completed Wilson conveyed a part of his interest in the system to the Divide Ditch Company and the remainder to plaintiff. Later plaintiff entered into the contract set out in his complaint. As above stated, all reference to the Columbine ditch and its appropriations were thereafter stricken from this contract by Eaton. It does not appear that plaintiff, when he received the contract from Eaton, in which all reference to the Columbine ditch and its appropriations were erased, objected to the erasures, although his attention was directly called to them by the letter accompanying it; the reason for the erasure being, as stated in the letter, that the Columbine ditch "was never in our agreement." The Divide Ditch Company commenced to construct the ditch intended to utilize the purchase from Wilson and plaintiff, but it was not entirely completed until after February, 1904, at which date it was conveyed to the defendant company and thereafter fully completed by the latter. It appears that plaintiff was aware of the work being carried on by defendant and its predecessor and that the first objection he made to the erasures was in November, 1906, when a statement showing the amount of water run in the ditch, which did not mention the Columbine, was handed to him. It also appears that on May 1st, 1902, by quit-claim deed recorded five days later, he conveyed to Eaton, as recited therein:

"The right of way for that certain ditch known as the Columbine ditch, located in section twenty-six in Tp 10 N R 75 West with all rights to the appropriation of water and any and all interests therein."

This is the same property which he claimed was included in the contract as originally drafted. By mesne conveyances the rights thus acquired by Eaton became vested in the defendant.

A material alteration in a written instrument may be ratified after it has been executed and delivered, and if so ratified will bind the parties; 7 Am. & Eng. Encyc. [19] of Law 144. Ratification may be express or it may arise by implication. If it is to be implied, facts must be established from which it necessarily results; Idem. Plaintiff did not expressly assent to the change in the contract and the question therefore is, did he impliedly do so? He knew of the change but did not object. He knew that after the change work was being prosecuted on the ditch system by his vendee, and its successor, the defendant. He remained silent for about four years and then, when a statement was rendered showing the volume of water he was entitled to receive royalty upon, which excluded the Columbine ditch, objected for the first time by claiming that he should be paid for water diverted by the Columbine ditch.

Prior to the change he had parted with his interest in the Columbine ditch by conveyance to Eaton. This situation explains his silence and clearly manifested an intention on his part to ratify the contract as changed, for the very obvious reason that the facts as they existed at the time of the change required that the Columbine ditch should be excluded from the contract. Without any objection from plaintiff relative to the change, the ditch system was completed by the defendant and its predecessor. The silence of the plaintiff in these circumstances would naturally cause the Divide company as well as the defendant to conclude that the work of completing the system was being prosecuted with the understanding on their part and the part of the plaintiff that the contract as modified by the erasures evidenced the agreement between them and calls for the application of the legal maxim that, "He who is silent appears to consent."

It is settled law that if a party by conduct has intimated that he consents to an act which has been done, or will offer no opposition to it, although it could not have lawfully been done without his consent; and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have acted on the fair inference to be drawn [20] from his conduct. *Truesdail v. Ward*, 24

Mich. 117. We must therefore hold from the undisputed facts that plaintiff assented to the change in the contract made by the erasures and is bound thereby as it read after this change was made.

The trial court, however, held by the judgment rendered that the contract without the erasures was the agreement between the parties, and decreed that plaintiff's right to water diverted by the Columbine ditch be quieted, and assessed damages for the failure of defendant to account to and pay him for his share of the water carried in this ditch. This we think was error for the reasons above stated.

Plaintiff also claimed and was awarded damages upon the ground that for the years 1906 and 1907 the defendant, without authority, had deducted from the volume carried by the Divide ditch 48 cubic feet per second of time, and for the year 1908, 21 cubic feet, thus reducing the volume to which the plaintiff claimed he was entitled to be paid for under his contract with the company. The testimony discloses that this water did not belong to the company, nor was it diverted for its use but that it represented water from appropriations made in Wyoming, which one Bruce G. Eaton claimed to have purchased, and that it was carried through the ditch system of defendant for his use and benefit. It may be that Eaton was without right to this water and could not lawfully divert it, but this is immaterial. Plaintiff certainly was not entitled to any portion of it except he established that it belonged to the company. This he failed to do. Independent of this, plaintiff is precluded from asserting any claim to this water, for the reason that the contract does not contemplate that he was to share in water except from the appropriations which he transferred.

The remaining question relates to the judgment awarding damages on the third cause of action. The averments of the complaint with respect to this cause are to the effect that for the year 1905 the defendant requested the plaintiff to rent a sufficient number of shares [21] of the North Poudre Irrigation Company stock for the proper irrigation of his land, described in the contract between himself and the Divide company; that, acting on this request, he rented such stock at an expense of \$350.00, which defendant has refused to pay. The court found in favor of plaintiff on this cause of action. Without going into details we think the testimony sustains the agreement pleaded and that the judgment of the court, awarding the plaintiff the amount of the obligation he incurred in renting the stock, is supported by the evidence. The judgment of the district court on this cause of action is affirmed.

Except as to this cause of action the judgment of the district court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Two-thirds of the costs in this court will be taxed to appellee and one-third to appellant.

Judgment affirmed in part and reversed in part, and the cause remanded.

Musser, C. J. and Hill, J. concur.

On Petition for Rehearing.

GABBERT, J.—In their brief for rehearing counsel for plaintiff contend, that under the pleadings the question of his consent to the changes in the contract was not presented because defendant did not plead a substitute agreement or the assent of plaintiff to the erasures. By answer, the defendant denied the contract set out of the complaint, and pleaded *hæc verba*, the contract upon which it relied. Evidence to establish a contract need not be pleaded. Defendant having specifically set up the contract upon which it relied could show that this instrument was the [22] one between the parties by assent to changes in the contract relied upon by plaintiff after it was executed, for the reason that this was merely testimony to establish the contract pleaded by defendant.

From the testimony the Wyoming water is in no sense involved. Plaintiff's rights are confined to the appropriations he transferred and as defined in his contract. His contract does not purport to give him any other interest. It is therefore wholly immaterial from what source or by what means additional water is secured by defendant or carried through its ditch, so long as by so doing plaintiff's rights under his contract are not infringed, or defendant does not refuse to comply with the terms and conditions of that contract to his damage.

We have determined the case on the record before us, but this does not preclude either party on retrial, from introducing competent testimony which might establish facts different from those now presented.

The petition for rehearing is denied.

Rehearing denied.

Musser, C. J., and Hill, J., concur.

NOTE.

The reported case holds that a person having knowledge of the previous alteration of an instrument to which he is a party may impliedly as well as expressly assent to the alteration. The subject of ratification or waiver of an alteration of an instrument is discussed in the note to *Smith v. Barnes*, reported ante, this volume, at page 330.

COHEN

v.

PHILADELPHIA RAPID TRANSIT
COMPANY.

Pennsylvania Supreme Court—May 26, 1915

250 Pa. St. 15; 95 Atl. 315.

**Trial — Physical Examination of Party
— Discretion of Court.**

Where plaintiff had been examined by two physicians representing defendant company prior to the trial of an action for personal injuries, and there was no evidence that she or her physicians deceived the examining doctor, it is not an abuse of discretion to refuse request by defendant for examination of plaintiff at the time of the trial.

[See note at end of this case.]

Withdrawing Juror — Surprise — Evidence as to Nature of Injuries.

Where plaintiff was injured internally, it is not an abuse of discretion to refuse to withdraw a juror, after defendant claims surprise because there was no allegation in statement of claim of an internal injury, where no bill of particulars was asked for, and the statement is broad enough to cover the injuries proved at the trial.

Appeal from Court of Common Pleas, Number 1, Philadelphia county: BREXY, Judge.

Action by Eva Cohen, plaintiff, against Philadelphia Rapid Transit Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Sidney Young for appellant.

Henry J. Scott for appellee.

[16] MOSCHZISKE, J.—On September 3, 1908, Eva Cohen, a single woman, twenty-one years old, was a passenger on a car of defendant company which came into collision with another car; she was thrown, striking on her back and head. Miss Cohen was attended by her family physician from September 19, 1908, until December 10, 1910. On March 24, 1910, she consulted a specialist, who treated her, and testified to her condition at time of trial. This young woman was physically examined on different occasions by two doctors representing the defendant company. At the trial one of these doctors testified for defendant, but the other was not called, nor was his absence explained; furthermore, no information was given as to when the absent doctor made his examination, or what injuries he discovered. After the plaintiff closed her case, counsel for the defendant asked the court to order another physical examination, which the trial judge declined

to do; whereupon the withdrawal of a juror was requested and refused. A verdict was rendered for the plaintiff, upon which judgment was entered; the defendant has appealed and assigns for error, (1) the refusal "to grant the defendant's request for an examination of the plaintiff by a gynecologist selected either by the court or by the defendant," (2) the refusal [17] "to withdraw a juror after the defendant had pleaded surprise on the ground that there was no allegation in the statement of claim that the plaintiff was internally injured;" it appearing that there had been no express declaration "made by the plaintiff or her physician to the defendant's examining physician of such a claim," and the appellant alleging that "the first knowledge the defendant had that such a claim would be made was at the time of the trial, over six years after the accident." Both assignments of error complain of abuse of discretion, and in general concern matters largely within the control of the trial judge. We entertain no doubt of the right of a court, when one sues for alleged injuries to the person, to afford the defendant a proper opportunity to have a physical examination of the plaintiff made by skilled medical men. Of course, the court cannot order a plaintiff to submit to such an ordeal against his will, but it can, and, when the ends of justice so require, should refuse to permit the case to proceed until the plaintiff undergoes an examination.

In the present case, however, we are not convinced of abuse of discretion. Although, if sitting as a trial court, under the peculiar circumstances at bar, we might have granted the request refused by the court below, yet, it appears that before the time of trial the defendant had been afforded ample opportunity for as extensive an examination of the injured woman as its physicians desired to make, and there is nothing to show that they were in any way deceived or deliberately misled by the plaintiff or her doctor when they examined her.

No bill of particulars having been asked for, the averment of injuries in the statement of claim is quite broad enough to cover those asserted at trial. We agree with counsel for the defendant that, when a suitor refuses to undergo a physical examination, the fact of his refusal can be considered by the jury, and, in most instances, might well justify an inference against him; but the defendant at bar made no requests for charge, and hence [18] is not in a position to criticize the trial judge for not so instructing the jury.

Since the plaintiff, before the trial, submitted herself to a physical examination by medical representatives of defendant, we cannot say that the trial judge, who is one of the most experienced, careful and discreet of

those who grace the Common Pleas bench, abused his discretion in refusing to direct another examination or continue the case.

The assignments are overruled and the judgment is affirmed.

NOTE.

Power of Court to Compel Submission to Physical Examination.

Introductory, 351.

During Trial:

Majority Rule, 351.

Minority Rule, 352.

Before Trial, 353.

Introductory.

The purpose of this note is to review the late cases which discuss the power of a trial court to compel submission to a physical examination. The earlier cases dealing with the question are considered in the notes to Austin, etc. R. Co. v. Cluck, 1 Ann. Cas. 261; Johnston v. Southern Pac. Co. 11 Ann. Cas. 841; Sidekun v. Wabash, etc. R. Co. 3 Am. St. Rep. 549; and Cleveland, etc. R. Co. v. Huddleston, 68 Am. St. Rep. 238.

During Trial.

MAJORITY RULE.

The rule obtaining in the majority of jurisdictions that in an action to recover damages for personal injuries the trial court has power to require the plaintiff to submit to a physical examination finds support in several recent decisions. *People v. Preston*, 19 Cal. App. 675, 127 Pac. 660; *Illinois Cent. R. Co. v. Beeler*, 142 Ky. 772, 135 S. W. 305; *State v. Anderson* (Mo.) 194 S. W. 268; *State v. Troup*, 98 Neb. 333, 152 N. W. 748, L.R.A.1915E 936; *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, Ann. Cas. 1916B, 101, 176 S. W. 1031. See also *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884; *In Louisville, etc. R. Co. v. Koonce*, 4 Tenn. Civ. App. 1, the question came up for the first time in that jurisdiction and the court gave the reasons for its holding as follows: "The purpose of this suit, as well as all other actions, is to do equal and exact justice between the plaintiff and the defendant, and in order to attain that end, the court must know the exact truth of the facts involved in issue, and when a party to a suit disputes the right of his adversary to a knowledge of any fact pertinent to the truth of the issues, his denial raises a suspicion that his claim is unjust or unfounded. In this cause the defendant denied and insists the plaintiff was not injured by the collision, to the extent

claimed by him in his testimony, or by his physicians in their evidence. If he was injured to that extent, he had nothing to fear from a physical examination by expert, scientific medical men; if he was not so injured, such an examination would expose the fallacy of his claim and show it without merit. The court and jury had the right to know the truth of this matter, and the right to the very best evidence that would show the truth of this matter. If, as has been said, the plaintiff may expose his wounds or injuries to a friend or kinsman, or to his family physician, or even to an expert physician of his own selection, and have them testify as to what they saw or discovered by such an examination, there is no reason in law or morals, if he is unwilling, why the court should not compel him to submit to an examination by expert, scientific and disinterested medical men, in order that the exact truth as to his physical condition, resultant from the injuries, may be shown to the jury. As we have said, if he is injured to the extent claimed by him and his friends, he has nothing to fear from such an examination, and if he is not so injured, he is attempting to practice a fraud on the court, and such fraud should be exposed, and his false claim denied. We, therefore, think there are no grounds in law or reason, why an application seasonably made to the court, to have a party examined who sues for physical injuries, in order to ascertain whether his claim is false or just, should not be sustained."

Most of the recent decisions which have adopted the majority rule are, however, in harmony with the earlier cases in holding that the defendant's application for an order requiring the plaintiff to submit to a physical examination is addressed to the sound discretion of the trial court, and in the exercise of that discretion the plaintiff will not be required to submit his body to a physician or surgeon selected by the defendant. The physician must be selected by the trial judge, and he must be one of competent skill and indifferent between the parties. *Macon, etc. R. Co. v. Ross*, 133 Ga. 83, 65 S. E. 146; *Wheeler v. Chicago, etc. R. Co.* 267 Ill. 306, 108 N. E. 330, 182 Ill. App. 194; *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L.R.A. 396; *Kokomo, etc. Traction Co. v. Walsh*, 58 Ind. App. 182, 108 N. E. 19; *Lexington R. Co. v. Cropper*, 142 Ky. 39, 133 S. W. 968; *Keller, etc. Co. v. Berry* (Ky.) 121 S. W. 1009; *Scheffler v. Lee*, 126 Md. 373, 94 Atl. 907; *Fillingham v. Michigan United Rys.* 154 Mich. 233, 117 N. W. 635; *Logan v. Lenawee Count Agricultural Soc.* 156 Mich. 537, 121 N. W. 485; *Dean v. Wabash R. Co.* 229 Mo. 425, 129 S. W. 953; *Shamp v. Lambert*, 142 Mo. App.

587, 121 S. W. 770; *Dent v. Springfield Traction Co.* 145 Mo. App. 61, 129 S. W. 1044; *Donovan v. Kansas City Elevated R. Co.* 157 Mo. App. 649, 138 S. W. 679; *Graham v. Sly*, 177 Mo. App. 348, 164 S. W. 136; *Benson v. Altoona, etc. Electric R. Co.* 228 Pa. St. 290, 77 Atl. 492; *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, Ann. Cas. 1916B 101, 176 S. W. 1031; *Louisville, etc. R. Co. v. Koonce*, 4 Tenn. Civ. App. 1; *Just v. Littlefield*, 87 Wash. 299, 151 Pac. 780. And see the reported case. See also *Mobile Light, etc. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509. In upholding the majority rule the court in *Kokomo, etc. Traction Co. v. Walsh*, 58 Ind. App. 182, 108 N. E. 19, quoting from *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L.R.A. 396, said: "'(1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding.' . . . The power of the court to grant an order requiring an examination of the plaintiff in such cases is based on the supposition that without its exercise injustice may be done the defendant. On this subject the supreme court in the case of *South Bend v. Turner*, supra, 429, said: 'When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff on the one hand, and probable injustice to the defendant on the other, the law will not hesitate—the court in making such orders, with respect to time, place, and persons, in every case, having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit.' The court, however, in the

exercise of such power should not look to the rights of the defendant alone. The age and sex of the person who is the subject of the examination, and the nature and character of the examination involved will all be considered by the appellate tribunal in determining whether the trial court has abused its discretion in a given case."

In *Murphy v. Southern Pac. Co.* 31 Nev. 120, 21 Ann. Cas. 502, 101 Pac. 322, the court commenting on the discretionary power to order the plaintiff to submit to a physical examination said: "After a very thorough and careful investigation of the authorities presented upon this interesting assignment of error, and while there appears to be a great contrariety of opinion, yet we find that the great weight of authority is to the effect that the trial courts have the right to exercise this power, and such power is vested in the sound discretion of the trial judge, and, if he grants or denies an examination, such action on his part will not be reversed unless it discloses a gross abuse of such discretion."

It has been held not to be reversible error for the trial court in its discretion to overrule a motion for an X-ray examination. *Louisiana, etc. R. Co. v. Woodson* (Ark.) 192 S. W. 174.

If, prior to the trial, the court appoints physicians to examine the plaintiff and they do so, a refusal by the court to require the plaintiff to be re-examined is not error. *St. Louis, etc. R. Co. v. Carter*, 93 Ark. 589, 126 S. W. 99; *Scullin v. Vining* (Ark.) 191 S. W. 924; *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149. But where it appeared that the defendant was misled by the plaintiff in the first examination, the court's failure to order a second examination was held to be error. *Rief v. Great Northern R. Co.* 126 Minn. 430, 148 N. W. 309.

The court has no power to direct physicians appointed by it to perform an operation on a party to ascertain a fact in controversy, although the party is willing to undergo the operation. *Hoxsey v. Murray*, 84 Wash. 588, 147 Pac. 205.

If the condition of any private part of the body of a male or female is material on any trial, and cannot be examined in court without an improper exposure of the person, it should under an order of the court be examined out of court by experts appointed for that purpose. *Wheeler v. Chicago, etc. R. Co.* 267 Ill. 306, 108 N. E. 330.

MINORITY RULE.

The recent cases which follow the minority rule that the trial court has no power to order a physical examination appear to rest their holdings mainly on the ground that, unless there is a statute to the contrary, no

court has the right to invade the inviolability of the plaintiff's person by compelling him to submit to a physical examination before or at the trial. *Yazoo, etc. R. Co. v. Robinson*, 107 Miss. 192, 65 So. 241; *Gentry v. Gulf, etc. R. Co.* 109 Miss. 66, 67 So. 849; *Atchison, etc. R. Co. v. Melson*, 40 Okla. 1, Ann. Cas. 1915D 760, 134 Pac. 388; *Best v. Columbia St. Ry. etc. Co.* 85 S. C. 422, 67 S. E. 1; *Brackett v. Southern Ry.* 88 S. C. 447, Ann. Cas. 1912C 1212, 70 S. E. 1026; *Missouri, etc. R. Co. v. Rogers*, 55 Tex. Civ. App. 93, 117 S. W. 939; *Taylor v. White (Tex.)* 113 S. W. 554; *Sharp v. Ogden Rapid Transit Co. (Utah)* 160 Pac. 438. See also *Oklahoma R. Co. v. Thomas (Okla.)* 164 Pac. 120; *Artesian Belt R. Co. v. Young (Tex.)* 155 S. W. 672. In *Larson v. Salt Lake City*, 34 Utah 318, 97 Pac. 483, the court thoroughly discussed the want of power in the absence of legislative authority to compel a physical examination, saying: "No one would seriously contend that courts generally have the power to make and enforce orders which in their discretion will bestow equal and exact justice. The power of courts is not measured by so flexible a yardstick. There are many things over which it may be expedient on the part of courts to exercise a discretionary power, but concerning which courts have constantly refused to act because of a want of power. Courts are creatures of the law. The power of state courts is generally derived from constitutions and laws of the state. The power of our courts is derived from the constitution and the laws of this state, and the common law so far as it is not repugnant to, or in conflict with, the Constitution and laws of the United States and the constitution and laws of this state. Whenever the power of a court is invoked, in order that it may be lawfully exercised, it is essential to point to some constitutional provision or some legislative enactment or the common law authorizing it—not necessarily to some express provision or enactment, but to some provision where the right to exercise the power invoked is fairly implied, or where it may be necessarily inferred from the nature and constitution of the tribunal itself."

The federal courts seem to adhere to the minority rule holding that in the absence of a statute a plaintiff cannot be required to submit to a physical examination, still following the rule laid down in *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 11 S. Ct. 1000, 35 U. S. (L. ed.) 734. See *Denver City Tramway Co. v. Norton*, 141 Fed. 599, 73 C. C. A. 1; *Brace v. Central R. Co.* 216 Fed. 718. But the federal courts will grant an order for a physical examination if there is a state statute providing for such an order in the district where the federal court is held. *Green v. Delaware, etc. R. Co.* 211 Fed. 774.

Ann. Cas. 1917D—23.

Where an injured party has once invited the inspection of his injured parts by the jury he thereby waives his right to object to an examination. *Galveston, etc. R. Co. v. Chojnacky (Tex.)* 163 S. W. 1011; *International, etc. R. Co. v. Bartek (Tex.)* 177 S. W. 137; *San Antonio, etc. R. Co. v. Stuart (Tex.)* 178 S. W. 17. See also *Oklahoma R. Co. v. Thomas (Okla.)* 164 Pac. 120. The federal courts appear to be in accord with the view that where the plaintiff at the trial voluntarily exhibits his injury for inspection, it is beyond his power to arrest the investigation. *Chicago, etc. R. Co. v. Kendall*, 167 Fed. 62, 16 Ann. Cas. 560, 93 C. C. A. 422.

In *Texas* it seems that the trial court may appoint a physician to examine the plaintiff if he consents thereto. *San Antonio, etc. R. Co. v. Spencer*, 55 Tex. Civ. App. 456, 119 S. W. 716. It has been held to be within the trial court's discretion to refuse an application for a physical examination outside of the courtroom and not in the presence of the jury. *Houston, etc. R. Co. v. Boukowsky (Tex.)* 175 S. W. 477. But if it is made to appear to the trial court that a proper and reasonable examination cannot be made in the presence of the jury it is the duty of the court to permit such an examination to be made elsewhere. *San Antonio, etc. R. Co. v. Stuart (Tex.)* 178 S. W. 17.

Before Trial.

In *New York* the courts, under a statute, have the power to require the plaintiff to submit to a physical examination before trial. But such an examination is not an absolute right. It must appear that the defendant is ignorant of the nature and extent of the injuries complained of. The court must protect the plaintiff from objectionable handling, and a woman plaintiff may not be required to submit to an examination except by physicians and surgeons of her own sex. *N. Y. Code of Civil Procedure*, § 873; *Mizak v. Carborundum Co.* 75 Misc. 205, 132 N. Y. S. 1104; *Strom v. American Dist. Steam Co.* 84 Misc. 197, 145 N. Y. S. 720; *Lasher v. S. Bolton's Sons*, 161 App. Div. 381, 146 N. Y. S. 321. But it has been held that if the examination will subject the plaintiff to bodily injury the court cannot require the plaintiff to submit. *Gregory v. Acme Road Machinery Co.* 175 App. Div. 473, 162 N. Y. S. 574 (Foote, J.; dissenting). And where such an order is improperly granted, that is, if the moving papers seem to be insufficient and of no probative value, it will be reversed on appeal. *Smyth v. Lichtenstein*, 137 App. Div. 335, 122 N. Y. S. 74.

Under a similar statute in *Florida* the trial court is empowered to require the injured party, either before or at the time of the

trial, to submit to such a physical examination as shall be reasonably sufficient to determine the physical condition at the time of trial and the nature and extent of the alleged injuries; providing however, that the examination shall be made by a physician to be named by the court in the presence of one or more physicians selected by the injured party. *Atlantic Coast R. Co. v. Dees*, 56 Fla. 127, 48 So. 28; *State v. Call*, 64 Fla. 144, 59 So. 789, 41 L.R.A.(N.S.) 1071.

In *Canada* it seems that an order for a physical examination either before or at the trial will not be made unless the plaintiff consents thereto. *Burns v. Toronto R. Co.* 13 Ont. L. Rep. 404, 9 Ont. W. Rep. 277; *Mousseau v. Montreal*, 4 Quebec Pr. 38. But in *Baxter v. Davis*, 4 Quebec Pr. 153, the court granted the defendant's order for a medical examination of the plaintiff, the physicians to be named by the defendant. The court, however, gave no reason for its decision, although the report states that the court deliberated. It seems, however, from the opinion in *Reily v. London*, 14 Ont. Pr. 171, that in certain exceptional cases, a party may be compelled to submit to a physical examination, as for example, in a proceeding to annul a marriage for impotency.

GILLIES

v.

BROWN.

Canada Supreme Court—June 24, 1916.

53 Can. Sup. Ct. 557.

Frauds, Statute of — Promise to Answer for Debt of Another — Agreement of Stockholder to Repay Advances to Corporation.

A promise by a stockholder that he will repay advances to be made to the corporation, on the strength of which advances are made, creates an original and not a secondary liability and is not within the statute of frauds.

[See note at end of this case.]

Appeal from Appellate Division of Supreme Court of Ontario.

Action by N. B. Brown, plaintiff, against James F. Gillies, defendant. Judgment for defendant in trial court. Judgment reversed by Appellate Division of Supreme Court of Ontario. Defendant appeals. **AFFIRMED.**

[557] The action in this case was brought against the appellant and the Coleman Development Co. to recover monies advanced by respondent for the company's operations, which, he alleges, appellant promised to repay. It was referred to a referee, who found that the promise of repayment was made, and gave judgment against the appellant and for the company. On appeal, Mr. Justice Middleton accepted the findings [558] of fact by the referee, but reversed his judgment on the ground that the appellant's agreement was one to answer for the debt of the company and void under the Statute of Frauds. He gave judgment against the company, and dismissed the action against appellant. The Appellate Division restored the judgment of the referee.

Tilley, K. C. and *H. S. White* for appellant.
McCullough for respondent.

A. G. Slaght, solicitor for appellant.

S. W. McKeown, solicitor for respondent.

THE CHIEF JUSTICE (dissenting).—It has been assumed that this case is concluded by the authority of decided cases, of which *Lake-man v. Mountstephen*, L. R. 7 H. L. 17, is a leading case. I think that is far from correct. All that was before the House of Lords, in that case, was the question whether there was evidence to go to the jury. Per Lord O'Hagan:—

"Our judgment proceeds merely on the ground that there was evidence to go to the jury."

In the present case, whilst fully admitting that there was evidence on which it was possible for the referee to find a primary liability of the appellant, this court has also to consider whether the facts establish such liability.

Although this court is reluctant to disturb findings of fact arrived at in the courts of original jurisdiction, yet this rule calls for a less strict observance where the finding is not of a judge or a jury, but a referee, whose decision may not command so much confidence. In the present case, moreover, the finding of the so-called fact is, in reality, rather an inference from the facts.

I am far from satisfied that the evidence shews an [559] original primary liability of the appellant to the respondent, but there is more than this. Lord Selborne, in the case above-mentioned, when laying down that there can be no suretyship unless there be a principal debtor, adds:—

"Who, of course, may be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time."

In my view, the evidence does not support the conclusion arrived at below, and I would allow the appeal with costs.

DAVIES, J.—The sole question in this case is whether the contract made between Brown and Gillies for the advances made by the former to the Coleman Development Company was one which involved a personal liability on Gillies' part, and, if it did, whether it came within the Statute of Frauds and was a promise to pay the debt of the company.

Mr. Tilley's argument was that the subsequent transactions with the company shewed that the contention as to Brown being a primary debtor was incorrect and, in fact, impossible.

I am unable to accept that contention, and think these subsequent transactions are quite consistent with Gillies' primary liability for the monies advanced by Brown. I agree with the Second Appellate Division in its conclusion as to the law on the proved facts. The findings of fact of the referee were accepted by Mr. Justice Middleton, who determined, however, against Gillies' primary liability.

Gillies' promise to Brown was, in effect: If you advance these monies to pay the accruing liabilities of the company, which I had agreed to do, but find myself at present unable to do, I will return them to you. It matters not that the monies advanced were for the [560] advantage of the company. I think both parties fully understood that Gillies was the primary debtor to whom Brown looked for payment, and that the evidence shews this to be so.

It does not seem to me that the Statute of Frauds applies at all to a case such as this. That statute applies only to cases where the promise is made to the creditor or person to whom the debt is owing. A promise to a debtor to pay his debt is not within the statute. *Eastwood v. Kenyon*, 11 Ad. & El. 438, 39 E. C. L. 137, in 1840.

I would dismiss the appeal with costs.

INDINGTON, J. (*dissenting*).—This action brought by respondent Brown, as plaintiff, against appellant Gillies and the Coleman Development Company, was referred to the late Mr. Kappelle as official referee, and, after he had heard the evidence for plaintiff and part of that for the defence and died, the continuation of the reference was transferred to Mr. Cameron as official referee.

His report maintaining respondent's claim was reversed by Mr. Justice Middleton, and, on appeal, the report of the referee was restored.

The question of law raised is whether or not the contract, if any, between appellant and respondent falls within the Statute of Frauds, section 4.

In order to appreciate properly the facts, which one must have an accurate conception of in such cases in order to apply the law,

I read the respondent's evidence, and found myself, from the peculiarities I found therein, compelled to read and consider the entire evidence in the case.

It is, unfortunately, by reason of the death of the learned referee, one of those cases where we cannot, [561] as I conceive, rest satisfied with findings of fact, so far as dependent upon the relative credibility of the parties, by the judge upon whom it has devolved to finish a half-tried case. This is not the first of that kind to come here. He is in little, if any, better position than we when rehearing trials upon mere depositions. Indeed, he may, in a sense, sometimes be in a worse, in case those coming before him happen to be possessed of a demeanour to impress him favourably.

The appellant was the owner of some mining claims and promoted the incorporation of the defendant company; became, and continued throughout, its president and possessor of \$200,000 face value of its stock, as the price of conveying his claims to the company, and, later, acquired a very large number of shares to recoup him for advances to develop the property, and the solicitor who procured the charter was assigned stock in the way of compensation for his services, and became one of the directors.

Others seem to have taken merely the necessary stock to qualify them as directors, and a purchase by respondent from appellant, in the spring of 1906, of 500 shares left the appellant more deeply interested than all the rest combined in the success of the company.

By reason of his falling ill in July, 1906, and being unable for a time to look after the business, the solicitor suggested engaging respondent at ten dollars a day for two days in each week, and to this appellant assented.

He was engaged accordingly, and soon became also the secretary and a director of the company, which position he held during all the time we are concerned to know anything of their affairs.

He presented an account of \$192—substantially—[562] for services, at a meeting in July, 1906, and took payment in shares at 25c. a share.

On the 29th October, 1906, he presented another account for \$800, and accepted payment in shares issued on same basis.

He would seem thus to have become a shareholder of a greater number of shares than any other person besides appellant.

His present claim rests upon an alleged conversation had in December, 1906, and the construction put thereupon.

His evidence is as follows:—

"98. Q.—When did you commence advancing monies? A.—Along in December,

"99. Q.—Of what year? A.—The fall of 1906.

"100. Q.—How did you come to make those advances? A.—Mr. Gillies' money had run short, and he didn't want to discontinue the operations and have the company die out. He wanted to keep working, and he told me that if I would advance this money and keep the thing alive, that he had monies coming in and he would return it to me.

"101. Q.—When you say "advanced" this money—what money? A.—Money to the workmen or to keep the operations of the company going. There were supplies and wages.

"102. Q.—When do you say that arrangement was made? A.—Prior to the payment of this 4th December to William Hill.

"103. Q.—Well, did you agree to that? A.—Yes, I agreed to it.

Either this story is true or false. It is unsupported by anything that can properly be called corroboration. It is absolutely denied by the appellant.

A perusal of the entire evidence leaves a most unpleasant impression as to each as a witness. The respondent, notwithstanding what he would have the court believe as to this bargain with appellant in December, 1906, presented, at a meeting 22nd January, 1907, an account for \$2,800, admittedly comprising advances of the character he had just bargained so recently to look to appellant for repayment of.

If his story is true, then he had no right to render [563] this account to the company, so far as it embraces items for advances. His doing so tends to destroy belief in his story and helps us to credit appellant in his denial.

But what could he expect in way of repayment? He knew the company had no cash. And less than two months had elapsed since, if his story is to be believed in the sense he now asks the court to accept and act upon it, he was to look to appellant alone.

In presenting the account to the company, we hear nothing from him but a demand for stock at 25c. on the dollar, although believed by those at that meeting, including himself, to be forth par or perhaps twice its face value. He did not, when appellant resisted him, there turn round and demand the repayment from him of the money advanced. Why? Can there be a doubt in the mind of anyone reading his evidence that he much preferred stock at 25c.?

Passing these men for the moment, there was in the person of the solicitor, also a director, another witness. He is one of repute and standing, whose veracity has not been questioned, and his version of what transpired does not agree with that of the respondent. And he denies the adoption of a resolution, whilst he was present, which is found afterwards written up in the minute book by the respondent in the following terms:—

Resolution passed by the Directors of The Coleman Development Company, Limited, on the 22nd day of January, 1907, at 9:30 P. M.
Present:—

James F. Gillies.

N. B. Brown.

John McKay.

Moved, seconded and resolved, that the account of N. B. Brown, amounting to the sum of twenty-eight hundred dollars, be paid by issuing stock at twenty-five cents per share amounting to eleven thousand two hundred paid-up shares, and the same is issued.

Carried

James F. Gillies, *President.*

N. B. Brown, *Secy.*

[564] The appellant denies this, but has to admit his signature thereto. And counsel asks us to look at these signatures in the minute book and find, what he contends, that all appellant's signatures to a series of minutes were written at one time with the same pen and ink.

I did not hear this challenged as fact in argument, and, without posing as an expert, I may say it is to be regretted the point was not developed by expert testimony.

Whatever may be the facts, there is certainly a curious appearance in this alleged resolution, in which I take the liberty above of making the spelling conform with the signed minute instead of that in the printed case.

The sequel to this alleged resolution is also curious.

No stock certificates were issued until the following August, and then as of course by the respondent.

Assuming for the moment this only an accident and the resolution quite regular, if these two parties could manufacture wealth in that manner, why should the appellant not look to the company? Why should he pick out a man likely only, if paying personally, to pay only dollar for dollar, and let go the chance of multiplying wealth by an issue of stock?

The attitude of mind of the respondent Brown towards this company and its stock is illustrated by the following letter:—

Haileybury, Ont.,

March 10, 1907.

Mr. John McKay, Soo.

Dear Sir,—Your favour of the 8th inst. to hand, and, in reply, beg to say that, so far as I am concerned, I have no objection whatever to your selling your stock at \$1.75. I would not like to see it put on here for less than 2.00, as a great many of the holders of it here have paid two and up as high as 2.60, the party who would be buying your

stock would, in all probability, hold it at 2.00 or better—in that event there could be no harm done the holders here, as they are all [566] pretty well satisfied it will yet make them some money. Mr. Gillies has ordered a compressor plant, and when it is installed, which will be in the course of a couple of months, together with the depth we will be then on the big vein, I think the stock should sell at 5.00, they are down on the big vein about 10 to 12 ft. from where they are sinking to where the find was made it is as straight as a gun shot through that swamp the vein where they are sinking is about as wide but has not metal in it of course it is perhaps twenty feet higher than where it was first found. Mr. Gillies is in Toronto, has been sick I believe. I am expecting him back every day; you did not say if you got the bag of ore samples which I sent you.

Yours truly,
N. B. Brown.

When brought face to face with this letter, he says he did not believe what he asserts therein.

I prefer to believe his letter to his frail memory.

And in that letter, read in light of the minutes of that January meeting, I can easily understand why a man, acting as the respondent did in relation thereto and holding such high hopes of the stock, should prefer looking to the company to recoup his advances by issues of stock at 25c. on the dollar, to charging up his advances dollar for dollar against appellant, whose possible means of repayment may have been dependent on same source.

Better an investment that might multiply ten or twenty times than one that could yield only five per centum per annum.

He has chosen to put his own interpretation upon the meaning of the conversation I have quoted by his own acts.

It seems to me the circumstance of the sending of an account by the plaintiff in the case of *Lakeman v. Mountstephen*, L.R. 7 H.L. 17, in 1874, had not by any means the same force as I think should be given here. I need not dwell on the attendant circumstances there. After all, that [566] case had been submitted to a jury, and, as Lord Cairns presents the matter, all that was really involved in that case was whether or not there was evidence which should be submitted to a jury, and the jury had found for the plaintiff. I think Mr. Justice Middleton was right in the conclusion he reached, and that his judgment should be restored.

In all these cases the question is really one of fact, and, these once correctly appreciated and comprehended, there is not much difficulty in the law.

There is not much doubt in my mind but that, resting not on the alleged conversation of December, 1906, but upon what transpired between these parties later, the appellant owed the respondent in respect of some of the later advances, but the case has not been so developed as to enable anyone to determine the exact truth and found a judgment thereon.

Mrs. Brown's evidence indicates and perhaps corroborates such a view. Beyond that her evidence cannot be stretched. The notes and cheques referred to by the parties needed some explanation by credible witnesses, who, no doubt, could have been got to render that part of the story intelligible and susceptible of judicial determination.

The memorandum of release signed by the parties suggests as much, but is far from furnishing proof of an indebtedness by appellant to the extent of \$7,000.

It is the combined indebtedness of the company and of appellant that is therein dealt with.

That document, so far from being corroborative of the respondent's story and claim, seems to me destructive thereof.

The appellant certainly admits by it owing something for himself, but both parties clearly admit the company owed something as well as the appellant. [567] And, whatever each owed respondent, he agreed both together should be discharged for the sum of \$7,000.

According to the contention now set up by respondent, the company owed him nothing. He had no contractual relations with them involved in the matters thus disposed of.

But it may be said his wages were intended. They were already obliterated.

I think the appeal should be allowed and the judgment of Mr. Justice Middleton restored.

ANGLIN, J.—It has been held by an official referee acting as trial judge in this action, by Mr. Justice Middleton on appeal, and again, on a further appeal, by the four judges who constituted the Appellate Division, that the defendant made a promise of some sort to repay the monies advanced by the plaintiff to the Coleman Development Company. That finding is sufficiently supported by evidence, and the appeal against it is hopeless.

The only difference of opinion in the provincial courts was that, while it was the view of the official referee and of the learned judges of the Appellate Division that Gillies' promise was absolute and that of a primary debtor, Mr. Justice Middleton held that

"The promise made by Gillies was, in truth, a promise to answer for the debt of the company. . . . I think the true finding of fact ought to be that the company became debtor,"

and he discharged Gillies under the fourth section of the Statute of Frauds.

Gillies absolutely denied any promise whatever. His denial was not accepted. The only version of the oral contract is that of Brown, who says that

"He (Gillies) told me that if I would advance this money and keep the thing alive, that he had moneys coming in and that he would return it to me."

[568] There is no direct evidence of any undertaking of liability by the company, although there is no doubt that the monies were advanced for its benefit. Upon this evidence I agree with the learned judges of the Appellate Division that a case of direct and primary liability on the part of Gillies is made out.

There were, no doubt, a number of circumstances, as Mr. Justice Middleton points out, which afford somewhat cogent evidence that there was some sort of understanding that Brown would be paid by the company—the facts that accounts were rendered by him to the company covering both wages (for which its liability is admitted) and the advances which he claims Gillies promised to repay, and that the present action was brought against the company as well as Gillies. On the other hand, the plaintiff's particulars clearly distinguish between the two claims, and, in a document evidencing a settlement of the amount of Brown's claim at \$7,000, Gillies authorized payment of that sum by one Cartwright, who held an option on Gillies' shares in the company.

Although the evidence in chief given by Brown was heard before another officer since deceased, Gillies' evidence and Brown's evidence in rebuttal were heard by the learned referee who gave the judgment, and who thus had an opportunity of observing the demeanour of both parties as witnesses. A careful study of the evidence in the light of the argument has not convinced me that the conclusion reached by the referee and unanimously affirmed on appeal by the Appellate Division, that the defendant became the primary and direct debtor of the plaintiff, is so clearly erroneous that it should be disturbed in this court. While I have little doubt that it was expected that in some way the monies advanced by Brown would be obtained from the company—and, had its affairs prospered, [569] that would in all probability have happened—I cannot find in the record any evidence which establishes that it ever incurred legal liability to him.

The appeal fails and should be dismissed with costs.

BRODEUR, J.—This action had been brought to recover payment of advances made by the

respondent, Brown, against the Coleman Development Company and the appellant, Gillies. His action was dismissed with regard to the company, but was maintained against the appellant.

The issue of fact was whether the defendant, Gillies, had agreed to reimburse those advances.

A long *enquête* has taken place, and it was found that the promise to pay, alleged by the plaintiff, was proved. The defendant now claims that his contract with the plaintiff was a contract of suretyship and not a direct obligation to pay.

I have perused the evidence in that regard, and I am unable to find that the facts disclosed shew that Gillies became the surety of the Coleman Development Company. He simply agreed to pay those advances.

It is true that Brown was in the employ of the mining company and that his salary was paid by the latter by way of issue of stock; but it is true equally that some advances previously made to the mining company by Brown were paid also in the same way. But, when large advances were to be made, it was agreed with the appellant, Gillies, that he would reimburse those advances. It was a personal and direct liability on his part, and he cannot now invoke the Statute of Frauds to prevent him from being liable under that contract.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

NOTE.

The reported case holds that a promise by an officer and stockholder of a corporation that if a third person will advance money to the corporation he will be responsible is not a promise to answer for the debt or default of another within the statute of frauds. The promise is held to be a direct and primary liability to which the promisor may bind himself by parol. The cases discussing the question whether an oral promise of a stockholder to pay a debt of the corporation is within the statute of frauds are reviewed in the notes to *Hurst Hardware Co. v. Goodman*, Ann. Cas. 1912B 218, and *Goldie-Klenert Distributing Co. v. Bothwell*, Ann. Cas. 1913D 849.

RALEIGH COUNTY BANK

v.

POTEET ET AL.

West Virginia Supreme Court of Appeals—
June 16, 1914.

74 W. Va. 511; 82 S. E. 332.

Bills and Notes — Stipulation for Attorney's Fees — Validity.

A stipulation in a negotiable promissory note for the payment of "five per cent collection fees" on the principal thereof, and in addition thereto "\$10 attorney fee in addition to the attorney's fee taxed or allowed by law," is forbidden by the policy of the law and void and unenforceable.

[See note at end of this case.]

Same.

Chapter 81 of the Acts of 1907, chapter 98 A (secs. 4172-4368) of the Code, known as the Negotiable Instruments Law, does not legalize contracts expressly condemned and declared void by the statutes of this state, nor those forbidden by the policy of its laws.

[See note at end of this case.]

Error to Circuit Court, Raleigh county.

Action by Raleigh County Bank, plaintiff, against J. H. Poteet et al., defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. **REVERSED.**

File & File and *H. E. Stansbury* for plaintiffs in error.

J. E. Summerfield for defendant in error.

[511] **POFFENBARGER, J.**—In this action on a note, a tender of the amount conceded [512] to be due was made after the institution of the action. Coming too late, it was wholly unavailing and futile, stopping neither interest nor costs, since we have no statute on the subject, modifying the common law. 28 Am. & Eng. Enc. of Law (2d ed.) 21, 38 Cyc. 147, 149, both citing numerous authorities.

Professing to be in debt, the writ claimed damages in the sum of \$2,500.00 and failed to specify the amount of the debt, wherefore, it varied from the declaration claiming \$2,200.00 as the principal of a note, \$110.00 as commission for collection thereof and \$10.00 as an attorney's fee in addition to the fee allowed by law. To cure this defect, the plaintiff amended the writ, with leave of the court and over an objection by the defendants. The amendment was properly allowed. Code, chap. 125, sec. 15; *Ryan v. Piney Coal, etc. Co.* 69 W. Va. 692, 73 S. E. 330; *Barnes v. Grafton*, 61 W. Va. 410, 56 S. E. 608.

The inclusion in the judgment of the stipulated commission of 5 per cent, \$110.00, is the basis of the principal complaint. Such notes have not been in common use in this state, and the validity of such a stipulation has never been passed upon by this court. An inference of a consensus of opinion among the members of the legal profession against it naturally arises from the absence of notes of that kind in the commercial paper of the state. Had it been regarded as legal and valid, no doubt they would have been abundant here as they are in other states in which such an addition is deemed valid; and our reports would afford many decisions affirming their validity and defining their operation, as do those of the states in which they have been sustained.

As to the validity of the stipulation, the authorities in the various jurisdictions are in conflict. The following decisions uphold it: *Shelton v. Aultman*, 82 Ala. 315, 8 So. 232; *Telford v. Garrela*, 132 Ill. 550, 24 N. E. 573; *Duluth Loan, etc. Co. v. Klov Dahl*, 55 Minn. 341, 58 N. W. 1119; *Peyser v. Cole*, 11 Ore. 30, 4 Pac. 520, 50 Am. Rep. 451; *Imler v. Imler*, 94 Pa. St. 372; *Parham v. Pulliam*, 5 Cold. (Tenn.) 407; *Krause v. Pope*, 78 Tex. 478, 14 S. W. 616; *McIntire v. Cagley*, 37 Ia. 676; *Siegel v. Drumm*, 21 La. Ann. 8; *McCornick v. Swem*, 36 Utah 6, 20 Ann. Cas. 1368; 102 Pac. 626; *North Atchison Bank v. Gay*, 114 Mo. 203, 21 S. W. 479; *Morgan v. Kiser*, 105 Ga. 104, 31 S. E. 45; *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24; *Cloud v. Rivord*, 6 Wash. 555; 34 Pac. 136; *Rinker v. Lauer*, 13 Idaho 163, 88 Pac. 1057.

In the following cases, it is denounced as a cover for usurious [513] interest and a means of exacting the same or as a mere unenforceable penalty. *Witherspoon v. Musselman*, 14 Bush (Ky.) 214, 29 Am. Rep. 404; *State v. Taylor*, 10 Ohio 378; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857; *Tinsley v. Hoskins*, 111 N. C. 340, 16 S. E. 325, 32 Am. St. Rep. 801; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Boozar v. Anderson*, 42 Ark. 167.

By this collation, which does not include all the cases, by any means, but enough to disclose the attitudes of the various courts of last resort, a decided preponderance in number favoring the validity of the stipulation appears. But, in some of the states, it is authorized by statute. How many need not be ascertained. It is in Iowa for one. Notwithstanding the admitted preponderance, the solution of the question is one of reason as well as of authority and we are under no duty to yield to the mere force of numbers. Besides, the policy of this state, as disclosed by its statutes relating to costs and interest, and the consensus of legal opinion as revealed

by a settled and long-continued course of conduct in business, must be considered.

Impartial writers of recognized ability, after having considered both classes of cases and the reasoning upon which they stand, have unhesitatingly given their approval to those decisions which condemn the stipulation and refuse to enforce it. Mr. Daniel, in his work on negotiable instruments, expresses himself thus: "Unless there be some statute under which such stipulations are permissive, it certainly tends to the oppression of debtors to sanction their incorporation in commercial instruments; and they are therefore against the policy of the law and void." Judge Caldwell, in *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662, quotes from 14 Am. L. Rev. 858, as follows: "It seems to us to be more consistent with public policy to consider all such agreements absolutely void. They can readily be used to cover usurious agreements, and excessive exactions may be made under the guise of an attorney fee." Judge Cooley of Michigan, a great author as well as an able judge, expressed himself thus in *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356: "A stipulation for such a penalty, we think, must be held void. It is opposed to the policy of our laws concerning attorney's fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression. It [514] would be idle to limit interest to a certain rate, if, under another name, forfeitures may be imposed to an amount without limit. The provision in those notes is as much void as it would have been had it called the sum imposed by its true name of forfeiture or penalty. There is no consideration that can support it."

This suggestion of lack of consideration prompts the inquiry as to what the borrower gets in exchange for his promise, and discloses the necessity of resort, on the part of courts in which the agreement is held valid, to the theory of indemnity. The agreement to pay costs and attorneys' fees is obviously not an agreement to pay for any service to be rendered to the promisor, the maker of the note, for such services are always rendered to and for the promisee, the payee of the note. It is a promise to pay for something done against the promisor and to his material injury. He derives no benefit from it. The detriment to the other party, occasioned by the default in payment is the only circumstance that could possibly constitute consideration for the promise. In that case, the injury is deprivation of the use of the money and the compensation for that is fixed and limited by the statutes, allowing only the legal rate of interest and the legal costs, including the attorney's fee prescribed by law. Our statutes limit the interest to six per cent, fix the costs in court and prescribe the amount to

be included as an attorney's fee. Nothing more can be obtained by force of the law. At the common law costs or expenses of recovering a debt were not allowed at all, and they were never allowed *eo nomine*. In actions for damages, some sort of compensation for trouble or expense was included in the verdict. 3 Bl. Com. 399; 4 Minor's Inst. 699; *Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. 520; *Roberts v. Paul*, 50 W. Va. 531, 40 S. E. 470; *West v. Ferguson*, 16 Gratt. (Va.) 270. Whether inability to obtain relief from this defect by contract may be inferred from the resort to the legislature for enabling statutes, it is unnecessary to inquire. It suffices to say the legislature passed laws dealing fully and comprehensively with the subject and presumptively made what was deemed an adequate provision, wherefore, under a well settled rule of construction, it is not in the power of the courts, by their judgments, or private persons, by their contracts, [515] to extend or broaden it. If it be conceded that there was common law on the subject, these statutes necessarily repealed it by implication. By them, the Parliament in England substituted a system of statutory law for the common law, as to costs, covering the whole subject and omitting any supposed right to recover them by virtue of a stipulation in the contract; and that statutory system, as revised and extended by our legislature, still omits it, and has actually provided against it.

"Whenever a statute undertakes to provide for a specific matter or thing already covered by a common-law rule, omissions in its provisions of certain portions of the rule may be taken as indicative of a legislative intent to repeal or abrogate the same. And this, though in all other respects the statute and common law are in exact conformity." In re Lord, etc. *Chemical Co.* 7 Del. Ch. 248, 44 Atl. 775. To the same general effect see *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Pearce v. Atwood*, 13 Mass. 324; *Com. v. Dennis*, 105 Mass. 162. On this principle, the Supreme Court of the United States held that wager of law, if it ever existed in this country as a mode of trial, had been abolished. *Childress v. Emory*, 8 Wheat. 642, 5 U. S. (L. ed.) 705. See also 8 Cyc. 376, citing numerous other cases. Having specified what may be recovered, whether the common law would have permitted more or not, by its prescription of rules, the legislature has impliedly negated any supposed right to obtain anything in addition thereto. The detriment to the payee or holder, resulting from default in payment, is compensated as fully as the legislature intended it to be, by the costs and fees prescribed by the statute, wherefore there can be no consideration for the promise, even in the sense of detriment.

Viewed as a contract of indemnity, the stipulation fails on the same principle. It is indemnity against what a debtor, unable or unwilling to pay, has a legal right to do, avail himself of the delay in payment, accorded him by law, subjecting himself to the incidental punishment inflicted in the form of costs and fees prescribed, and recoverable. This legal, though not moral, right in the debtor precludes the existence of any consideration for the contract as one of indemnity, and the agreement amounts to no more than one to bear the [516] burden imposed by law upon the person in whose favor it is made, an agreement to give something for nothing. For reasons of public policy, the legislature has, in effect, declared that the lender or creditor shall take the risk of expense of collection in excess of the allowance it has made by way of indemnity or reimbursement. It has not left the matter in the hands of the parties to be provided for by agreement. It has acted upon the subject itself and declared its will, for the same reason that impelled it to act upon the subject of interest, to the end there should be no open door to oppression and undue advantages, attended by constant temptation to money lenders, to violate the law against usury, and, on the part of collectors, to encourage litigation and inflict unnecessary costs and expenses amounting, in an economic sense, to waste and loss. It would encourage the employment of collectors and attorneys and be an inducement to the attorneys to seek claims for collection and institute actions unnecessarily. In this connection, the following observations of Woods, judge, in *State v. Taylor*, 10 Ohio 378, are apropos: "What may be supposed as the natural result to the community from the execution of this agreement? It would be the condition of future loans, at banks, that the borrower should pay the expense of collection, and perhaps, the tax thereon. The brokers in this state would hold a general jubilee; and as their sense of morality and law usually expands with their hopes of gain, in proportion to the borrower's necessity, they would find probably, additional items of costs, as a means of legalized extortion upon their loans." In *Witherspoon v. Musselman*, 14 Bush (Ky.) 214, 29 Am. Rep. 404, the court held as follows: "Agreement to pay a reasonable attorney's fee, in the body of a promissory note, if it is 'collected by suit,' is absolutely void—it is contrary to the policy of our laws—it is an agreement to pay a penalty, tends to the oppression of the debtor, and to encourage litigation."

The decisions upholding such contracts themselves disclose the abuses indicated. Some of them inquire only as to whether the stipulated amount is reasonable. This permits the holder of the paper to take as

profit on the transaction all he can save out of the amount recovered, and it amounts to additional interest. *Wood v. Winship Mach. Co.* 83 Ala. 424, 3 So. 757, 3 Am. St. Rep. 754; [517] *Toler v. Keiher*, 81 Ind. 383; *North Atchison Bank v. Gay*, 114 Mo. 203, 21 S. W. 479; *Stillwater First Nat. Bank v. Larsen*, 60 Wis. 206, 19 N. W. 67, 60 Am. Rep. 365; *Exchange Bank v. Tuttle*, 5 N. M. 427, 23 Pac. 241, 7 L.R.A. 445; *Morgan v. Kiser*, 105 Ga. 104, 31 S. E. 45; *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24. In others an effort is made to avoid this result by treating the contract as one of indemnity and allowing only the actual expense. *Eagle Lake First Nat. Bank v. Robinson*, 104 Tex. 166, 135 S. W. 372; *Dunovant v. Stafford*, 36 Tex. Civ. App. 33, 81 S. W. 101. These decisions disclose a futile effort on the part of the courts to prevent abuse of it. As the matter is all in the hands of the creditor and his attorney, neither the debtor nor the court can know what fees are actually paid.

It is hardly necessary to say the legislature has ample power to forbid such contracts, in view of the evils they carry or of which they are, to say the least, susceptible, for nobody is likely to dispute it. Hence, the inquiry is one of legislative intent only, and that seems perfectly clear, when the statutes are considered in the light of the rules of interpretation. Indeed, the non-recognition of such an oppressive and evil working contract reflects credit upon the common law itself. In those courts which recognize it, liberty of contract and increased efficiency of negotiable paper as an instrumentality of commerce are the principal grounds of justification. The statutes marking out inhibitive public policy are seldom mentioned and never fully analyzed. The inquiry goes only to the question of usury. No effort is made to escape the common-law inhibition of costs or the limitation of statutory costs—both of which are more directly applicable than the usury statute. If these statutes have the scope and effect here claimed, there is no such liberty of contract, and however beneficial these contracts may be in commerce, it is the province of the legislature, not the courts, to legalize them, and the courts have no power to do so, in the face of a clearly manifested public policy condemning them.

Through all the refinements in argument upon which validity of this sort of an agreement is predicated, the reader feels the weight of conviction that the real inducement to the stipulation is the loan of the money, not any wish or desire on the part of the borrower to relieve the lender of any burden. It is inseparably connected with the loan, and can have no separate or distinct existence. It is entered into to [518] obtain the loan and for no other purpose. That being the intent of

the borrower, concurred in by the lender, it is difficult to see how, in point of intent and purpose, there can be any other consideration. As legally there can be no other, the indemnity is a mere benefit to the lender in addition to the interest for which the law permits him to contract.

In opposition to the conclusion here indicated and the reasoning upon which it is predicated, certain early Virginia decisions are relied upon, one of which, *Campbell v. Shields*, 6 Leigh 517, holding a bond, given for a past due debt and including a sum equal to 5 per cent of the debt, to cover commissions which the creditor might be compelled to pay to an agent for collection, not to be usurious, apparently conflicts with it to some extent. In the opinion, Judge Carr declared it lawful to charge a reasonable commission for trouble and expense. The defense was usury and had for its purpose the defeat of the entire debt, under the statute forfeiting the whole debt for the offense of usury. As the statute was so highly penal, it was perfectly natural for the court to struggle against the establishment of the offense and to that end, give the statute a strict construction, under the rule requiring it in the case of a penal statute. No reference was made to the statute limiting costs, and much stress was laid upon the question of intent. Our statute against usury is not penal. Forfeiting only the interest in excess of the legal rate, it is purely remedial and falls under the rule of liberal construction. Had Judge Carr been deciding the case under it, his opinion might, and likely would, have pursued an entirely different course and led to an opposite conclusion. He founded his conclusion in part of *Stratton v. Mutual Assur. Co.* 6 Rand. 22, involving the collection of a penalty of 7½ per cent imposed upon a delinquent member of a fire insurance society, by one of its by-laws. Of course there was no semblance of usury in that, for there was no loan of money, nor any debt other than that incident to membership in the society, which included the percentage for delinquency. *Greenhow v. Buck*, 5 Munf. 263, was a case of the same kind. In *Pollard v. Baylor*, 6 Munf. 433, there was involved a commission on a contract for the sale of tobacco, which contract the court said, the debtor could make with the creditor as [519] well as others, and, besides, as in the case of *Campbell v. Shields*, the debt had been previously made and was free from the suspicion of usury when made, and the court said a debt, valid in its inception, could not be vitiated by a subsequent usurious transaction. In neither case, was the question at issue collection of the commission. In *Pollard v. Baylor*, the purpose of the plea was to invalidate a deed in an action of ejectment, and, in the other, to escape payment of the whole debt, and the commissions were only collaterally involved

by efforts to accomplish vastly larger purposes than relief from the commission contracts.

The Virginia court has not acknowledged these decisions as binding it in the disposition of the question here presented. In its later decisions, it has uniformly held stipulations for expenses of collection void as being inhibited by public policy. *Fields v. Fields*, 105 Va. 714, 54 S. E. 888; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498; *Ronald v. Princeton Bank*, 90 Va. 813, 20 S. E. 780. Moreover, the principle here declared was enunciated and applied in *Toole v. Stephen*, 4 Leigh 581. There a note given by a debtor to the attorney of a bank for part of his commission for reducing its claim to judgment was declared usurious. This commission differed from those involved in *Pollard v. Baylor* and *Campbell v. Shields* in this only, that it had been earned, while the others had not. It was not payable to the creditor, but to the attorney who had rendered the service. Nevertheless the court refused enforcement of the contract to pay it. This was, in substance and effect, a declaration of want of consideration. Had the commissions only been involved in the other two cases, they would probably have met a like fate. *R. S. Oglesby Co. v. New York Bank*, 114 Va. 663, 77 S. E. 468, decided by the Virginia court, involves no departure from the law as declared in *Rixey v. Pearre*, and other later cases. It upheld the stipulation under the laws of New York, holding the contract to be governed in respect of its performance by the laws of New York. The last point of the syllabus reads: "A contract valid at the place of performance, another state, will be enforced in Virginia, though a similar contract made and to be performed in Virginia would not be upheld."

In this state, as has been indicated, the law upon the subject has been regarded as settled beyond question or doubt. [520] Our decisions do not disclose a single case in which recovery has been sought on such an agreement. No effort has ever been made here to establish its validity. In all the states in which it has been upheld, the reports abound with decisions involving such contracts. In the reports of the courts of other states in which it is condemned, appear many instances of effort to legalize it, as in Michigan, North Carolina, Arkansas and Virginia. A thorough and general conviction on the part of members of the profession against its validity has restrained them from presenting the question, and foundation for this impression appears in the judicial declaration of invalidity of contracts, not usurious at all, but tending to usury, and because they have such tendency. A contract for compound interest is declared to be void and unenforceable because of such tendency, although it is admittedly not usurious in law or fact. In *Childers v. Deane*, 4 Rand.

(Va.) 408, Judge Carr said: But an agreement made at the time of the loan, that at the end of the year interest shall become principal, will not be allowed; not that it is usury and will render the contract illegal and void; but because the chancery considers it hard and oppressive and tending to usury." So this court has uniformly held. *Genin v. Ingersoll*, 11 W. Va. 549; *Hurst v. Hite*, 20 W. Va. 183; *Boggeas v. Goff*, 47 W. Va. 139, 34 S. E. 741. Here is an instance in which a contract not forbidden by any statute is held void because of its mere tendency to usury and liberty of contract, accorded by the common law, denied and restrained by the public policy of the state. On the same principle, the uniformly admitted usurious tendency of the stipulation for attorneys' fees, condemns it. although, in the absence of a defined public policy, it seems to fall within the power of individuals to make contracts.

The negotiable instruments law, ch. 81 Acts of 1907, ch. 98 A of the Code, has not altered this policy. Negotiability of paper is one thing, and the policy of the state as to usury and other oppressive practices quite another, and that statute deals with the former not the latter. It says not a word about usury. Its purpose was to establish uniformity in the quality, characteristics and incidents of negotiable paper and to extend the principle of negotiability, but it assumed [521] the validity of the paper contemplated. In other words, it assumed the paper to be such as the law permits the parties to make and allows the courts to enforce. No rule or principle of construction justifies the courts in saying its very general terms repeal positive statutes relating to subjects other than negotiability of valid paper. On the contrary, the rules of construction forbid it. *Reeves v. Ross*, 62 W. Va. 7, 57 S. E. 284; *Coal, etc. R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; 36 Cye. 1146; 26 Am. & Eng. Enc. of Law 640; *Lewis' Southerland*, Statutory Con. sec. 274, old Ed. 157.

The trial court erroneously included the commission in its judgment. It likewise erred in the refusal of credit for usurious interest paid to the bank amounting to \$39.66. As credit for this item was claimed in the pleadings no principle upon which it could be disallowed is perceived. Deduction of these two items from the amount of the judgment rendered leaves \$2270.22, as the amount for which it should have been rendered.

The judgment will be reversed and judgment entered here for said sum, as of the 4th day of September 1912, with interest thereon from that date until paid and costs in the court below. Costs in this court will be adjudged to the plaintiff in error.

Reversed and entered.

MILLER, P. (*dissenting*).—I am of opinion not to concur. Concededly the opinion is against the great weight of authority, including the leading case of *Campbell v. Shields*, 6 Leigh 517, a case directly in point, and other Virginia cases antedating the separation of the states, and as many times decided binding on us. The decision in *Campbell v. Shields*, was reached after the question involved had been a long time controverted in Virginia, and so far as I have found it was never thereafter questioned, until *Rixley v. Pearre*, 89 Va. 113, 15 S. E. 498, which makes no reference to the prior Virginia decisions, and refers only to the Michigan case of *Bullock v. Taylor*, 39 Mich. 137 33 Am. Rep. 356.

Mr. Daniel has apparently with great care, in the last edition of his work on Negotiable Instruments, volume 1, section 62 and 62a, collated in the notes to these sections all [522] the decisions of the different states covering the subject, and it is only necessary to refer thereto to learn how overwhelming the decisions of the various states are against the position taken in the opinion. As a general rule these opinions are uninfluenced by statute, and like the early Virginia cases are merely declaratory of the general law. Most of them sustain not only the validity of such stipulations, but likewise the negotiability of the instrument. Many uphold the validity of the stipulations, while denying the negotiability of the instrument. A few hold the stipulations penal and void; and one or two cases, including the Ohio case of *Shelton v. Gill*, 11 Ohio 417, hold them usurious and subject to the statutes against usury. In III Minor's Inst. part 1, page 311, this great expounder of the Virginia law, referring among others to the case of *Campbell v. Shields*, places contracts or stipulations for collection expenses along with brokerage contracts, and holds such contracts not usurious. He says it is not usury for a creditor who gives indulgence to his debtor to include the commission which he would have to pay an agent for collecting the debt for him.

The reason given in the opinion for going against the Virginia cases binding us, and against this great weight of authority, is that such stipulations tend to usury, oppression, and to the encouragement of litigation. I do not see how this is so in theory or in fact. If such was the fact it seems remarkable that so many of the great commercial states of the country continue to deny the usurious character of such stipulations, and to hold them collateral, and enforceable not necessarily to the full amount stipulated, but only for reasonable attorney's fees and collection expenses, not exceeding the sum stipulated. Such construction robs them not only of the taint of usury, but also of any danger from

oppression or the encouragement of litigation. *Campbell v. Shields*, and other Virginia cases, would so construe them. A creditor bound to collect his debt by law would not stop short of enforcing his rights by legal action, because of the expense he would incur in the litigation.

In reply to the suggestion that such contracts are usurious Mr. Daniel says: "Such stipulations do not, we think, render such instruments usurious. The additional amounts are in [523] consideration of additional trouble and expense inflicted on the holder, and not excessive interest for the loan or forbearance of money." True the more recent Virginia decisions, referred to in the opinion, tend to unsettle the law of that state, but those decisions are not binding on and should not disturb us. While *R. S. Oglesby Co. v. New York Bank*, 114 Va. 663, 77 S. E. 468, the most recent Virginia case, involved a New York contract, and for that reason may not be exactly in point, nevertheless it criticizes *Rixley v. Pearre*, and *Fields v. Fields*, 105 Va. 714, 54 S. E. 888, and approves the earlier Virginia cases, including *Campbell v. Shields*, and the inference to be drawn from the argument is a purpose to adhere to the principles of the earlier cases. Reference is made in the opinion to *Toole v. Stephen*, 4 Leigh 581, as being opposed to *Campbell v. Shields*, but it is not. Quite the contrary. The distinction noted between the two cases is important. In the *Toole-Stephen* Case the promise was absolute to pay judgments recovered by the creditor with costs and attorney's fees, as the opinion concedes, already incurred. The promise held usurious was unconditional. There was no way for the debtor to escape payment. This is the exact point of distinction, and the reason why in the one case the promise was held usurious, and in the other not so. *Pollard v. Baylor*, 6 Munf. 433, Anno. and the cases cited in the note make this distinction very plain. The first point of the syllabus in that case is: "A penalty, inserted in a contract, from which the party may deliver himself, does not make such contract usurious." And in the second point of the syllabus it is said: "The question whether a contract is usurious, or not, is to be decided with reference to the time when it was entered into; for a contract legal at such time, can not be made usurious by subsequent events." In *Ward v. Cornett*, 91 Va. 681, 22 S. E. 494, 49 L.R.A. 550, it was decided that, where a debtor by punctual payment of the debt may relieve himself and avoid the payment of the illegal interest stipulated for it is not usury.

I do not see how it can be said that we have any policy in this state against this character of contracts. Prior to the recent Virginia cases I do not think any lawyer would have

hesitated, on looking to the Virginia decisions, binding us, and to Mr. Minor's statement of the law on the subject, and [524] seeing the great weight of authority supporting these early Virginia cases, to advise his client that such contracts were enforceable in Virginia and in this state. One of the strong reasons noted by Mr. Daniel, given or implied in the many cases upholding the validity of such stipulations and the negotiability of the instrument containing them, is, that being an indemnity by the maker against the consequence of his own act or default, they are entirely consonant with public policy because they add to the value of the paper, and tend to lower the rate of interest and discount, and as these decisions say, how can contracts of this character be against public policy when the debtor may avoid their effect by prompt payment or payment before suit? To hold otherwise is to unduly hamper commerce and the freedom of contracts. In this day and age the business of the usurer has become unprofitable. Money, as a general rule, is plentiful and seeking investment at legal rates, and below legal rate in many instances, and the chances for hard bargains are few. A borrower does not have to submit to hard bargains these days. But why should it be thought a hardship or oppressive for him who has laid by a few dollars for old age, and on the income of which he depends for his existence, to bargain with the borrower that if he fails to pay the debt and interest, as agreed, he and not the lender shall bear the burden and expense of collection? All loans are not of this character, it is true. But even the banks are engaged in loaning the money of the people entrusted to them and who depend on their earnings for daily support, and the principle is the same.

The hundred years and more of judicial history in this country, and where these contracts have been upheld, has failed to develop the evils portended in the opinion. The uniform negotiable instruments law adopted in this state and in most of the other states recognizes the validity of such contracts, and specifically provides that they shall not render instruments uncertain or destroy their negotiability. It seems to me these laws are entitled to some consideration in this connection. The reason noted in some of the decisions why instruments bearing such stipulations are not rendered uncertain and non-negotiable is that they in no way affect the sum certain to be paid at maturity, the obligation of the contract [525] maturing subsequently to the date of maturity of the instrument.

The opinion I think finds no support in *Genin v. Ingersoll*, 11 W. Va. 549, *Hurst v. Hite*, 20 W. Va. 183, and *Boggess v. Goff*,

47 W. Va. 139, 34 S. E. 741. Those cases as I interpret them do no more than declare the rules applicable to partial payments with respect to the question of compounding interest. The Boggess-Goff Case would justify a new contract to pay interest on interest after interest has become due without such new contract being affected by usury.

But it is unnecessary in a dissenting opinion already too extended to further elaborate the questions discussed. I would affirm the judgment, and Judge Williams, I am authorized to say, concurs with me in this dissent.

NOTE.

Validity of Stipulation for Attorney's Fee in Promissory Note.

Introductory, 365.

What Law Governs, 365.

View that Stipulation Is Valid:

Generally, 366.

Reason for View, 368.

Qualification of View, 369.

View that Stipulation Is Invalid, 371.

Effect of Negotiable Instruments Law, 372.

Introductory.

This note discusses the validity of a stipulation in a promissory note to pay attorney's fees or costs of collection. It does not include the validity of a like stipulation in a mortgage or other contract, or the construction and effect of such a stipulation in a note. The effect on the negotiability of a note of a provision therein for attorney's fees is considered in the notes to Green v. Spires, 4 Ann. Cas. 261, and Mackintosh v. Gibbs, Ann. Cas. 1912D 163. The construction of such a stipulation as to the amount which may be recovered is discussed in the note to McCornick v. Swem, 20 Ann. Cas. 1468. As to the effect of the stipulation as binding indorsers, see the note to Franklin v. The Duncan, Ann. Cas. 1917C 1080.

What Law Governs.

Since the jurisdictions which hold that a stipulation in a promissory note to pay attorney's fees is invalid, rest the doctrine on grounds of public policy (see *infra* the subdivision *View that Stipulation Is Invalid*) the weight of authority is to the effect that in an action brought in a jurisdiction where that doctrine obtains on a note containing such a stipulation the stipulation will not be enforced though the note was made or is by its terms payable in a jurisdiction wherein agreements of that kind are held to be valid. Arden Lumber Co. v. Henderson Iron Works,

etc. Co. 83 Ark. 240, 103 S. W. 185; White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 S. W. 208; Clark v. Tanner, 100 Ky. 275, 38 S. W. 11; Carsey v. Swan, 150 Ky. 473, 150 S. W. 534; Hallam v. Telleren, 55 Neb. 255, 75 N. W. 560; Exchange Bank v. Apalachian Land Co. 128 N. C. 193, 38 S. E. 813; Commercial Nat. Bank v. Davidson, 18 Ore. 57, 22 Pac. 517. Compare Martin v. Berry, 1 Indian Ter. 309, 37 S. W. 835; Brownsville First Nat. Bank v. Fleitmann, 168 App. Div. 75, 153 N. Y. S. 869; R. S. Oglesby Co. v. New York Bank, 114 Va. 663, 77 S. E. 468 (enforcing note payable in New York at a time when stipulations for attorney's fees were held in Virginia to be invalid).

In Arden Lumber Co. v. Henderson Iron Works, etc. Co. *supra*, the court said: "Although the stipulation for attorney's fees is good and enforceable in Louisiana where the notes in suit were executed and are made payable, yet in our state such stipulations will not be enforced. They are held to be agreements for a penalty. Boozer v. Anderson, 42 Ark. 167. We will not enforce such contracts. Penal statutes are not extraterritorial; and while the rule of comity will impel us to enforce contracts in another state as to the principal and lawful interest on such contracts, it does not require us to enforce stipulations that would be for a penalty under our law, and we will not enforce contracts that are contrary to the policy of our own laws. Crebbin v. Deloney, 70 Ark. 493. Appellant, having sought to enforce its contract for attorney's fees in this forum, where such contracts are in the nature of a penalty and cannot be enforced, must be governed by the law of the forum where it seeks the remedy."

In Clark v. Tanner, 100 Ky. 275, 38 S. W. 11, it was said: "It is sometimes difficult to determine whether a particular case is within the general doctrine or fairly an exception to it; but it is a safe position that comity should not nor does it require a contract made in one state, to be enforced by the courts of another state that treat a similar one as absolutely void because it is an agreement to pay a penalty, tends to oppress the debtor and encourage litigation."

In Commercial Nat. Bank v. Davidson, 18 Ore. 57, 22 Pac. 517, the court said: "Counsel for the respondent insists that the stipulation to pay the additional sum contained in the note in suit was valid and binding in the territory where the note was executed, and that therefore it should be upheld in this state. As a general rule, the law of the place where contracts merely personal are made, governs as to their nature, obligation and construction. But I do not think that rule applies to an agreement, the obligation of which does not arise until a remedy is sought

upon the contract, to which it is only auxiliary. In regard to such agreements, the law of the place where they are attempted to be enforced, I should suppose, would prevail. This agreement was to pay the additional percentage as costs for collection of the note, and if the courts where the note was executed would have enforced the agreement, it does not follow that the courts of another jurisdiction are bound to do so. The effect of the agreement was to provide for an increase of costs, which must necessarily depend upon the law of the forum. A stipulation in a note made in Utah territory, providing that in an action on the note the plaintiff, in case of a recovery, should be entitled to double costs, might be considered valid under the laws of that territory, and enforceable in its courts; but that certainly would not render it incumbent upon the courts of this state, in an action upon such note, to award double costs."

In *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. 560, it was said: "The petition alleges and the proof shows that the notes were made and payable in Iowa, and that by the law of that state such a provision as that in the notes for the taxation of attorneys' fees is valid and enforceable. But such a provision is a stipulation for costs and refers to the remedy. It is not a substantive part of the contract itself and cannot be enforced in another jurisdiction."

In *Martin v. Berry*, 1 Indian Ter. 399, 37 S. W. 835, the contrary view was stated as follows: "The allowance of attorney's fees raises the question of the validity of the stipulation therefor contained in the note sued on. The note is dated at Dallas Tex.; it is, by its terms, payable there. We think these two circumstances are sufficient, in the absence of proof, to make the law of Texas controlling in the solution of all questions as to the validity and effect of the note. . . . The stipulation for attorney's fees being valid by the laws of Texas, it follows that the court did not err in giving judgment for the same. The question whether such stipulation is valid in contracts made and to be performed in the Indian Territory, under the laws in force therein, is not decided."

So in *Brownsville First Nat. Bank v. Fleitmann*, 168 App. Div. 75, 153 N. Y. S. 869, it was said: "The facts thus pleaded show that the promissory note upon which a recovery is sought is a Texas contract, and the validity of the provision for the collection fee must be determined by the laws of that state. The defendant does not raise an issue as to the validity of such a provision under the laws of Texas; on the contrary, such validity is admitted, at least impliedly, by defendant's failure to deny the allegation of paragraph 4 of the amended complaint, which

sets forth the validity of such a provision under the laws of that state. All he asserts is that such a provision is unenforceable in the state of New York, since it is opposed to the public policy of the state. If the provision is valid in the state of Texas, it is valid here, and will be enforced."

As to whether the federal courts are bound by the holding of the state wherein the court is held as to the validity of a stipulation in a promissory note for attorney's fees the decisions are in conflict. It has been held that the doctrine of the state court will be followed. In *re Keelon*, 126 Fed. 426; *Chestertown Bank v. Walker*, 163 Fed. 510, 90 C. C. A. 140. On the other hand, in *Mechanics'-American Nat. Bank v. Coleman*, 204 Fed. 24, 122 C. C. A. 338, the court said: "The position of counsel for appellant is that a clause in a note stipulating for an attorney's fee, provided the note is placed in the hands of an attorney for collection, is valid, enforceable, and conclusive as to amount; that such is the law of the state of Missouri, in which this contract was made, and therefore binding upon this court. The proposition, as stated, cannot be accepted in its entirety. The question here presented is one which falls within the domain of general or commercial law. It involves simply the construction and effect of recitals in negotiable instruments, and no question of right under the constitution and statutes of a state. In such matters the decisions of the state court are not controlling in the federal tribunals."

View that Stipulation Is Valid.

GENERALLY.

The rule obtaining in the majority of jurisdictions is that a stipulation in a promissory note for the payment of attorney's fees or other costs of collection is valid. Such a stipulation is in those jurisdictions regarded as a reasonable provision for indemnity to the creditor against the expenses incident to a default on the part of the debtor.

United States.—*Wilson Sewing Mach. Co. v. Moreno*, 6 Sawy. 35, 7 Fed. 806; *Bank of British North America v. Ellis*, 6 Sawy. 102, 9 Rep. 204, 8 Am. L. Rec. 460, 2 Fed. Cas. No. 859; In *re Keeton*, 126 Fed. 426 (following Texas rule); *Chestertown Bank v. Walker*, 163 Fed. 510, 90 C. C. A. 140 (following Maryland Rule). *Compare Merchants' Nat. Bank v. Sevier*, 14 Fed. 662; *Mechanics'-American Nat. Bank v. Coleman*, 204 Fed. 24, 122 C. C. A. 338.

Alabama.—*Johnson v. Durner*, 88 Ala. 580, 7 So. 245; *Stephenson v. Allison*, 123 Ala. 439, 26 So. 290.

California.—*Mason v. Luce*, 116 Cal. 232, 48 Pac. 72.

Colorado.—Florence Oil, etc. Co. v. Hia-watha Gas, etc. Co. 55 Colo. 378, 135 Pac. 454; Byers v. Bellan-Price Inv. Co. 10 Colo. App. 74, 50 Pac. 368.

Dakota.—Farmers' Nat. Bank v. Rasmus-sen, 1 Dak. 57, 46 N. W. 574. And see Hovey v. Edmison, 3 Dak. 449, 22 N. W. 594.

Georgia.—See *infra*, this subdivision, *Quali-fication of View*.

Idaho.—Rinker v. Lauer, 13 Idaho 163, 88 Pac. 1057; Tipton v. Ellsworth, 18 Idaho 207, 109 Pac. 134.

Illinois.—Barton v. Farmers' etc. Nat. Bank, 122 Ill. 352, 13 N. E. 503; Weigley v. Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335; Keenan v. Blue, 240 Ill. 177, 88 N. E. 553.

Indiana.—See *infra*, this subdivision, *Qualification of Rule*.

Iowa.—McGill v. Griffin, 32 Ia. 445; Ft. Dodge First Nat. Bank v. Breese, 39 Ia. 640.

Maryland.—Maryland Fertilizing, etc. Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750; Bowie v. Hall, 69 Md. 433, 16 Atl. 64, 9 Am. St. Rep. 433, 1 L.R.A. 546; Gaither v. Tolson, 84 Md. 638, 36 Atl. 449.

Minnesota.—Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. 252; Harris Mfg. Co. v. Anfinson, 31 Minn. 182, 17 N. W. 274.

Mississippi.—Meacham v. Pinson, 60 Miss. 217; Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615; Brahan v. Clarkeville First Nat. Bank, 72 Miss. 266, 16 So. 203; Dug-gan v. Champlin, 75 Miss. 441, 23 So. 179; Duncan Bank v. Brittain, 92 Miss. 545, 46 So. 163.

Missouri.—Creasy v. Gray, 88 Mo. App. 454; German-American Bank v. Martin, 129 Mo. App. 484, 107 S. W. 1108; Neelyville Bank v. Lee, 182 Mo. App. 185, 168 S. W. 796.

Montana.—Bank of Commerce v. Fuqua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L.R.A. 588; Morrison v. Ornbaum, 30 Mont. 111, 75 Pac. 953.

New Mexico.—Exchange Bank v. Tuttle, 5 N. M. 427, 23 Pac. 241, 7 L.R.A. 445; Howey v. Gesaler, 16 N. M. 319, 117 Pac. 734.

New York.—R. S. Oglesby Co. v. New York Bank, 114 Va. 663, 77 S. E. 468 (applying New York rule). And see International Mo-tor Co. v. Palmer, 92 Misc. 214, 155 N. Y. S. 357 (stipulation not usurious). Compare Brownsville First Nat. Bank v. Fleitmann, 168 App. Div. 75, 153 N. Y. S. 869 from which case it would appear that the question is still an open one.

Oklahoma.—Baker Gin Co. v. N. S. Sher-man Mach. etc. Works, 31 Okla. 484, 122 Pac. 235; Continental Gin Co. v. Sullivan, 150 Pac. 209; Stigler First Nat. Bank v. Howard, 158 Pac. 927.

Oregon.—See *infra*, this subdivision, *Quali-fication of View*.

Pennsylvania.—Johnson v. Marsh, 21 W. N. C. 570; Imler v. Imler, 94 Pa. St. 372.

South Carolina.—Aultman, etc. Co. v. Gib-ert, 28 S. C. 303, 5 S. E. 806.

Tennessee.—Parkam v. Pulliam, 5 Cold. 497.

Texas.—Roberts v. Palmore, 41 Tex. 617; Miner v. Paris Exch. Bank, 53 Tex. 559; Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S. W. 975; Laning v. Iron City Nat. Bank, 89 Tex. 601, 35 S. W. 1048; Ealge Lake First Nat. Bank v. Robinson, 104 Tex. 166, 135 S. W. 372; Sturgis Nat. Bank v. Smith, 9 Tex. Civ. App. 540, 30 S. W. 678; Brown v. Gatewood, 150 S. W. 950; Rushing v. Citizens' Nat. Bank, 162 S. W. 460; Childs v. Yuenger, 162 S. W. 474.

Utah.—McCornick v. Swem, 36 Utah 6, 20 Ann. Cas. 1368, 102 Pac. 626.

Virginia.—Colley v. Summers Parrott Hardware Co. reported in full post, this volume, at page 375. Compare the earlier Virginia cases reviewed at length therein.

Washington.—Cloud v. Rivord, 6 Wash. 555, 34 Pac. 136.

Wisconsin.—Stillwater First Nat. Bank v. Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365; Vipond v. Townsend, 88 Wis. 285, 60 N. W. 430; Pirie v. Stern, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103.

In addition to the foregoing cases the view that a stipulation in a note for attorney's fees is valid also finds support in the cases construing such a stipulation. See the note to McCornick v. Swem, 20 Ann. Cas. 1368. The cases (collated in the notes to Green v. Spires, 4 Ann. Cas. 261, and Mack-intosh v. Gibbs, Ann. Cas. 1912D 163) which hold that such a stipulation destroys the negotiability of the note are also au-thority for its validity. "In Jones v. Rad-atz, 27 Minn. 240, it was decided that a stipulation in a promissory note otherwise negotiable for reasonable attorney's fees in-troduced an element of uncertainty into the contract, which made it non-negotiable. This would not have been the result if the stipula-tion had been void." Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. 252.

In Billingsley v. Dean, 11 Ind. 331, it was said: "It was optional with Billingsley whether he should become liable to pay the expenses of collecting the debt. That lia-bility could only result from his own default. And evidently, when a party agrees to indem-nify another against the consequences of his own act, he cannot complain if his contract is enforced against him. The agreement in the case is reasonable, and there is certainly no good reason why an agreement on the part of the debtor to pay an expense resulting

necessarily from his own act should not be held valid in law."

REASON FOR VIEW.

The courts which sustain a provision in a promissory note for an attorney's fee regard the provision as one for indemnity and not as a penalty for non-payment. Thus in *Farmers' Nat. Bank v. Rasmussen*, 1 Dak. 57, 46 N. W. 574, it was held that a provision in a note for an attorney's fee of ten dollars in case of suit thereon did not fall within a statute providing that "penalties imposed by contract for any non-performance thereof are void." The court said: "This contract plainly does not come within this section, for the stipulation in this note to pay ten dollars attorney's fees if action is commenced thereon, at most, can be construed to be only an agreement for liquidated damages upon default and in event of suit commenced."

As against the contention that a provision in a note for the payment of attorney's fees is unreasonable and oppressive it was said in *Bowie v. Hall*, 69 Md. 433, 16 Atl. 64, 9 Am. St. Rep. 433, 1 L.R.A. 546: "In the case before us the interest on the sum lent, up to the maturity of the note, is less than half the most reasonable commissions the lender will have to pay an attorney for collecting it by suit or otherwise. So that by default of the borrower he would lose all the interest and part of the principal. What possible objection can there be in allowing the parties to contract against a result like that? In our judgment such contract violates no principle of law or public policy. It seems to us simply a stipulation intended to secure punctuality in the performance of the contract, and as such contains no element of oppression to the borrower. Its tendency, in fact, is to help him to borrow at a less rate of interest, as punctuality in payment is usually taken into consideration in fixing the terms of a loan. Nor can it be regarded as a cover to usury, for its effect is clearly not to put any money above the legal rate of interest, into the pocket of the lender, but merely to enable him to get back his money with legal interest and nothing more."

In *McGill v. Griffin*, 32 Ia. 445, the court said: "A debtor, by refusing or neglecting to pay his creditor, imposes upon him the expense of resorting to the law to enforce his rights. It is equitable and just that the debtor, in such a case, should pay the expense which he has imposed upon his creditor. While the law makes no provision for enforcing such a conscientious obligation, it will certainly be esteemed a sufficient consideration upon which to base a contract whereby the party binds himself to do that which in conscience he ought to do, or to reimburse

his creditor for expenses which his own wrong has made necessary to be incurred."

In *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L.R.A. 588, it was said: "It is not against public policy nor against the spirit of the law in these times that attorneys should receive just and reasonable compensation for services. Nor is it in principle unlawful for one to contract with another to reimburse the latter for a lawful expenditure caused by the default or wrong committed by the promisor. If the main obligation is valid, and the obligor can pay it, without question he should do so at maturity; and it would seem merely stubborn denial of another's right to compel the obligee to go into court to enforce payment, and suffer the delay, inconvenience, and expense of such proceeding. Now, the parties have provided for this condition of things in part by a stipulation in the instrument that in such event, if the obligee is driven into court by the default of the obligor, the latter shall pay a reasonable attorney's fee for the prosecution of the action. This has been held void as against public policy, because it is oppressive to the debtor. We cannot see on what principle it should be so held. In such a case, as just stated, the oppression is the other way—it proceeds from the party who has borrowed the other's money or got his goods, and refuses to pay for the same when he is able so to do. But it may be said that, in the event the debtor's circumstances are such that he cannot repay the debt when due, it would be oppressive to have judgment recorded against him for the amount and attorney's fees. In such a case a judgment against one, which cannot be enforced, will be poor satisfaction for what the obligor received in consideration for the note; and in such case he may offer to confess judgment without action, at the maturity of the note, and then it is not at all likely judgment would be given for attorneys' fees, if that was shown. . . . But will the stipulation encourage litigation? Viewed from one side it will not. The debtor will not do anything to encourage the bringing of an action against himself, which involves his payment of a greater sum than would be called for without action. He will discourage that result, and to do so he will see that his obligation is satisfied or extended. Is there any real motive for the creditor to unduly hasten into court with his note or bill of exchange, simply because his debtor would be required to pay the attorney's fees—a matter from which the creditor could personally gain nothing? Would he decline to grant reasonable extension to a solvent debtor, who was at the time unprepared to meet his obligation, and hurry into court for the sole purpose of

wrenching from the debtor an attorney's fee? We do not believe that experience shows that these results follow. The bill before us found its way into court several months after its maturity, and the complaint avers that the payees had often been requested to pay the same, and this is not denied."

With respect to the consideration for a stipulation for attorney's fees, in *Weigley v. Matson*, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335, it was said: "A stipulation, by which a debtor agrees to pay the fees of his creditor's attorney in case the latter is compelled to resort to legal proceedings to collect his debt, is an agreement which is not only eminently just, but which rests upon a good and valuable consideration. It is not in the nature of a gratuity, but is a contract, by which the debtor, in part consideration of the credit given him, agrees to indemnify his creditor against the consequences of his neglect or refusal to pay, whereby the creditor may be subjected to the necessity of employing and paying an attorney." See also *Barton v. Farmers, etc. Nat. Bank*, 122 Ill. 352, 13 N. E. 503; *McGill v. Griffin*, 32 Ia. 445.

Answering the contention that a provision in a note for attorney's fees constitutes usury, it was said in *Wilson Sewing Mach. Co. v. Moreno*, 6 Sawy. 35, 7 Fed. 806: "The ruling that such stipulation makes the note usurious is founded upon the unauthorized assumption of fact, that the sum agreed to be paid as an attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction it should be treated accordingly. But the fact cannot be assumed any more than that a like sum of the alleged principal is illegal interest in disguise."

In *Parham v. Pulliam*, 5 Cold. (Tenn.) 497, it was said: "Nor is usurious of itself, the stipulation to pay the attorney collecting, commissions, in case the debtor fail to pay the debt within the prescribed time, and be sued. Of itself, observe, such stipulation is not usurious so as to avoid the instrument upon which it appears. It may, perhaps, by proof be shown to be usurious. A device of any kind, the purpose of which is to enable the creditor to obtain for the use of the money, or forbearance of the debt, more than the lawful rate of interest, is usurious. And if such stipulation were shown by proof to have been designed to enable the creditor to obtain more than lawful interest, it would be usurious. Observe, the stipulation does not, of itself, import usury. Usury is the taking more interest for the use of money, or forbearance of a debt, than the law allows. An usurious contract, is one which stipulates for the payment of more than lawful interest, Ann. Cas. 1917D—24.

for the use of money, or forbearance of a debt: 3 Pars. Contracts, Title, Usury. Upon this instrument, nothing appears indicating or declaring that the creditor is to be paid, or receive more than the lawful rate of interest prescribed by the law of Mississippi. The contract of the debtor to pay the attorney's commissions, in case of suit upon default of payment of the debt, for the prescribed time, adds nothing to the amount of interest to be paid to the creditor. If the debtor pays the ten per cent interest stipulated, and also pays the attorney's commissions, the creditor has received no more than the ten per cent interest. If he do not pay the attorney's commissions, the creditor receives, to that extent, less than the ten per cent interest."

In *Smith v. Silvers*, 32 Ind. 321, the court said: "It is questioned here whether the stipulation for attorneys' fees was valid. It is argued that it was an indirect method of taking usury. We do not so regard it. A stipulation whereby the debtor agrees to be liable for reasonable attorneys' fees, in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it."

In *Tipton v. Ellsworth*, 18 Idaho 207, 109 Pac. 134, it was said: "This court has held that since an attorney's fee is allowed for the payment of the attorney, that provision, whether contained in one or more notes, is not usurious. If the provision for an attorney's fee is used as a device to conceal actual usury and evidence to that effect were properly submitted, the note would, of course, be held usurious. As the record appears, the court is urged to presume that because a lender takes several notes to evidence one indebtedness, each providing for an attorney's fee, that that fact alone constitutes usury, although this presumption is repudiated on the face of the notes by the fact that the loan is for less than the legal rate. We cannot concur in that contention. In *Broadbent v. Brumback*, 2 Idaho 366, 16 Pac. 555, this court said: "The appellants claim, also, that the attorney fee is but usury in disguise, and ought not to be allowed. In *Lloyd v. Scott*, 4 Pet. 205, 7 U. S. (L. ed.) 833, Justice McLean says: 'When a party agrees to pay a specified sum, exceeding lawful interest, provided he do not pay the principal by a day certain, it is not usury.' *Rinker v. Lauer*, 13 Idaho 163, 88 Pac. 1057; *Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540; *Jones v. Stoddart*, 8 Idaho 210, 67 Pac. 650."

QUALIFICATION OF VIEW.

A stipulation in a note for the payment of attorney's fees will be enforced only to the

extent of affording to the payee indemnity for the sum which he has actually expended or become liable for on account of the default of the maker. Though the stipulation fixes the amount of the fees it will be enforced only to the extent to which the provision is reasonable. See the note to *McCornick v. Swem*, 20 Ann. Cas. 1368.

In *Oregon* it is held that a provision in a note for the payment of reasonable attorney's fees is valid but that a provision for a fixed sum is invalid, and that in an action on a note containing a stipulation of that kind no attorney's fee will be allowed. *Peyser v. Cole*, 11 Ore. 39, 4 Pac. 520, 50 Am. Rep. 451; *Balfour v. Davis*, 14 Ore. 47, 12 Pac. 89; *Kimball v. Moir*, 15 Ore. 427, 15 Pac. 669; *Commercial Nat. Bank v. Davidson*, 18 Ore. 57, 22 Pac. 517; *Levens v. Briggs*, 21 Ore. 333, 28 Pac. 15, 14 L.R.A. 188; *Cox v. Alexander*, 30 Ore. 438, 46 Pac. 794. In *Kimball v. Moir*, *supra*, it was said: "We further held, in effect, in *Balfour v. Davis*, *supra*, that when the parties had fixed the amount of attorney's fees in a note which was unconscionable and unreasonable, we would not undertake to partially enforce the contract, by fixing such sum as we might deem reasonable. If a party wishes to indemnify himself for attorney's fees in case of suit upon a promissory note, he may do so by providing therein for a reasonable attorney's fee. It is not practicable, nor is it consistent with sound public policy, to allow parties at the inception of a transaction of this nature to determine the amount of attorney's fees to be paid in case of default. It is impossible for them to know at that time the extent or value of the services to be rendered. In such a case they will always be placed at the highest possible limit, and the defendant may show their unreasonableness, if he can. Some of the authorities hold that the insertion in a note of a fixed percentage as attorney's fees, in case of suit, is to be regarded as a penalty, from which the court in giving judgment may vary according to the circumstances of the particular case. But such is not the nature of the transaction, nor was it the intention of the parties. It is a liquidated sum, to be paid, at all events, if suit is brought. I think if such a contract is good for any purpose, it must be enforced as the parties made it; and therefore, for the reasons stated in *Balfour v. Davis*, *supra*, we refused to modify and then enforce it as modified. But on the other hand, if a contract provides for a reasonable attorney's fee, the court, when called upon to enforce it, as soon as the extent of the services rendered by the attorney is ascertained, has knowledge of their value, and can always make the proper allowance without the possibility of unfairness or abuse." So in *Commercial Nat. Bank v. Davidson*, 18

Ore. 57, 22 Pac. 517, the court said: "It may be claimed, with apparent reason, that where the parties fix a just and fair amount for collecting the note, that the court should allow it. But it is not consistent with public policy to permit parties to agree upon such amount. They do not stand upon an equality of footing. The creditor, in a majority of cases, would be too apt to take advantage of the necessities of the debtor. The latter, especially when he desires to procure the loan of money, is not always competent to contract regarding the additional amount to be paid, in case he makes default in the payment of the principal sum. He generally wants the money very badly, and is willing to subscribe to almost any condition in order to get it; but, if it is left to the court to adjudge the additional amount which he is required to pay, an oppressive exaction, in a majority of the cases, will be avoided. It is my opinion that a clause in a promissory note, in the form of the stipulation in question, is not valid, and should not be enforced. The payee may properly require an agreement from the maker of the note that he will, in case an action or suit is instituted to collect it, pay such additional sum as the court may adjudge reasonable as attorney's fees in such action or suit. Agreements of that character are sanctioned by the courts of this state, upon the ground that the holder of the note has necessarily incurred the expense of attorney's fees in collecting it, occasioned by the dereliction of the maker, and, the matter being under the observance and control of the court, the holder may be reimbursed therefor without doing any injustice to the maker. But the courts have not sanctioned the doctrine that the payee may exact from the maker an obligation to pay a positive and certain additional sum, in case of default in the payment of the note, without ascertaining what amount of expense the payee will actually incur in the affair."

In *Georgia* the statute now in effect provides that attorney's fees cannot be recovered in an action on a note providing therefor, unless a specified notice of intention to sue on the note is given and the debtor fails to pay before the return day. *Stocking v. Moury*, 128 Ga. 414, 57 S. E. 704; *Mt. Vernon Bank v. Gibbs*, 1 Ga. App. 662, 58 S. E. 260. An earlier statute made attorney's fees recoverable only in case the debtor filed a plea which was not sustained. *Demere v. Germania Bank*, 116 Ga. 317, 42 S. E. 488. Prior to the statutes a provision in a note for the payment of an attorney's fee was held to be valid. *Merck v. American Freehold Land Mortg. Co.* 79 Ga. 213, 7 S. E. 265; *Ray v. Pease*, 97 Ga. 618, 25 S. E. 360.

In *Indiana* a conditional stipulation is now void by statute but an unconditional stipulation is valid. *Churchman v. Martin*,

54 Ind. 380; *Brown v. Barber*, 59 Ind. 533; *Sinker v. Fletcher*, 61 Ind. 276; *Smock v. Ripley*, 62 Ind. 81; *Garver v. Pontious*, 66 Ind. 191; *Tuley v. McClung*, 67 Ind. 10; *Harvey v. Baldwin*, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222; *Starnes v. Schofield*, 5 Ind. App. 4, 31 N. E. 480; *Moore v. Staser*, 6 Ind. App. 364, 32 N. E. 503, 33 N. E. 665; *Shoup v. Snepp*, 22 Ind. App. 30, 53 N. E. 189; *Boyd v. Smith (Ind.)* 39 N. E. 208. Prior to the act stipulations both conditional and unconditional were sustained. *Billingsley v. Dean*, 11 Ind. 331; *Smith v. Silvers*, 32 Ind. 321; *Martinsville First Nat. Bank v. Canatsey*, 34 Ind. 140; *Johnson v. Crossland*, 34 Ind. 334; *Mathews v. Norman*, 42 Ind. 176; *Stingley v. Lafayette Second Nat. Bank*, 42 Ind. 580; *Smiley v. Meir*, 47 Ind. 559.

View that Stipulation Is Invalid.

In a number of jurisdictions it is held that a stipulation in a promissory note for the payment of an attorney's fee is void.

Arkansas.—*Boozer v. Anderson*, 42 Ark. 167; *Arden Lumber Co. v. Henderson Iron Works, etc. Co.* 83 Ark. 240, 103 S. W. 185; *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S. W. 208; *Bank of Holly Grove v. Sudbury*, reported in full, post, this volume, at page 373.

Kentucky.—*Witherspoon v. Musselman*, 14 Bush 214, 29 Am. Rep. 404; *Clark v. Tanner*, 100 Ky. 275, 38 S. W. 11; *Carsey v. Swan*, 150 Ky. 473, 160 S. W. 534.

Michigan.—*Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Wright v. Traver*, 73 Mich. 493, 41 N. W. 517, 3 L.R.A. 50

Nebraska.—*Dow v. Updike*, 11 Neb. 95, 7 N. W. 857; *In re Breckinridge*, 31 Neb. 489, 48 N. W. 142; *Hartford Security Co. v. Eyer*, 36 Neb. 507, 54 N. W. 838, 38 Am. St. Rep. 735; *National Bank v. Thompson*, 90 Neb. 223, 133 N. W. 190.

North Carolina.—*Tinsley v. Hoskins*, 111 N. C. 340, 16 S. E. 325, 32 Am. St. Rep. 801; *Briscoe v. Norris*, 112 N. C. 671, 16 S. E. 850; *Williams v. Rich*, 117 N. C. 235, 23 S. E. 257; *Exchange Bank v. Apalachian Land, etc. Co.* 128 N. C. 193, 38 S. E. 813.

Ohio.—*State v. Taylor*, 10 Ohio 378; *Shelton v. Gill*, 11 Ohio 417; *Martin v. Belmont Bank*, 13 Ohio 250; *Leavans v. Ohio Nat. Bank*, 50 Ohio St. 591, 34 N. E. 1089; *Miller v. Kyle*, 85 Ohio St. 186, 97 N. E. 372.

South Dakota.—*Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439 (by express statute).

West Virginia.—*Pineville First Nat. Bank v. Sanders*, 88 S. E. 187. And see the reported case.

The contentions against the validity of a stipulation in a note for attorney's fees, one or more of which has found favor in each of the jurisdictions holding such a stipulation to

be void, are that the stipulation is a contract provision for a penalty: that it violates the policy fixed by the statutes limiting the items taxable as costs; that it is without consideration; that it is oppressive; that it tends to promote litigation, and that it is either usurious or a convenient cover for usury.

In *Boozer v. Anderson*, 42 Ark. 167, it was said: "To us it appears clear, even to demonstration, that they are agreements for a penalty. The obligor agrees to pay a certain sum of money if he shall fail to perform the contract contained in another clause of the same instrument. Now courts of equity abhor penalties and forfeitures. So far from lending their aid actively to enforce them, they are inclined to relieve against them, when it can be done consistently with their rules. Compensation and not forfeiture is their aim. Accordingly they consider that when a debtor pays the debt, with interest for its detention and costs of suit, he ought not to be mulcted in a further sum. Whenever the injury is susceptible of definite admeasurement, as it is in all cases where the breach consists in the nonpayment of the money, the parties will not be allowed to stipulate for a greater amount, whether in the form of a penalty or of liquidated damages."

In *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356, Justice Cooley said: "In this state the attorney's fees which the successful party is permitted to recover in courts of record are prescribed by statute or by rule of court. In justices' courts none are given, except in a few special cases. The policy of our law is to limit such recovery to a very moderate sum in every case where it is permitted at all. We have also in this state had usury laws from the very first: and though their penalties have not been severe, they have fixed a maximum of ten per centum per annum, which is not to be exceeded under any circumstances. And it is a question of very grave importance whether the policy which thus limits attorney's fees, and also limits the rates of interest, can be set aside by provisions like that under review. The notes upon which a recovery is sought in this case vary in amount from \$41.50 to \$104.12. Six of them, including two for \$41.50 each, contain the promise to pay an attorney's fee of fifteen dollars, should any proceedings be instituted for collection. All of them could be sued in justice's court, and the mere taking out of a summons would be a proceeding for collection. Therefore the makers are made to promise that if the payee, when the notes come due and are not paid, shall take out a summons upon each of them, the makers will pay an attorney's fee of fifteen dollars upon each. It is of course preposterous to call this a fee: a fee supposes

services; and here the services to be compensated may be purely nominal. The sum is nothing but a penalty; it cannot even be regarded as stipulated damages on a default; for the sum to be paid bears no proportion to the sums overdue, but is the same for the smallest notes as for the largest. Moreover, the law itself determines what shall be the recoverable damages on default in the payment of a liquidated demand, and limits it to a sum not to exceed ten per centum per annum: while these stipulations in some cases provided for the payment of a sum equal to thirty-five per centum, however brief might be the period of default. A stipulation for such a penalty we think must be held void. It is opposed to the policy of our laws concerning attorney's fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression. It would be idle to limit interest to a certain rate, if under another name forfeitures may be imposed to an amount without limit. The provision in these notes is as much void as it would have been had it called the sum imposed by its true name of penalty or forfeiture. There is no consideration whatever that can support it."

In *Witherspoon v. Musselman*, 14 Bush (Ky.) 214, 29 Am. Rep. 404, the court said: "We are clearly of the opinion that all such contracts are absolutely void. They are contrary to the policy of our laws, which prescribe the amount of attorney's fees that may be taxed against the unsuccessful litigant. They are agreements to pay penalties, tend to the oppression of the debtor, and to encourage litigation."

In *Williams v. Rich*, 117 N. C. 235, 23 S. E. 257, the court said: "Such stipulations are in the nature of forfeitures and encourage litigation. They can readily be used to cover usurious agreements, and excessive exactions may be had under the guise of an attorney's fee." In *State v. Taylor*, 10 Ohio 378, the court said: "Now, it seems to us to be of little consequence, in this case, what this five per cent may be called, but the inquiry is, what is the thing itself? However it may be disguised, it is very clear to us it is a mere shift or device by which twelve per cent is retained, as interest, upon this loan, and in this view of the case cannot be enforced. This court have decided that under the laws of Ohio, but six cent interest is recoverable, though the parties contract for more or higher rates. But is it such a contract as public policy should execute? What may be supposed as the natural result to the community from the execution of this agreement? It would be the condition of future loans, at banks, that the borrower should pay the expenses of collection, and, perhaps, the tax thereon. The brokers in this state

would hold a general jubilee; and as their sense of morality and law usually expands with their hopes of gain, in proportion to the borrower's necessity they would find, probably, additional items of costs, as the means of a legalized extortion upon their loans. In our opinion, such agreements are against the public policy of the country, and ought not to be enforced in courts of justice. They have, by this court, on the circuit, been denied to be obligatory, and further reflection confirms us in the correctness of such opinion. The absence of adjudicated cases in the reports, either English or American, show these agreements are of modern invention, having their origin in the improvements of the age. That this five per cent is not costs, is certain, from the fact that it is not so recognized by law. At common law no costs were allowed. If a plaintiff failed in his action, he was amerced for his false clamor, but costs were not adjudged against him. In Ohio, no costs are given to a successful party, unless authorized by statute, with but one or two exceptions, and the statute defines the items, and imposes severe penalties upon the ministers of the law, for taking other or higher costs or fees than are expressly provided for. On the whole, we think the common pleas were right in holding the agreement void to pay five per cent collection fees."

Effect of Negotiable Instruments Law.

The uniform Negotiable Instruments Law, now in force in substantially every American jurisdiction, contains a provision that the negotiability of a note is not impaired by the fact that it contains a provision for costs of collection or attorney's fees in case it is not paid at maturity. That provision is held to have no application to the question whether such a provision is valid. *Mechanics' American Nat. Bank v. Coleman*, 204 Fed. 24, 122 C. C. A. 338 (cited *supra* in the subdivision *View that Stipulation Is Valid*): *Bank of Holly Grove v. Sudbury*, reported in full, post, this volume, at page 373 (cited *supra* in the subdivision *View that Stipulation Is Invalid*); *Miller v. Kyle*, 85 Ohio St. 186, 97 N. E. 372 (cited *supra* in the subdivision *View that Stipulation Is Invalid*): see also *Colley v. Summers Parrott Hardware Co.* reported in full, post, this volume, at page 375 (cited *supra* in the subdivision *View that Stipulation Is Valid*). And see the reported case. In *Miller v. Kyle*, *supra*, it was said: "It is suggested that the general assembly must be presumed to know the common law of the state, and that every section of a statute should be regarded as evincing an intention to change it. That would indeed be a novel rule of interpretation, and in the days of the codifier it would reach re-

sults most confounding. Its impracticability as a rule of interpretation will at once appear if an attempt be made to apply it to the act of which these two sections form a part. That act has been in force in this state for more than nine years, and to the present time our attention has been called to but one respect in which it changes the common law of the state upon the subject of negotiable instruments. Quite different from the rule suggested is the rule which the wisdom of generations has established: That statutes in derogation of the common law shall not by construction receive a meaning beyond that of the terms which they employ. Certainly this does not mean that such statutes are to be construed in a spirit of hostility, but in its application to the present case it cannot mean less than that the legislative act, which contains language appropriate only to saving the negotiable character of instruments which contain stipulations for the payment of attorney fees, should not be construed to impart validity to such stipulations notwithstanding an established rule of the common law to the contrary.

But in *Florence Oil, etc. Co. v. Hiawatha Gas, etc. Co.* 55 Colo. 378, 135 Pac. 454 (cited supra in the subdivision *View that Stipulation Is Valid*), it was said: "On the subject of stipulations in notes for attorney's fees there is a wide variance in the adjudicated cases. In some jurisdictions it is held that they are against public policy, and therefore void. There is nothing in our statutes which will render this doctrine applicable. On the contrary, impliedly at least, the general assembly has recognized that they are valid, by providing in the Negotiable Instrument Act, section 5052, Rev. Ed. Mill's Statutes, that a note providing for cost of collection of an attorney's fee, in case payment shall not be made at maturity, does not affect its negotiability."

BANK OF HOLLY GROVE

v.

SUDBURY.

Arkansas Supreme Court—November 15, 1915.

121 Ark. 59; 180 S. W. 470.

Bills and Notes — Stipulation for Attorney's Fees — Validity.

Provision in a note for an attorney's fee, if it be not paid without suit, by prior decisions held invalid as against public policy,

but not rendering uncertain the sum payable nor affecting negotiability, is not validated by the Negotiable Instruments Law (Acts 1913, p. 260), which by section 2 declares that provision in a note for payment of an attorney's fee shall not prevent the sum payable being a "sum certain," necessary for negotiability, and by section 5, after declaring non-negotiable an instrument which contains an order or promise to do an act in addition to the payment of money, and making certain exceptions thereto, provides: "But nothing in this section shall validate any provision or stipulation otherwise illegal."

[See note at end of this case.]

Appeal from Circuit Court, Mississippi county: GAUTNEY, Judge.

Action by Bank of Holly Grove, plaintiff, against J. G. Sudbury, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Hope, Seibert & Reeder, Hawthorne & Hawthorne and *D. K. Hawthorne* for appellant.

A. G. Little for appellee.

[59] SMITH, J.—This was a suit on a note which contained a provision for the collection of an attorney's fee if the note was not paid without suit, and the validity of this provision is the only question involved in this litigation.

It is conceded, of course, that this provision was invalid prior to the enactment of the negotiable instruments law in this State. Act No. 81, Acts 1913, p. 260. The note sued on was executed after the above named act became effective.

[60] It is urged that the effect of the passage of this act is to change the declared policy of this State on this question.

Section 1 of this act declares the essentials of negotiability. Section 2 of the act defines the term "sum certain," as used in the first section of the act, as the sum payable, although the note may contain any one of the provisions set out in the second section, among which provisions is the following: "With cost of collection or an attorney's fee in case payment shall not be made at maturity."

And it is pointed out that the provisions of section 5 of the act are as follows: "An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable." But certain exceptions to this general statement are noted in that section, after which follows the statement: "But nothing in this section shall validate any provision or stipulation otherwise illegal."

And it is argued that as the purpose of the act was to make uniform the law of com-

mercial paper, and as the uniform negotiable instruments law has been adopted by forty or more of the States of the Union, in most of which the provision for an attorney's fee is held enforceable, that the adoption of the law in this State signifies an intention on the part of the Legislature to change the policy of this State, as declared in the decisions of this court prior to the enactment of this law.

It is competent, of course, for the Legislature to declare the policy of this State, or to change this policy as recognized by the courts, and the question here is whether or not this act accomplishes that purpose.

There is no doubt as to the policy of this State on this question prior to the enactment of this law. In the case of *Boozar v. Anderson*, 42 Ark. 167, it was said that the provision for the payment of an attorney's fee was an agreement for a penalty, and that the courts of this State would not enforce it. This holding was reaffirmed in the case of *Benton v. Holliday*, 44 Ark. 60, and *Chaffe* [61] v. *Landers*, 46 Ark. 371. It is true that this court in the case of *Jarvis v. Southern Grocery Co.* 63 Ark. 225, 38 S. W. 148, when again called upon to reconsider its previous holdings on the question, said:

"It is but fair to say that, were it a new question, we would not be agreed as to the doctrine of the validity of such a stipulation, either in a note or a mortgage, but the majority stands on the previous decisions of this court as to the stipulation in the note, while all of us agree that the rule is to be applied to the stipulation in the mortgage the same as to the stipulation in the note."

And the court refused to allow the attorney's fee there provided for.

This holding has been reaffirmed in the subsequent cases of *Arden Lumber Co. v. Henderson Iron Works, etc. Co.* 83 Ark. 244, 103 S. W. 185, and *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S. W. 208. In the case of *Arden Lumber Co. v. Henderson Iron Works, etc. Co.* supra, this court refused to enforce a stipulation for an attorney's fee in a note payable in a State where that provision was enforceable, upon the ground that comity did not compel us to enforce contracts which contravene the policy of our own laws.

It thus appears that the policy of this State was thoroughly well fixed at the time of the enactment of this law. This negotiable instruments law is a very comprehensive one, and its history is well known. In enacting it, the Legislature manifested its intention to legislate in a very comprehensive way on this subject, and having this purpose it is not to be assumed that the Legislature intended by mere implication to change the policy of this State, unless the act itself ac-

complishes that purpose. We find no language in the act which leads to that conclusion. Subdivision 5 of section 2 set out above does not accomplish that purpose. Its effect is to declare that the provision contained in a note for the collection of an attorney's fee, when read in connection with section 1, does not affect the negotiability of the instrument. But this worked no change in our law, for, notwithstanding this provision had been held unenforceable, it had also [62] been held that it did not affect the negotiability of the note. *White-Wilson-Drew v. Egelhoff*, supra, and cases there cited.

Section 5 of the act deals also with the question of negotiability, and the proviso above quoted, "But nothing in this section shall validate any provision or stipulation otherwise illegal," gives no support to appellant's contention. The proviso, by its terms, applies only to the provisions of section 5, all of which relate to the question of negotiability. Upon the contrary, we think this proviso tends to show that the Legislature did not contemplate any change in the general policy of the State by validating any provision, or stipulation, otherwise illegal in the effort there made to add to the negotiability of commercial paper.

There is an extended note to the case of *Raleigh County Bank v. Poteet*, L.R.A.1915B 928. The note to this case contains a general review of the decisions of all the States upon this subject, and contains a statement of the reasons given by the various courts in upholding, and in rejecting the provision for the payment of an attorney's fee. The decision in the case to which the note is appended was by the Supreme Court of West Virginia. That court was called upon to pass upon the validity of this provision. The majority of that court held that the provision was invalid, although there was a dissenting opinion in which two of the justices concurred. It is pointed out, however, in both the majority and the minority opinions in that case that the uniform negotiable instruments act had been passed by the Legislature of that State before the execution of the note there sued upon, and it was not contended in either opinion that the act itself should control the court upon that question. Speaking for the majority of the court, Mr. Justice Poffenbarger said:

"The negotiable instruments law (chapter 81, Acts 1907; chapter 98A of the Code) has not altered this policy. Negotiability of paper is one thing, and the policy of the State as to usury and other oppressive practices quite another, [63] and that statute deals with the former, not the latter. It says not a word about usury. Its purpose was to establish uniformity in the quality, charac-

teristics, and incidents of negotiable paper, and to extend the principle of negotiability; but it assumed the validity of the paper contemplated. In other words, it assumed the paper to be such as the law permits the parties to make and allows the courts to enforce. No rule or principle of construction justifies the courts in saying its very general terms repeal positive statutes relating to subjects other than negotiability of valid paper. On the contrary, the rules of construction forbid it."

In the minority opinion, it was said:

"The uniform negotiable instruments law adopted in this State and in most of the other States recognizes the validity of such contracts, and specifically provides that they shall not render instruments uncertain or destroy their negotiability. It seems to me these laws are entitled to some consideration in this connection. The reason noted in some of the decisions why instruments bearing such stipulations are not rendered uncertain and non-negotiable is that they in no way affect the sum certain to be paid at maturity, the obligation of the contract maturing subsequently to the date of the maturity of the instrument."

As pointed out in this dissenting opinion, this uniform negotiable instruments law recognized the validity of the contract for the payment of an attorney's fee, and specifically provided that it shall not render instruments uncertain or destroy their negotiability. But as has been said, we had previously held such provision invalid but that it did not render uncertain the sum payable, nor destroy the negotiability of an instrument containing that provision.

If the enactment of this law in West Virginia, before that State had declared its policy on this question, did not operate to uphold the validity of this provision, then certainly the enactment of the law in this State after the State's policy had become firmly fixed could not operate [64] to accomplish that purpose. We are constrained to believe that had any such purpose been entertained by the Legislature, it would have been made manifest, and as we find nothing in the act inconsistent with our previous declaration of the State's policy, we hold that it remains unchanged by the act, and the provision in the note is void and the judgment will be affirmed.

NOTE.

The reported case follows the earlier decisions in the same jurisdiction in holding to be invalid a stipulation for the payment of an attorney's fee contained in a promissory note. It is further held that the provision of

the Negotiable Instruments Law that such a provision does not destroy the negotiability of the note has no application to the question of its validity and does not require a departure from the doctrine of the earlier cases. The validity of a provision for an attorney's fee in a promissory note is discussed in the note to Raleigh County Bank v. Poteet, reported ante, this volume, at page 359.

COLLEY

v.

SUMMERS PARROTT HARDWARE COMPANY.

Virginia Supreme Court of Appeals—September 11, 1916.

119 Va. 439; 89 S. E. 906.

Bills and Notes — Actions — Parties — Joint Makers or Indorsers.

Under Code 1904, § 2853, prescribing against whom an action may be brought, the holder of a note may sue defendant alone without joining other joint makers, whether defendant is a joint maker or an indorser.

Negotiability — As Requisite of Note.

A promissory note does not necessarily possess the quality of negotiability.

Actions — Motion for Judgment — Description of Instrument Sued On.

In a notice of motion for judgment the description of the instrument sued on as a "promissory note" is good as far as it goes, and its incompleteness in no way prejudices the defendant.

Same.

In an action against the indorser of a note which contains a complete waiver of notice of presentment and dishonor, though the notice of motion for judgment should allege such waiver, the defect in the notice is harmless, as, in view of the undisputed written waiver, an amendment at bar would be proper.

Status of Parties to Note — Signature in Blank on Back.

Under the Negotiable Instruments Law (Code 1904, § 2841a, subsec. 63), the presence of a name on the back of a note without indication by appropriate words of an intention to be bound in some other capacity classes such signer as an indorser.

Consideration — Pre-existing Debt.

A pre-existing debt is a sufficient consideration for a note.

Failure of Consideration — Right to Prove — Variance.

In an action against an indorser, the defendant cannot prove a failure of considera-

tion contradictory to his verified plea in the cause averring that he was an original joint contractor with the makers.

Stipulation for Attorney's Fees — Validity.

Under the Negotiable Instruments Law (Code 1904, § 2841a), and in view of the fact that at its enactment the validity of the provision of a note for attorney's fees was unsettled in this state, and in view of the purpose and policy of the Negotiable Instruments Law and of the course of decision prevailing in a majority of the states having substantially the same law and of the importance of the uniformity of interpretation, a provision in a promissory note governed by the laws of the state for a ten per cent attorney's fee if suit should be brought thereon is valid.

[See note at end of this case.]

Error to Circuit Court, Dickenson county.

Action by Summers Parrott Hardware Company, plaintiff, against S. J. Colley, Jr., defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

Sutherland & Sutherland for plaintiff in error.

Skeen & Skeen for defendant in error.

[440] KELLY, J.—The judgment under review was obtained by the Summers Parrott Hardware Company against S. J. Colley, Jr., upon a negotiable note endorsed by the latter.

The note was payable "to the order of the Summers Parrott Hardware Co., Dickenson County Bank, Inc., Clintwood, Va.;" provided for a ten per cent attorney's fee in case suit was brought thereon; waived presentment, protest, etc.; was signed "Childress & Taylor per C. C. Childress," and was endorsed by the following persons, in the order named: C. C. Childress, S. J. Colley, Jr., Summers Parrott Hardware Co., J. A. Summers, H. R. Parrott, J. P. Summers.

The first assignment of error complains of the action of the court in refusing to permit the defendant to prove by parol certain extrinsic facts tending to show that his liability, if any, was that of a surety or joint maker, and not that of an endorser in the technical sense. The contention was that the other joint makers, Childress and Taylor, should have been joined as parties defendant. The evidence was immaterial. Plaintiff had the right to sue as it did, regardless of whether defendant was a joint maker, or an endorser. Code, sec. 2853; Burks' Pl. & Pr. p. 52.

[441] The notice described the paper sued on as "a promissory note." The point sought to be made out of a distinction between such

a note and one which is negotiable is without merit. It is true that a promissory note does not necessarily possess the quality of negotiability; but the description in the notice was good as far as it went, and its incompleteness in no way affected the defendant to his prejudice.

The second assignment of error (in direct conflict in this respect with the first) points out that the notice refers to defendant as an "endorser, which latter term can only apply to negotiable instruments," and argues that his demurrer to the notice of motion for judgment should have been sustained because it failed to allege notice of presentment and dishonor. The note, in the body of it and on the back, contains a complete waiver of such notice. The pleading should have alleged this fact (Security Loan, etc. Co. v. Fields, 110 Va. 827, 67 S. E. 342) but the defect was such as that, in view of the undisputed written waiver, an amendment at bar would have been proper, and the error was entirely harmless.

It is next urged as error that the trial court permitted the note to be introduced in evidence and read to the jury, the objections, based on an alleged variance, being (1) that the note was described in the declaration as a promissory note, (2) that it shows on its face that the Dickenson County Bank, Inc., was a joint payee with the plaintiff, and neither endorsed the note nor became a co-plaintiff in the motion, and (3) that when the defendant endorsed the note it was still in the hands of an agent for the payee, who had not yet endorsed it (a conceded fact), and that, therefore, the defendant was improperly described as an endorser.

[442] The first objection has already been disposed of; the second answers itself upon an inspection of the note, which manifestly intended to designate the Dickenson County Bank as the place of payment; and the third is met by the provisions of section 2841-a, sub-section 63, of the Code, by virtue of which the presence of defendant's name on the back of the note, as it here appears, classes him as an endorser, he having failed to indicate "by appropriate words his intention to be bound in some other capacity."

The defendant offered to prove that he endorsed the note for the accommodation of the payee, after Childress and Taylor had signed it, and without their request or knowledge: the contention being that the endorsement was without consideration. There was no error in excluding this evidence. It is conceded that the note was given for a pre-existing debt due from Childress and Taylor to the plaintiff. This was a sufficient consideration for the note itself; and this evidence, offered by the defendant, tending to show a

failure of consideration was palpably contradictory of his verified plea in the cause averring that he was an original joint contractor with Childress and Taylor.

"A party cannot assume successive positions in the course of a suit or series of suits in reference to the same facts or state of facts, which are inconsistent with each other and mutually contradictory." *Chesapeake, etc. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

This brings us to the last assignment of error. The note, as observed at the outset, provides for a "ten per cent attorney's fee" if suit should be brought thereon. The judgment includes this fee, and the case thus presents to this court, for the first time since the enactment of the negotiable instruments law (Acts 1897-8, p. 896, Code, sec. 2841-a) the question of the validity [443] of such a provision in an instrument governed by the laws of this State. No question arises as to the effect of the provision upon the negotiability of the paper, the statute in terms resolving that previously mooted question in favor of the stipulation. (Code, 2841-a, subsec. 2, cl. 5.) As to its validity, the authorities in the various jurisdictions are in conflict, and the same may be said of the decisions in Virginia.

The weight of outside authority sustains the validity of the stipulation. See collation of authorities in *Raleigh County Bank v. Poteet*, 74 W. Va. 511, 82 S. E. 332, L.R.A. 1915B 928; 1 *Dan. Neg. Inst.* (6th ed.) secs. 62, 62-a, and notes; 3 *R. C. L.* p. 894, sec. 82 and note 1.

In *Raleigh County Bank v. Poteet*, supra, the majority opinion holds the stipulation void as against public policy, but concedes that, in numbers at least, the weight of authority is opposed to that view. The dissenting opinion by two of the five judges of the West Virginia Supreme Court favors the validity of the provision.

The recent Virginia case of *R. S. Oglesby Co. v. New York Bank*, 114 Va. 663, 77 S. E. 468, dealt with a New York contract, but in so doing had to consider whether the stipulation for attorney's fee was so repugnant to the public policy of this State as that its courts would not enforce the same. In the course of the opinion the court said: "Two Virginia cases are cited to support the contention that the stipulation in question is a penalty and contrary to the policy of this State, and, therefore, not enforceable, viz.: *Rixey v. Pearre*, 89 Va. 113, 15 S. E. 498, and *Fields v. Fields*, 105 Va. 714, 54 S. E. 888.

"It is especially noteworthy that the agreements in both these cases antedated the enactment of the negotiable [444] instrument law in March, 1898. The former case fol-

lowed, without discussion, a Michigan decision, *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356, and in the latter it is said: 'This court has held that an agreement in a note to pay attorney's fees for collection is a penalty and not enforceable.' Citing the first-named case.

"In *Stratton v. Mut. Assur. Soc.* 6 Rand. (Va.) 28, the court upheld the by-law of a society which declared that members who, by failing to pay, rendered it necessary to coerce payment of premiums by legal proceedings, should indemnify the society for expenses incurred in the employment of collectors by payment of seven and one-half per cent on each premium and interest. It was said that the exaction was neither usury nor a penalty, citing *Greenhow v. Buck*, 5 Munf. (Va.) 263.

"In *Campbell v. Shields*, 6 Leigh (Va.) 517, a stipulation in a promissory note to pay, in addition to the principal sum, \$48, to cover cost of collection on default of payment, if made in good faith and not as a device to evade the statute of usury, was in point of law not usurious; nor was it a penalty against which equity would relieve.

"The same doctrine is announced in *Myers v. Williams*, 85 Va. 621, 8 S. E. 483.

"These authorities answer the suggestion that the 'attorney's fee clause' is contrary to the public policy of this State. The contrary view is also accentuated by the circumstance that the General Assembly has adopted the negotiable instrument law in force in New York, and generally throughout the United States. Va. Code, 1904, Ch. 133-A."

It may be conceded that the passage of the negotiable instruments law would not of itself change the law in [445] States where stipulations for attorneys' fees were held to be contrary to usury laws or to public policy, and, therefore, void. There is reason and there is high authority for this proposition. *Raleigh County Bank v. Poteet*, supra; *Miller v. Kyle*, 85 Ohio St. 186, 97 N. E. 372; *Crawford's Ann. Neg. Instr. Law* (1916), p. 16; 10 *Va. Law Reg.* p. 461; *Id.* 11, p. 241.

We are of opinion, however, that at the time this law was passed in Virginia the question could not be regarded as a settled one, in view of the fact that *Campbell v. Shields*, supra, and other cases announcing a substantially similar doctrine, had not been expressly overruled by the cases of *Rixey v. Pearre* and *Fields v. Fields*. These latter cases, it is true, squarely decided at least in one aspect, the question here involved, but did so very briefly and rather incidentally, and did not discuss at all the former authorities. In this state of the law, we are of opinion, as indicated in *R. S. Oglesby Co. v. New York Bank*, that the purpose and policy

of the negotiable instruments law should not be wholly disregarded by us, and, furthermore, that in giving recognition to that purpose and policy we should not be unmindful of the course of decision which already prevails in a majority of the States having substantially the same statutory law upon this subject. Uniformity of interpretation and enforcement is no less important than uniformity of enactment.

In so far as the Rixey and Fields Cases, *supra*, hold that stipulations of the character here involved are invalid, they are disapproved and overruled.

We will add that no complaint is made in this case of the amount of the attorney's fee fixed in the note as being in itself unreasonable or unconscionable. Where this question has arisen in other jurisdictions, the courts do not appear to have had any difficulty in [446] settling it upon just principles. *Holston Bank v. Wood*, 125 Tenn. 6, 140 S. W. 31; 20 Ann. Cas. note, p. 1372.

There was no error in the judgment complained of, and it must be affirmed.

Affirmed.

Note.—Since the foregoing opinion was prepared there has appeared in the *Virginia Law Register* (Vol. 2, N. S. p. 321) a discussion of the validity of a clause providing for attorney's fees in negotiable notes, which those who may desire to pursue the subject further will find interesting and instructive.

NOTE.

Overruling several earlier decisions in the same jurisdiction, the reported case holds to be valid a stipulation in a promissory note for the payment of a reasonable attorney's fee if suit is brought thereon. The cases discussing the validity of such a stipulation are reviewed in the note to *Raleigh County Bank v. Poteet*, reported *ante*, this volume, at page 359.

McCABE ET AL.

v.

KAIN.

Pennsylvania Supreme Court—July 3, 1915.

250 Pa. St. 444; 95 Atl. 574.

Negligence — Infant Stealing Ride on Vehicle.

Where, in an action for injuries to a thirteen year old child from jumping or falling

from defendant's moving wagon, it appears that he was endeavoring to steal a ride, and there is evidence that the driver struck or struck at him with the whip to make him get off, and that in doing so the child fell and was injured, it is error to direct a verdict for defendant.

[See note at end of this case.]

Appeal from Court of Common Pleas, No. 2, Philadelphia county: **SULZBERGER**, Judge.

Action by Walter J. McCabe, et al., plaintiffs, against James Kain, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. **REVERSED.**

Samuel G. Stem and *John J. McDevitt, Jr.*, for appellants.

J. A. Robbins for appellee.

[445] **STEWART, J.**—In directing a verdict for the defendant the learned trial judge expressed in very vigorous terms his personal disapproval of the law which protects children under fourteen years of age from the charge of contributory negligence, to the extent of raising a presumption in their favor that because of inexperience they are incapable of appreciating danger. No harm would have come had the learned trial judge stopped here, but the appellant complains, and we think justly, that in applying the law to the facts presented he adopted the law as he thought it ought to be, rather than the law as it is, and as a consequence that he was unjustly thrown out of [446] court. Plaintiff was between twelve and thirteen years of age when he sustained the injuries complained of. He had climbed upon a passing dray which was loaded with heavy barrels and driven by a servant of the defendant. He was unobserved by the driver at the time, but the latter's attention being afterward attracted to him by some occurrence, he swung his whip around at the boy, and, according to the boy's testimony, struck him with the lash. The boy then attempted to get from the wagon, and in doing so was caught by one of the rear wheels and injured. Several witnesses testified to having seen the driver use his whip at the boy, none of whom, however, saw the lash strike him. Technically the boy was a trespasser; he had gone upon the wagon uninvited. Had he been above the age of fourteen he would have been chargeable with contributory negligence in attempting to get upon a moving wagon in the manner he did; but because he was under that age the law will not impute to him an appreciation of the danger he ran in so doing, but leaves that question to be determined, not by the judge sitting in the case, but by the jury. Was it negligence on the part of the driver to use his whip in the way these witnesses

say he did, under the conditions here presented, to make the boy get from the wagon? Did the boy attempt to get from the wagon in the way he did because of what the driver had done? If so, was he capable of understanding and appreciating the risk he ran in so doing? These are the questions in the case, and they were for the jury exclusively. We have considered the case solely in the light of the evidence offered by the plaintiff. The judgment is reversed and a *venire de novo* is awarded.

NOTE.

Liability for Injury to Infant Stealing Ride on Vehicle.

From the comparatively few cases which have considered the rights and liabilities of persons driving vehicles in the public highways with respect to children "stealing a ride," may be deduced the general rule that one driving on a public highway, using ordinary care in the management and control of the vehicle under his charge, is not an insurer against accident, or liable for damages, even to a child of immature years, who playing on the highway is injured in an attempt to ride thereon without acquiescence or invitation on the part of the person in charge of the vehicle.

Thus in *Hebard v. Mabie*, 98 Ill. App. 543, it appeared that a child five and one-half years old was riding on the back steps of a bus to which a second bus was coupled and on being ordered off by the driver fell under the second bus and was injured. The court stated the rule as to the duty owed by drivers of vehicles to children riding thereon without permission as follows: "It is not the duty of a driver of a bus or other vehicle, moving along a public street or highway to keep a look-out behind so as to know whether children or adults are riding on the rear end of the bus or other vehicle. On the contrary, the duty of such driver is to look ahead, so as to avoid collisions with other vehicles or with persons." And while holding that personal negligence could not be imputed to a child five and one-half years of age it was held that the driver of a vehicle on a public highway did not owe to children the duty of preventing them from climbing thereon, the court saying: "If steam roads owe the duty of preventing children from climbing on their moving trains at crossings, then the operator of the street car, or the driver of a farmer's cart or any other vehicle which runs upon the street, and by its movement or its rumble excites a childish desire to mount and ride, must in logic and in reason owe a similar duty, and be alike liable for its non-

performance. Such a doctrine is not founded in justice or reason, and is without the support of legal sanction."

In *Walsh v. Hayes*, 72 Conn. 397, 44 Atl. 725, wherein it appeared that a boy five years of age was injured while riding on the rear end of an ice wagon, the court stated the duty owed by the driver as follows: "The complaints in these actions charge the defendant with negligence, first, in loading his wagon with large cakes of ice, one placed on top of another, without being secured in any way whatever so as to prevent them from falling out of the back end upon the slightest jar; second, in failing to put in the tail-board; and third, in using a pair of young and spirited horses, and urging them up a steep grade with the whip; when he knew that children were in the habit of being about the rear end of his wagon for the purpose of getting bits of ice. The default threw upon him the burden of disproving the negligence thus alleged, and he did disprove it. That a large cake of ice was in fact jolted out of place while the horses were trotting up hill, and flew out over the tail-board, did not necessarily indicate any want of ordinary care. It was for the trial court to determine, in view of all the attending circumstances, whether a wagon so heavily loaded could be hauled at such a rate of speed over a rough stone crossing, with due regard to the rights of those who might be found upon the highway. The boy who was injured was warned of his danger by one of the defendant's servants as soon as his presence was observed. Only extraordinary precautions, such as the use of a tail-board extraordinarily high, could have prevented any chance of such an accident. No such standard of care could be required on the part of the defendant."

Similarly, in *Conlon v. Bailey*, 58 Ill. App. 261, wherein the facts were almost identical with those in *Walsh v. Hayes*, supra, it was held that while a boy five years of age would be excused from ordinary care, such infancy created no extra duty on the part of the driver of an ice wagon toward him. The court said: "The plaintiff in error, between four and five years of age, climbed upon a step on the rear of the wagon, and a large block of ice slid out, falling on and severely injuring him. Had the boards at the end of the wagon been higher, the ice would not have slid out. Had the boy not been upon the step, he would not have been injured as he was. Admit that the defendants in error were negligent in securing the ice, yet they were negligent only toward those to whom they owed a duty. 'There can be no negligence without the failure to observe some duty.' . . . Had the block fallen upon one crossing the street, or walking behind the

wagon, the duty so to use the street, as not to injure others using it, would raise a question not in this case. And it is no answer to say that the boy might have been injured when on the street behind the wagon, as severely as when on the step. The fact is that he was not on the street, and only omniscience can tell where he would have been if not on the step. Being on the step without notice to the driver, the defendants in error were only under obligations of 'general humanity,' 'not wantonly or carelessly to be an aggressor' toward him. . . . The infancy of the plaintiff in error would excuse him from the exercise of any care. . . . But such infancy creates no duty of defendants in error."

In *Gamble v. Uncle Sam Oil Co.* (Kan.) 163 Pac. 672, it was held that an ordinary motor truck moving along a public street could not be regarded as an attractive or alluring vehicle to an intelligent boy about fifteen years old who was accustomed to the traffic of the streets, and that the doctrine of the turntable cases was not applicable in an action brought by the boy to recover for injuries sustained while trying to board the moving truck. The court said: "The attractive nuisance doctrine cannot be extended to include motor trucks nor made applicable to cases like this one. Motor trucks are in common use, and no more attractive nuisances than are drays and other ordinary vehicles used for carrying persons and goods along the streets and highways. . . . The petition discloses that the plaintiff was nearly fifteen years of age, and it is not contended that he was lacking in intelligence nor that he was unaccustomed to the streets or the traffic upon them. The defendant's truck was of a kind that is in common use, it was being used for a common purpose and in the ordinary way, and no reason can be urged for applying the doctrine of the turntable cases to this one." Nor did the fact that the plaintiff and other boys had previously boarded or clung to the defendant's trucks amount to an invitation from the defendant to the plaintiff to board a moving truck, and evidence of that character was inadmissible in the case.

In *Zigman v. Beebe, etc. Furniture Co.* 97 Neb. 689, 151 N. W. 166, L.R.A.1915D 536, it appeared that two wagons had been coupled together and that a child between four and five years of age while riding on the tongue of the rear wagon either fell or stepped off and was run over by the rear wagon and killed. The court, in answer to the contention that the owner of the wagons owed a duty to children to prevent them from riding on the wagons and that the mere fact that two wagons were being driven coupled together constituted negligence, said: "The

crucial question is whether the coupling of the wagons together in the manner described, and driving the team on the street without a guard or outlook on or about the rear wagon in order to warn children who might attempt to climb thereon, can be said, as a matter of law, not to constitute negligence. The jury has found that the act was negligence. Unless, when legal principles are applied to the facts presented, the defendant must be held to have been acting within its legal rights and was without fault, the verdict must stand, because otherwise the question was for the jury. The plaintiff relies upon the doctrine of *Lynch v. Nurdin*, 1 Q. B. 29 [41 E. C. L. 422], that one who negligently leaves dangerous machinery or appliances of such a nature as to be attractive to children, within their reach, unguarded, or in such a situation that it may be easily put in motion by children, may, if injury to a child results, be guilty of actionable negligence. This is the rule of the 'turntable cases' and is the law in this state. . . . Can this principle be applied to the passage of vehicles along the streets of a city? In the diversity of vehicles which traverse the streets there may be many forms attractive to children, and in many instances the attractive part of the vehicle is not within the view of the driver. Omnibuses are often used which are entered by steps at the rear with no conductor or guard, and the door to which is held closed by a cord or strap, reaching to the driver's seat. Would a child who climbed upon the rear steps while the omnibus was passing along the streets of a city be entitled to recover for injuries sustained by falling off the steps? . . . Wagons of certain types are constructed so that children can easily climb upon them. Those used for hauling stone, or to remove growing trees, or to carry iron girders, are of this class. Is it incumbent upon the owner of such a vehicle to send a guard as well as a driver every time he uses the streets for the transportation of his goods? These inquiries are suggested by the facts in this case. If the nature of a vehicle using the streets is such as to be attractive to children, and they may easily climb thereon, then, if the principle contended for by the plaintiff is sound, no owner of such a vehicle can relieve himself from liability for negligence unless it is accompanied by a special guard, for the attention of the driver in a busy street must necessarily be directed to the front in order to control his team or his automobile. The question would be different if the driver was aware that children were congregating on and about it, and were liable to be injured if not warned away."

But it has been held that a wagon attached to the rear of a house being slowly moved through the streets came within the attractive

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85 Wash. 460; 148 Pac. 769.

nuisance doctrine as applied in the turntable cases and so a child of five years of age injured while riding on the wagon could recover for his injuries. *Skinner v. Knickrehm*, 10 Cal. App. 596, 102 Pac. 947, wherein the court, though conceding the general rule to be that a driver of a vehicle on a public highway using ordinary care was not liable for injuries to a child stealing a ride, held that under the facts as brought out in the evidence the driver was guilty of such negligence as to render him liable for the injuries sustained. The exception was stated as follows: "There rests, however, upon everyone so using a public thoroughfare the duty of exercising ordinary care in the management and control of vehicles under his charge, to the end that others using such public places, exercising like care, or who, by reason of tender years, are unable to appreciate or guard against danger, may not suffer injury from the operation of such vehicles, and it is the duty of the one so operating such a vehicle to at all times retain such control over the same as may be requisite in averting, if possible, injury even to those not exercising such care or unable to appreciate the danger connected therewith. The complaint avers facts which show defendants' omission of duty in the regard above stated, for it is admitted that the vehicle, unguarded and unattended, was being propelled through the streets by defendants. Now is there anything inconsistent with such statement when used in connection with the allegation that the vehicle was in the charge of the defendants. Personal property may be in the general charge of one, notwithstanding one may be at the time not in the immediate supervision of the same, and we perceive no inconsistency in the statement that property so in charge was permitted to be unattended and unguarded."

It has been held that whether the driver of a vehicle on a public highway exercised the ordinary care required under the circumstances to prevent injury to a child attempting to steal a ride, was a question for the jury under proper instructions from the court. *Skinner v. Knickrehm*, 10 Cal. App. 596, 102 Pac. 947. And see the reported case.

Pleading — Departure — Capacity in Which Instrument Sued on Is Held.

In an action by plaintiff bank on a check which the complaint alleges it held as unqualified owner, the answer alleges that it is held as collateral, and the reply that it was taken on deposit, defendants' contention that the complaint tenders one issue, the reply another and that the proof, which shows that the check is held as collateral, sustains neither, is not sound, since the real issue made is the quality of the bank's possession, which is determined by the evidence: a "material variance" being only one that actually misleads the adverse party to his prejudice in maintaining his action or defense on the merits.

Variance — Burden of Showing Prejudice.

Under Rem. & Bal. Code, § 299, providing that no variance between pleadings and proof shall be deemed material unless it has misled the adverse party to his prejudice, and that, whenever it shall be alleged that a party has been so misled, the court may order the pleadings to be amended upon such terms as shall be just, the burden is upon one claiming a variance to show that he was misled thereby to his prejudice.

Bills and Notes — Consideration for Transfer — Pre-existing Debt.

Under Rem. & Bal. Code, §§ 3416, 3418, sections of the Negotiable Instruments Act, providing that "value" is any consideration sufficient to support a single contract, that a pre-existing debt constitutes value, and that, where the holder has a lien on the instrument, he is a holder for value to the extent of his lien; where plaintiff bank, suing the maker and indorser of a check, holds as collateral in part to an antecedent debt, it is a holder for value to the extent of such debt.

[See note at end of this case.]

Evidence — Presumptions — Common Law of Sister State.

The presumption is that the common law of a sister state is the same as that of the state of suit.

Bills and Notes — Holder in Due Course — Check Not Promptly Presented.

Rem. & Bal. Code, § 3444, provides that, where an instrument payable on demand is negotiated unreasonably long after issue, the holder is not a holder in due course. Section 3575 provides that a "check" is a bill of exchange drawn on a bank, payable on demand, and that, except as otherwise provided,

the provisions of the Negotiable Instruments Act applicable to a bill of exchange payable on demand apply to a check. Section 3576 provides that a check must be presented for payment within a reasonable time after issue, or the drawer will be discharged to the extent of the loss caused by the delay. A check was given by the maker to the indorser as an advance payment for corporate stock sold by the indorser to the maker; the understanding being that the check should not be negotiated until delivery of the stock. The indorser five weeks thereafter pledged the check with plaintiff bank as security for a pre-existing debt and a further loan. It is held that the bank was not thereby precluded from being a holder in due course, since, by section 3576, the fact that the instrument was stale when taken discharged the maker from liability only to the extent of the loss caused by the delay, of which there had been none, while, assuming that the bank was chargeable with knowledge of all the facts existing at the time of taking the check, it was merely chargeable with knowledge that such check was given in connection with an executory contract for the purchase of stock to be delivered 60 days from the date of the check, which time had still 30 days to run before breach, by failure to deliver the stock, could occur, while knowledge by the indorsee of a negotiable instrument that it has been given in consideration of an executory contract or agreement will not deprive such indorsee of his character as bona fide holder in due course, unless prior to the assignment he had notice of some breach of the executory contract.

[See generally Ann. Cas. 1917B 842.]

Pledge — Liability of Indorser on Pledged Check — Necessity of Exhausting Other Security.

Where a bank sues the maker and indorser of a check, pledged to it by such indorser, there was no requirement that the bank shall exhaust other security which it may hold as collateral to the indorser's antecedent debt, for which the check was pledged in part.

Failure to Present Pledged Check — Evidence of Custom.

Where a bank sues the maker and indorser of a check pledged to it by such indorser, evidence is properly rejected as to whether it was customary or in keeping with prudent banking to hold a check taken as collateral for 20 days before sending it through for collection; the material point, under Rem. & Bal. Code, § 3576, providing that a check must be presented within reasonable time after its issue, or the maker will be discharged to the extent of loss caused by the delay, being whether loss was caused by any delay.

Bills and Notes — Negotiability of Check — Effect of Secret Agreement.

Where defendant draws a check to the order of his codefendant without any indication on its face that it is not to be negotiated,

it not even being postdated, the secret agreement between the parties being that it should not be negotiated until the payee delivers to the maker certain stock, such agreement will not defeat the recovery of a bank, with which the indorser pledges the check as collateral for a new loan and for an antecedent debt, since he who makes a loss possible should suffer the loss.

Appeal from Superior Court, King county: GILLIAM, Judge.

Action by German American Bank of Seattle, plaintiff, against A. H. Wright et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Farrell, Kane & Stratton for appellants.
George D. Emery for respondent.

[461] ELLIS, J.—This is an action to recover upon a check drawn by the defendant Wright upon the Lincoln County Bank of Merrill, Wisconsin, payable to the defendant Cavette and by him indorsed to the plaintiff. The facts are these:

On February 21, 1912, Wright, in the city of New York, made his ordinary bank check of that date upon his bank of deposit in Merrill, Wisconsin, to the order of the defendant Cavette for \$5,000, and delivered it to Cavette. At that time Cavette, who was engaged in an effort to reorganize a [462] certain fisheries company, agreed to deliver to the defendant Wright \$15,000 worth of the fisheries stock about sixty days from the date of the check. Cavette testified that the check was given on account of this contract and as part payment on the stock; that the reorganization was to be completed about April 1, and the stock was to be delivered about April 21, 1912, and that in case he did not deliver the stock, he was to return the check to the defendant Wright. He also testified, and the fact is not disputed, that at the time of receiving Wright's check he, Cavette, gave to Wright his own check for the same amount, drawn on the plaintiff bank, as security to Wright that Cavette would carry out the contract.

Cavette returned to his home in Seattle about March 1, 1912, and about March 30, solicited a loan of \$700 from the plaintiff bank. He was already indebted to the bank in the sum of \$1,800, and the loan was declined unless he would give security, not only for the \$700, but also for this antecedent indebtedness. He thereupon offered this check as security, promising to repay the whole debt, including the \$700, in twenty days, and requested the bank to hold the check that length of time, agreeing to take

it up, together with his note, at the end of that period. The bank officials, knowing that Wright was solvent, and as the cashier testified, believing the check good, loaned Cavette the additional \$700, taking his note therefor, due in twenty days, and extending the time of payment of the former indebtedness of \$1,800 for the same time, Cavette indorsing the check to the bank as collateral for the loan and extension. The transaction was negotiated through the bank's cashier acting for the bank.

Cavette testified that he told the cashier that the check was a contract check and that if he delivered the stock he was to get the money; that he did not go into details, but simply told the cashier that it was a contract check and that he had to deliver the stock to Wright; that he asked the cashier to hold the check for twenty days as collateral to the loan, and [463] that he thought he would be able to finish the whole transaction within twenty days; that nothing was said as to what was to become of the check at the end of that time, but that he, Cavette, expected to take up the note and check before that time, and, if he failed to do so, he supposed that the natural proceeding would be for the bank to send the check on for collection. Cavette further testified that at one time Wright had made a deposit in the bank to Cavette's credit, but that it was not to take care of any obligation to the bank. Wright testified that the check was not to be used for any purpose until Cavette delivered the stock to him; that the stock was to be delivered within sixty days, and if not then delivered the check was to be returned. It is admitted that the stock was never delivered.

The bank held the check until April 22, when, the note to which it was held as collateral being unpaid, the plaintiff bank wired the Wisconsin bank on which the check was drawn inquiring whether there were funds there to meet it, and at first received an affirmative reply, but later in the day received a further message that payment on the check had been stopped by Wright. The check was then forwarded for collection, payment was refused, and the check protested. This suit was then brought against Wright as maker and Cavette as indorser of the check, the plaintiff suing as owner. In their answers, both defendants alleged that the check was taken by the bank as collateral security, and this fact, as we have seen, was established by the evidence. The case was tried to the court without a jury. The court found that the bank was a holder in good faith for value and without notice of any equities between Wright and Cavette; that it received the check as collateral to the prior debt and the loan, in the usual course of business. Judgment was rendered for the

plaintiff against both of the defendants for the amount of the loan and the antecedent debt, aggregating \$2,500, with interest from the date of presentment, and the protest fees. Both defendants have appealed.

[464] It is claimed (1) that there was such a variance between the pleadings and the proof as to amount to a failure of proof; (2) that the respondent was not a holder in due course and for value, hence was not entitled to recover on the check as against the appellant Wright.

I. The complaint, in effect, alleged that the bank was the unqualified owner of the check. The answer alleged that the check was held by the bank as collateral. The reply alleged that the check was taken on deposit. The appellants contend that the complaint tendered one issue, the reply another, and that the proof sustained neither. Looking to the substance of the thing, there is no merit in this contention. The complaint tendered an issue of unqualified ownership in the bank. The answer pleaded the fact that the bank held the check as collateral only. The evidence sustained the latter view. The pleadings presented as the real issue the quality of the bank's possession. That was the issue which was tried. When we can say with certainty that a definite issue has been presented and tried, we do not indulge nice distinction touching technical variations in the pleadings or between the pleadings and the proof. We proceed, as directed by the statute, to a decision of the case on its merits, disregarding all technicalities and considering all amendments which could have been made as made. *Rem. & Bal. Code*, § 1752 (P. C. 81, § 1255); *Yeisley v. Smith*, 82 Wash. 693; 144 Pac. 918; *Gaskill v. Northern Assur. Co.* 73 Wash. 668, 132 Pac. 643; *Kelly v. Lum*, 75 Wash. 135, 134 Pac. 819, 49 L.R.A. (N.S.) 1161; *Bonne v. Security Sav. Soc.* 35 Wash. 696, 78 Pac. 38.

A variance to be material must have actually misled the adverse party to his prejudice in maintaining his action or defense on the merits. The burden is upon him to show that he was so misled. The statute so declares. *Rem. & Bal. Code*, § 299 (P. C. 81, § 287). In this case, it is obvious that the appellants were not misled. Whatever was lacking in the complaint to present the issue tried was supplied by [465] their answers. *Butterworth v. Teale*, 54 Wash. 14, 18 Ann. Cas. 854, 102 Pac. 768; *Wheatman v. Kane*, 55 Wash. 226, 104 Pac. 258.

II. The second question, as to whether the respondent was a holder for value in due course, is twofold. (a) The appellants claim that respondent was not a holder for value because it held the check as collateral in part to an antecedent debt. Our statute, however, effectually disposes of this question

contrary to the appellants' claim. The negotiable instruments act, reference being made to Rem. & Bal. Code, by section numbers, reads:

"§ 3415. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

"§ 3416. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

"§ 3417. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

"§ 3418. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

Clearly the respondent had a lien on the instrument arising from contract, and, as declared by the last section above quoted, it was a holder for value to the extent of that lien. This is the Federal rule, first announced by the supreme court of the United States, speaking through Mr. Justice Story, in *Swift v. Tyson*, 16 Pet. 1, 10 U. S. (L. ed.) 865, in 1842, and continuously followed by the Federal courts and the courts of many states since. The discussion invited by the appellants, of the relative merits of the Federal rule and the former New York rule as declared by Chancellor Kent in *Bay v. Coddington*, 5 Johns. Ch. 54, would be a purely academic exercise, since the contract of indorsement was made in this state and our statute is controlling [466] as to its effect. The same is true as to the rule in Wisconsin. Moreover, even assuming that the law of either New York or Wisconsin would govern, the law of neither of those states was either pleaded or proved. We would, therefore, assume that the present law of both is the same as our own. As a matter of fact, the present negotiable instruments acts of both those states contain sections identical with our § 3418 above quoted. 2 Revised Statutes, Codes and General Laws of New York (3d ed.) chap. 50, art. 3, par. 53. Wisconsin Statutes (1913), chap. 78, § 1675-53. The supreme court of New York has held that the negotiable instruments act changed the rule laid down in the *Coddington* case so as to include among holders for value holders of negotiable instruments taken merely as collateral security for antecedent debts, modifying the old New York rule "so as to conform to the rule in England and in our Federal court of last resort." *Brewster v. Shrader*, 26 Misc. 480, 57 N. Y. S. 606. We

have already declared the same rule in this state, but without expressly basing it on the statute. In *Canadian Bank of Commerce v. John J. Sesonon Co.* 68 Wash. 434, 123 Pac. 602, we said:

"In this state (and in the absence of a contrary showing we will presume the law of the place of indorsement to be the same) an indorsee of a note taken as collateral security is a holder in due course to the extent of his interests, if the note is taken before maturity and without notice of any existing equities between the maker and the original payee. *Peters v. Gay*, 9 Wash. 383, 37 Pac. 325. But the rights of such a holder are restricted to his interests; the rule being that, where the maker of a negotiable instrument, indorsed as collateral security, has a defense against the original payee of the instrument, the indorsee can in no event enforce payment in excess of the amount which the note is pledged to secure."

See also *Farmers' State Bank v. Blevins*, 46 Kan. 536, 26 Pac. 1044; *Cincinnati Second Nat. Bank v. Hemingray*, 34 Ohio St. 381; *Yellowstone Nat. Bank [467] v. Gagnon*, 19 Mont. 402, 48 Pac. 762, 61 Am. St. 520, 44 L.R.A. 243.

(b) It is next contended that the respondent was not a *bona fide* holder in due course because it took the check about five weeks after it was drawn, and to secure a then created debt of only \$700 in addition to the antecedent debt of \$1,800.

We shall assume, for the purpose of present discussion, that the check had been held by Cavette for an unreasonable time, that is for such length of time when it was taken by the respondent as to put the respondent on inquiry and charge it with notice of the facts then existing. The appellants contend that for that reason the negotiable instruments act, Rem. & Bal. Code, § 3444, makes the respondent not a holder in due course, but charges it with bad faith. That section reads:

"§ 3444. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

That section, however, is general and is apparently modified, so far as checks are concerned, by later sections of the same act, relating specifically to checks, which read as follows:

"§ 3575. A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

"§ 3576. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from

liability thereon to the extent of the loss caused by the delay."

The words which we have italicized mark the limits of the rule as applied to checks. It is obvious that while the taker of a stale check is not an unqualified holder in due course, he is such holder except in so far as the drawer of the check is able to show that he has been injured by the delay. The [468] statute can mean nothing else. This is also in keeping with the rule as it existed under the law merchant. As said by the supreme court of the United States in *Bull v. Kasson Bank*, 123 U. S. 105, 8 S. Ct. 62, 31 U. S. (L. ed.) 97:

"Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawee. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time."

The record here is barren of evidence that, had the check been presented immediately after it was drawn, Wright, the drawer, would have been in any better position than he now is. No "loss has been caused by the delay." If Cavette had any right to use the check at all, it is obvious that his delay in using it caused Wright no injury or loss.

If we charge respondent with knowledge of everything that its cashier could have learned at the time he took the check it would merely be charged with knowledge that the check was given in connection with an executory contract for the purchase of certain stock to be delivered in sixty days from the date of the check, which time had almost thirty days yet to run before breach by failure to deliver the stock could occur. True, the appellant Wright testified that the understanding was that the check would not be negotiated until the stock was delivered, and Cavette testified that he was to return the check if he failed to deliver the stock, but did not testify that he made any such statement to the bank. The evidence is undisputed that when Wright gave this check to Cavette, Cavette gave Wright his own check on the respondent [469] bank for the same amount to secure the carrying out of the stock transaction. Wright must have intended something by the

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delivery of his unqualified check to Cavette. It was not even postdated. It was clearly intended either as a payment on the purchase price, as Cavette testified it was, or as an advancement of Wright's credit to Cavette upon the strength of the executory contract. The fact that there was an exchange of checks between Wright and Cavette can only be explained on the theory that Cavette was to use Wright's check to obtain credit, which he otherwise would have been unable to obtain. Charging the respondent, therefore, with knowledge of the executory contract and that the check was given in connection therewith, is still far from establishing appellants' charge of *mala fides*. The contract to deliver this stock was still executory. It was a valuable consideration for the check whether the check be considered as an actual payment thereon or as an advancement of Wright's credit to Cavette by reason thereof. No failure of consideration had then occurred. As we said in the case of *Moyes v. Bell*, 62 Wash. 534, 114 Pac. 193, touching a similar situation in relation to a note:

"The courts have repeatedly held that knowledge by an endorsee of a note that it had been given in consideration of some executory contract or agreement of the payee, which the payee afterwards fails to perform, will not deprive the endorsee of his character of a bona fide holder in due course, unless prior to its assignment to him he had notice of the breach of the executory contract, and that such breach had theretofore occurred."

See also the numerous authorities to the same effect there cited and quoted.

At the time that the respondent took this check, Cavette's title thereto was not defective, as defective titles are defined by the negotiable instruments act. (Rem. & Bal. Code, § 3446 (P. C. 357, § 109). Cavette did not obtain the check or Wright's signature thereto by fraud, duress or other unlawful [470] means, or for an illegal consideration, nor can we say that his pledging the check to the bank while the contract was still executory was such a breach of faith as amounted to fraud, much less that it would, as a matter of law, charge the bank with notice of fraud. Since, under the evidence, Cavette's title was not defective when he pledged the check, § 3450 of the negotiable instruments act does not impose upon the bank as an indorsee the burden of showing that it was a holder in due course:

"§ 3450. (Every) holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

Viewing the whole transaction in the light of all of the evidence and applying the clear provisions of the negotiable instruments act, we are forced to the conclusion that the respondent was a holder of the check for value and in due course and is not chargeable with bad faith in the premises. Having taken the check as security, it is deemed holder for value to the extent of its lien.

We find no merit in the claim that the transaction should be treated as one of suretyship to the extent of the antecedent debt. So far as the abstract of record shows, this point was not raised during the trial. No motion was made to require the bank to exhaust other security which it held as collateral to Cavette's antecedent debt. In any event, we see no room for the application of the principle of suretyship. If the bank had cashed the check it would not have been incumbent upon it to look to the application of the proceeds, nor could Wright have complained. He is certainly in no worse position now than he would have been had the check been cashed.

Nor do we find any merit in the claim that the court erred in rejecting the testimony of an expert witness as to whether [471] it was customary or in keeping with prudent banking to hold a check taken as collateral for a period of twenty days before "sending it through" for collection. The material thing was whether the delay resulted in injury to the maker, Rem. & Bal. Code, § 3576 (P. C. 357, § 371). There was no evidence or offer of evidence tending to show that this delay caused Wright any loss whatever.

Finally, and aside from all technical rules of law, it seems to us that the trial court reached the correct result. The appellant Wright gave the appellant Cavette his negotiable check without any indicia whatever that it was not to be negotiated. The check, as we have noted, was not even postdated. If the check was not to be used, the reasonable thing, and that which would have absolutely protected the bank, would have been not to issue it. To permit an alleged secret agreement between the maker and the payee of a check, to which they have given currency, to defeat the check and relieve the maker from all liability thereon would be to place all of the care and caution touching negotiable paper upon the taker rather than upon the maker, thus reversing not only the theory of the law merchant, and the negotiable instruments act, but also the well known rule of equity that he who makes a loss possible should suffer the loss.

The judgment is affirmed.

Morris, C. J., Main, Crow, and Fullerton, JJ., concur.

NOTE.

Transfer of Negotiable Note as Security for Antecedent Debt.

Majority Rule:

In Absence of Negotiable Instruments Law, 386.

Effect of Negotiable Instruments Law, 387.

Minority Rule, 388.

Majority Rule.

IN ABSENCE OF NEGOTIABLE INSTRUMENTS LAW.

In accord with the rulings in *Birket v. Elward*, 68 Kan. 295, 1 Ann. Cas. 272, and *Exchange Nat. Bank v. Coe*, 94 Ark. 387, 21 Ann. Cas. 934, the majority of the recent decisions which were not based on the terms of the Negotiable Instruments Law have declared the rule that the holder of a negotiable note taken as collateral security for a pre-existing debt is a holder in due course, and as such is protected against all latent equities and defenses between the parties. *Miles v. Dodson*, 102 Ark. 422, 144 S. W. 908, 50 L.R.A.(N.S.) 83; *Exchange Nat. Bank v. Steele*, 109 Ark. 107, 158 S. W. 969; *Sackett v. Johnson*, 54 Cal. 107; *Leach v. Lewis*, 1 MacArthur (D. C.) 112; *Linderman v. Atkins*, 143 Ia. 366, 85 S. E. 101; *Patterson v. Peterson*, 15 Ga. App. 680, 84 S. E. 163; *German-American State Bank v. Lyons*, 127 Minn. 390, 149 N. W. 658; *Snelling State Bank v. Closen*, 132 Minn. 404, 157 N. W. 843; *Montreal Bank v. Beecher*, 133 Minn. 81, 157 N. W. 1070; *Ricks v. Johnson (Okla.)* 162 Pac. 476; *Citizens' Trust, etc. Bank v. Empey*, 34 S. D. 361, 148 N. W. 606; *Springfield Third Nat. Bank v. National Bank of Commerce (Tex.)* 139 S. W. 665; *Lane v. Canyon First Nat. Bank (Tex.)* 155 S. W. 307; *Daniel v. Spaeth (Tex.)* 168 S. W. 509; *Yantis v. Jones (Tex.)* 184 S. W. 572. See also *State Bank v. Holland (Tex.)* 128 S. W. 435.

The federal courts are in accord with the majority rule that the assignee of a negotiable instrument taking the same before maturity as collateral security for a pre-existing debt is to be regarded as a holder for value in due course of business. This rule has been followed by the federal courts since the leading case of *Swift v. Tyson*, 16 Pet. 1, 10 U. S. (L. ed.) 865, wherein Story, J., in an elaborate and logical opinion adopted the majority rule, and has been declared in a recent case. See *Melton v. Pensacola Bank, etc. Co.* 190 Fed. 126, 111 C. C. A. 166.

In *England* the holder of a negotiable paper as security for an antecedent debt is considered a holder in due course. But it seems that he cannot sue on the antecedent debt until the instrument given as security has become due and has been dishonored, since the suspension of the remedy against the old debt during that period constitutes the consideration for the new paper. *Bramah v. Roberts*, 1 Bing. N. C. 469, 27 E. C. L. 460; *Haywood v. Watson*, 4 Bing. 496, 15 E. C. L. 55, 130 Eng. Rep. (Reprint) 869; *Bosanquet v. Forster*, 9 C. & P. 659, 38 E. C. L. 277; *Percival v. Frampton*, 2 Crompt. & R. 180, 150 Eng. Rep. (Reprint) 78; *Currie v. Misa*, L. R. 10 Exch. 153, 4 Eng. Rul. Cas. 317, 1 App. Cas. 541; *Poirier v. Morris*, 2 El. & Bl. 89, 75 E. C. L. 89, 118 Eng. Rep. (Reprint) 702; *Baker v. Walker*, 14 M. & W. 465, 153 Eng. Rep. (Reprint) 558; *Ford v. Beech*, 11 Q. B. 852, 63 E. C. L. 852, 116 Eng. Rep. (Reprint) 693; *Kearslake v. Morgan*, 5 T. R. 513, 101 Eng. Rep. (Reprint) 289; *Boehm v. Sterling*, 7 T. R. 423; *Ex p. Beoxham*, 8 Ves. Jr. 531. In *Currie v. Misa*, L. R. 10 Exch. 162, it appeared that the security for the antecedent debt was a check payable on demand, but the court refused to make any distinction between a check and a promissory note, saying: "It was not disputed on the argument, nor could it be, that if instead of a check had been a bill or note payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable. This has been established by many authorities, both in this country and in the American courts. It has been supposed to rest on the ground that the taking of a negotiable security payable at a future date implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security. The counsel for the defendant accordingly contended that where the security is a check payable on demand, inasmuch as this consideration is wanting, the holder gains no independent title of his own, and has no better right to the security than the debtor himself had. We should be sorry if we were obliged to uphold a distinction so refined and technical, and one which we believe to be utterly at variance with the general understanding of mercantile men. And upon consideration we are of opinion that it has no foundation either in principle or upon authority. Passing by for the present the consideration of what is the true ground on which the delivery or indorsement of a bill or note payable at a future date is held to give a valid title to a creditor in respect of a pre-existing debt, and assuming that it is the implied agreement to suspend, it does not

follow that the legal element of consideration is entirely absent where the security is payable immediately. The giving time is only one of many kinds of what the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." See also *Belshaw v. Bush*, 11 C. B. 191, 73 E. C. L. 191, 138 Eng. Rep. (Reprint) 444.

In *Canada* before the enactment of the Bills of Exchange Act the courts followed the majority rule holding that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title. *Gooderham v. Hutchison*, 5 U. C. C. P. 241; *Blake v. Walsh*, 29 U. C. Q. B. 541; *Canadian Bank of Commerce v. Gurley*, 30 U. C. C. P. 583; *Cowan v. Doolittle*, 46 U. C. Q. B. 398. See also *Canadian Bank of Commerce v. Woodward*, 8 Ont. App. 347. Under a statute enacted in 1890, called the Bills of Exchange Act, an antecedent debt constitutes good and valuable consideration, but it seems that the mere existence of a liability to the indorsee is not considered a sufficient consideration, and the holder gets no better title than the indorser. Where the pre-existing debt is not mature at the time of the transfer of the note to the holder, the debt will not be considered a good consideration, and the indorsee is not a holder for value. *Bank of Commerce v. Wait*, 1 Alberta L. Rep. 68, 73, 7 West. L. Rep. 255. But where the indorsee has no notice of any defect in the note he will be considered as a holder for value. *Canadian Bank of Commerce v. Barlow*, 31 West. L. Rep. (Saskatchewan) 664. Compare *Merchants Bank v. Thompson*, 23 Ont. L. Rep. 502, 18 Ont. W. Rep. 582, 26 Ont. L. Rep. 183, 3 Dominion L. Rep. 577, 21 Ont. W. Rep. 740. See also *Ontario Bank v. Poole*, 1 Ont. W. Rep. 20, 832.

EFFECT OF NEGOTIABLE INSTRUMENTS LAW.

The uniform Negotiable Instruments Law provides that an antecedent or pre-existing debt constitutes value, and that where the holder has a lien on an instrument either from a contract or by implication of law he is deemed a holder for value to the extent of his lien, and in several recent cases that provision has been given effect. *State Bank v. Bilstad* (Ia.) 136 N. W. 204; *American Nat. Bank v. Minor*, 142 Ky. 792, 135 S. W. 278; *Central Bank v. Lyda* (Mo.) 191 S. W. 245; *State Bank v. Cape Girardeau*, etc. R. Co. 172 Mo. App. 662, 155 S. W. 1111; *A. E. McBee Co. v. Shoemaker*, 174 App. Div. 291, 160 N. Y. S. 251; *Smathers v. Tomaway*

Hotel, 162 N. C. 346, 78 S. E. 224. And see the reported case. *Compare* American Sav. Bank v. Helgesen, 64 Wash. 54, Ann. Cas. 1913A 390, 116 Pac. 837. In *Felt v. Bush*, 41 Utah 462, 126 Pac. 688, the court said: "In *Birket v. Elward*, 68 Kan. 295, 74 Pac. 1100, 64 L.R.A. 568, 104 Am. St. Rep. 405, 1 Ann. Cas. 272, decided in 1904, the supreme court of Kansas squarely holds that an indorsee of a negotiable instrument taken as collateral security for a pre-existing debt without any other or further consideration is a holder for value, and thus protected against all claims of payments made to the original holder of which the indorsee had no knowledge or notice. The Kansas court also places the ruling squarely upon the Negotiable Instruments Law. The later case is reported in 1 Ann. Cas. 272, where, in a note, the cases for and against the question are collated. In *re Hopper-Morgan Co.* 154 Fed. 249, decided in 1907, the United States District court for the Northern District of New York goes thoroughly over the precise question now under consideration. The particular sections of the Negotiable Instruments Law in question here are there construed and applied, and it is squarely held that that law changed the existing rule in New York. In that case the later decisions of several of the appellate divisions of the supreme court of New York are reviewed, and it is pointed out that, while in two cases (*Brewster v. Shrader*, 26 Misc. 480, 57 N. Y. S. 607 and *Petrie v. Miller*, 57 App. Div. 17, 67 N. Y. S. 1042) it is squarely held that the law upon the subject has been changed in New York, there are also three cases (*Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. S. 504; *Roseman v. Mahony*, 86 App. Div. 377, 83 N. Y. S. 749, and *Harris v. Fowler*, 59 Misc. 523, 110 N. Y. S. 987) in which a contrary conclusion was reached. The intermediate courts of New York are therefore divided upon the question, and in view that the Negotiable Instruments Law has never been passed on by the court of appeals, which is the court of last resort, the federal court in the decisions just referred to construed that law and in effect held that under it, in the interest of uniformity, the courts were required to hold that in New York, as in all other jurisdictions where the law has been adopted, an indorsee of negotiable paper who without notice takes it as collateral security for a pre-existing debt without further consideration is a holder in due course for value. . . . We have referred only to such cases as had under consideration the precise question presented for decisions here, and, so far as we have been able to discover, all the courts which have had occasion to construe the Negotiable Instruments Law have held that regardless of what the law upon the subject may have

been in those states, under the provisions of that law an indorsee of negotiable paper before due and without notice of existing equities or infirmities, although he receives it as collateral security for a pre-existing debt without any further consideration, is nevertheless a holder in due course for value. The question, therefore, it seems to us, has passed beyond the domain of judicial discussion. As we understand it, the Negotiable Instruments Law was intended to give legislative sanction to the majority rule to which reference has been made and was conceived by its authors and adopted by the different state legislatures for the express purpose of harmonizing the conflicting decisions which had been rendered on the subject of negotiable instruments and the rights of those interested therein whose rights were acquired before maturity. As we view it, therefore, it is our plain duty to follow the numerous decisions that have directly passed upon the Negotiable Instruments Law, and have construed it in accordance with the majority rule. The question is one of business expediency, and not of logic or equity as applied to an individual case."

In *Tennessee* the rule was changed by the adoption of the Negotiable Instruments Law making a pre-existing debt a good consideration; but where the pre-existing debt at the time of the giving of the note is worthless the courts will not consider it sufficient. *Citizens' Trust Co. v. McDougald*, 132 Tenn. 323, 178 S. W. 432.

Minority Rule.

Those jurisdictions that still adhere to the minority rule, holding that the transferee of commercial paper as security for a pre-existing debt is not a holder for value, base their holdings on the ground that the indorsee parts with nothing when he takes the note for a pre-existing debt, and is in no worse a situation than he was before. In *Alabama* the transfer of commercial paper as collateral security for a pre-existing debt, without any other consideration, does not constitute the transferee a bona fide holder for value; but if there is any additional consideration such as forbearance or an extension of the time of payment of the pre-existing debt for which the note is transferred as collateral security, the rule is different and in such a case the transferee is entitled to the same protection as any other bona fide holder for value. *Long v. Morris*, 176 Ala. 371, 58 So. 274.

In *Mississippi* under a statute, receiving property merely as security for a pre-existing debt does not constitute the holder a purchaser for value, and the courts applying this rule to commercial paper taken as security for a debt hold that the transferee of a bill

of exchange or note under such circumstances is not a holder for value in due course. Merchants', etc. Bank v. Winona Bank, 106 Miss. 471, 64 So. 210.

In *Wisconsin* the rule seems to be that the holder of a note as collateral security for a pre-existing debt holds for value if at the time of the transfer of the note something is done on the part of the indorsee such as an advancement, or a stipulation for further time to pay, or there is a change of securities, or the like. Under such conditions a holder of collateral will be protected from infirmities affecting the instrument before it was thus transferred. *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629; *Shaffer v. Peavey*, 161 Wis. 149, 152 N. W. 829; *Badger Machinery Co. v. Columbia County Electric Light, etc. Co.* (Wis.) 163 N. W. 188.

THE KING, AT THE PROSECUTION
OF ARTHUR ZADIG

v.

HALLIDAY.

England—House of Lords—May 1, 1917.

[1917] A. C. 260.

War — Internment — Person of Enemy Origin or Association.

A regulation empowering the secretary of state to order the internment of any person of "enemy origin or association" is authorized by the defense of the realm act and is valid.

[See note at end of this case.]

[260] The appellant, Arthur Zadig, who was born in Germany of German parents on July 10, 1871, became a naturalized British subject on May 18, 1905. On October 30, 1915, he was interned in Islington under an order of the Home Secretary, Sir John Simon, dated October 15, 1915. This order was made under reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914, which purported to be made under s. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8). The appellant contended that reg. 14B was not authorized by the Act and was ultra vires. Sect. 1, sub-s. 1, of the Act, reg. 14B, and the order of the Home Secretary are fully set out in the judgment of the Lord Chancellor.

On January 11, 1916, the appellant obtained from the King's Bench Division a rule nisi calling on the respondent, the governor [261] of the internment camp, to show cause

why a writ of habeas corpus should not issue. On cause being shown the Divisional Court (Lord Reading, C. J., A. T. Lawrence, J., Rowlatt, J., Atkin, J., and Low, J.), discharged the rule nisi, and the order of the Divisional Court was affirmed by the Court of Appeal (Swinfen Eady, L. J., Pickford, L. J., and Bankes, L. J.) [1916] 1 K. B. 738.

Llewelyn Williams, K. C. and *F. W. Hirst* for appellant.

Sir Frederick Smith, A.-G., *Sir Gordon Hewart, S.-G.*, and *G. A. H. Branson* for respondent.

Warren & Warren, solicitors for appellant.

The Treasury Solicitor, solicitor for respondent.

[264] LORD FINLAY, L. C.—My Lords, the appellant in this case is a naturalized British subject of German birth who has been interned by an order made by the Secretary of State under the powers of reg. 14B, which was made under the Defence of the Realm Consolidation Act, 1914.

It was contended on behalf of the appellant that reg. 14B was not authorized by the Act and was ultra vires.

It is beyond all dispute that Parliament has power to authorize the making of such a regulation. The only question is whether on a true construction of the Act it has done so.

The relevant part of the Act in question (5 Geo. 5, c. 8) is s. 1, sub-s. 1:

"His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by Courts of summary jurisdiction, and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed—

"(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of [265] any of His Majesty's forces or the forces of his Allies or to assist the enemy; or

"(b) to secure the safety of His Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbours; or

"(c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces by land or sea or to prejudice His Majesty's relations with foreign Powers; or

"(d) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty; or

"(e) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered."

The power conferred on His Majesty is limited to the duration of the war and is to issue regulations for securing the public safety and the defence of the realm. The subsection goes on to provide that His Majesty may by such regulations authorize the trial and punishment of persons committing offences against the regulations, and especially against regulations designed for any of the purposes enumerated under heads (a), (b), (c), (d), and (e). These heads comprise the prevention of communication with the enemy, securing the safety of His Majesty's forces and means of communication, and of railways, ports, and harbours, preventing the spread of false rumours, and the prevention of assistance to the enemy and the successful prosecution of the war being in danger.

On the face of it the statute authorizes in this subsection provisions of two kinds—for prevention and for punishment. Any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. Anyone who infringes such regulations will become the proper subject of punishment.

The regulation in question made under this statute is reg. 14B of the Defence of the Realm (Consolidation) Regulations. It is as follows:

"Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned [266] it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order.

"Provided that any such order shall, in the case of any person who is not a subject of a State at war with His Majesty, include express provision for the due consideration by one of such advisory committees of any representations he may make against the order.

"If any person in respect of whom any order is made under this regulation fails to

comply with any of the provisions of the order he shall be guilty of an offence against these regulations, and any person interned under such order shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war, except so far as the Secretary of State may relax such restrictions.

"The advisory committees for the purposes of this regulation shall be such advisory committees as are appointed for the purpose of advising the Secretary of State with respect to the internment and deportation of aliens, each of such committees being presided over by a person who holds or has held high judicial office.

"In the application of this regulation to Scotland references to the Secretary for Scotland shall be substituted for references to the Secretary of State.

"Nothing in this regulation shall be construed to restrict or prejudice the application and effect of regulation 14, or any power of internment of aliens who are subjects of any State at war with His Majesty."

It will be observed that any action of the Secretary of State under this regulation is to be upon the recommendation of a competent naval or military authority or of an advisory committee. If on such recommendation it appears to the Secretary of State that, for securing the public safety or the defence of the realm, it is expedient so to do, he may subject any person of hostile origin [267] or associations to certain restrictions, one of which is internment. The order must, however, include provision in the case of any person not being an enemy subject for consideration of any representation which the person affected may make against the order by an advisory committee, which is to be presided over by a person who holds or has held high judicial office. The regulation, therefore, provides means for ascertaining whether any complaint against the justice or necessity of the order is well founded.

The order complained of was made by the Home Secretary on October 15, 1915, and is as follows:

"Whereas, on the recommendation of a competent military authority, appointed under the Defence of the Realm Regulations, it appears to me that, for securing the public safety and the defence of the realm, it is expedient that Arthur Zadig, of 56, Portsdown Road, Maida Vale, W., should, in view of his hostile origin and associations, be subjected to such obligations and restrictions as are hereinafter mentioned.

"I hereby order that the said Arthur Zadig shall be interned in the institution in Cornwallis Road, Islington, which is now used as a place of internment, and shall be subject

to all the rules and conditions applicable to aliens there interned.

"If within seven days from the date on which this order is served on the said Arthur Zadig he shall submit to me any representations against the provisions of this order, such representations will be referred to the advisory committee appointed for the purpose of advising me with respect to the internment and deportation of aliens and presided over by a judge of the High Court, and will be duly considered by the committee. If I am satisfied by the report of the said committee that this order may be revoked or varied without injury to the public safety or the defence of the realm, I will revoke or vary the order by a further order in writing under my hand. Failing such revocation or variation this order shall remain in force.

"(Signed) John Simon,

"One of His Majesty's Principal Secretaries of State.

"Whitehall, 15th October, 1915."

The truth of the recital that Zadig is a person of hostile origin and associations was not questioned, but it was insisted that Parliament [268] had not conferred the power to make such an order in the interest of the public safety against such persons. The order provides for representations being made against it and for their consideration by an advisory committee presided over by a judge of the High Court, and states that, if the Home Secretary is satisfied by the report of such committee that the order may be revoked or varied without injury to the public safety and the defence of the realm, he will revoke or vary the order.

As I have stated, the power of Parliament to authorize such a proceeding was not and could not be disputed. The only question is as to the construction of the Act.

It was contended (1.) that some limitation must be put upon the general words of the statute; (2.) that there is no provision for imprisonment without trial; (3.) that the provisions made by the Defence of the Realm Act, 1915, for the trial of British subjects by a civil Court with a jury strengthened the contention of the appellant; (4.) that general words in a statute could not take away the vested rights of the subject or alter the fundamental law of the Constitution; (5.) that the statute is in its nature penal and must be strictly construed; (6.) that a construction said to be repugnant to the constitutional traditions of this country could not be adopted.

Reference was made by the appellant's counsel to the history of the various interferences with a right to habeas corpus in times of public danger, and it was urged that if it had been intended to interfere with

personal liberty this is the course which would have been adopted.

I am unable to accede to any of the arguments urged on behalf of the appellant.

It was not, as I understand the argument, contended that the words of the statute are not in their natural meaning wide enough to authorize such a regulation as reg. 14B, but it was strongly contended that some limitation must be put upon these words, as an unrestricted interpretation might involve extreme consequences, such as, it was suggested, the infliction of the punishment of death without trial.

It appears to me to be a sufficient answer to this argument that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament [269] may do so feeling certain that such powers will be reasonably exercised.

The statute in its recital of the objects of the regulations in respect of which particularly punishment may be inflicted throws some light upon the question before the House.

The regulations are to be for preventive purposes as follows:

(a) The prevention of communication with the enemy or obtaining information for that purpose or any purpose calculated to jeopardize the operations of His Majesty's forces or those of his Allies or to assist the enemy;

(b) To secure the safety of His Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbours;

(c) To prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces or to prejudice His Majesty's relations with foreign Powers.

(e) Otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.

One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is this that reg. 14B is directed. The measure is not punitive but precautionary. It was strongly urged that no such restraint should be imposed except as the result of a judicial inquiry, and indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons. It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The

duty of deciding this question is by the order thrown upon the Secretary of State, and an advisory committee, presided over by a judge of the High Court, is provided to bring before him any grounds for thinking that the order may properly be revoked or varied.

[270] The statute was passed at a time of supreme national danger, which still exists. The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges, &c., had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. This appears to me to be the meaning of the statute. Every reasonable precaution to obviate hardship which is consistent with the object of the regulation appears to have been taken.

It was urged that if the Legislature had intended to interfere with personal liberty it would have provided, as on previous occasions of national danger, for suspension of the rights of the subject as to a writ of habeas corpus. The answer is simple. The Legislature has selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted on the occasion of previous wars.

The suggested rule as to construing penal statutes and the provision as to trial of British subjects by jury made by the Defence of the Realm Act, 1915, have no relevance in dealing with an executive measure by way of preventing a public danger.

The application of the present appellant was rejected by the Divisional Court consisting of five members, and by the Court of Appeal, and in my opinion the present appeal ought to be dismissed.

LORD DUNEDIN.—My Lords, I concur in the opinion just delivered, which exactly expresses the reasons for the view I hold. It is only because I am aware that there is not unanimity among your Lordships that I add a few words.

The only question is as to the construction of the Act of Parliament. The prerogative may have been mentioned incidentally in the course of the argument, but it certainly was not founded on by the Attorney-General.

It is pointed out that the powers, if interpreted as the unanimous judgment of the Courts below interprets them, are drastic and might be abused. That is true. But the fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument obedience to which [271] may be compelled by some judicial body. The danger of abuse is

theoretically present; practically, as things exist, it is in my opinion absent.

Were a regulation to be framed, as my noble friend who is to follow me suggests, to intern the Catholics of south Ireland or the Jews of London the result would, I think, be the speedy repeal of the Act which authorizes the regulation.

That preventive measures in the shape of internment of persons likely to assist the enemy may be necessary under the circumstances of a war like the present is really an obvious consideration. Parliament has in my judgment, in order to secure this and kindred objects, risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body; and has thought the restriction of the powers to the period of the duration of the war to be a sufficient safeguard.

LORD ATKINSON.—My Lords, I concur. Several of the topics to which the learned counsel for the appellant addressed themselves in the course of their arguments, however interesting historically, had, in my view, little if any relevancy to the question to be decided in this case, such, for instance, as the scope and nature of the legislation passed by the Parliament of England on the several occasions in her history when she was at war. The question for decision in this case is what the Legislature has done by this statute of November, 1914, not what it did by legislation passed centuries before that date. It may be that so dear to the Legislature of those days was the personal liberty of the subject that it sacrificed, or endangered, the interest of the State, and hampered the nation in its struggle for victory in order to preserve that liberty. For myself I do not at all think it was so. Or it may have been that the circumstances of the time did not need such drastic remedies as do those of the present time. However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive. What [272] is contended is that the Executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact. It was also urged that this Defence of the Realm Consolidation Act of 1914, and the regulations made under it, deprived the subject of his rights under the several Habeas Corpus Acts. That is an entire misconception. The subject retains every right which those statutes confer upon him to

have tested and determined in a Court of law, by means of a writ of Habeas Corpus, addressed to the person in whose custody he may be, the legality of the order or warrant by virtue of which he is given into or kept in that custody. If the Legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if *intra vires*, do not infringe upon the Habeas Corpus Act in any way whatever, or take away any rights conferred by Magna Charta, for the simple reason that the Act and these Orders become part of the law of the land. If it were otherwise, then every statute and every *intra vires* rule or by-law having the force of law creating a new offence for which imprisonment could be inflicted would amount, *pro tanto*, to a repeal of the Habeas Corpus Acts or of Magna Charta quite as much as does this statute of November 27, 1914, and the regulations validly made under it. Swinfen Eady, L. J., most correctly points out that the provisions of the Defence of the Realm Consolidation Act of 1914 are of two kinds—punitive and preventive. Paragraph (a) of sub-s. 1 of s. 1 contemplates and authorizes the issue of regulations designed to prevent persons communicating with the enemy, or obtaining information for any purpose calculated to jeopardize the success of the forces of His Majesty or his Allies, or to assist the enemy. Paragraph (c) likewise contemplates that the regulations should prevent the spreading of false reports. Two conditions are, however, imposed: First, the regulations can only be issued during the war, and, second, whatever they purport to do must be done for the purpose of securing the public safety and the defence of the realm. It by no means follows, however, that if on the face of a regulation it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would [273] not be *ultra vires* and void. It is not necessary to decide this precise point on the present occasion, but I desire to hold myself free to deal with it when it arises.

Preventive justice, as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England. For instance, the 34th Edw. 3, c. 1, passed in 1360, directs the justices of the peace to "take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people." This jurisdiction is entirely different

from that of binding over one person at the instance of another to keep the peace towards that other. If the person required to enter into recognizances under the statute should refuse or omit to do so he can be committed to prison. This provision of this ancient statute has received a very wide construction even in normal times: *Reg. v. Cork Justices* (1882) 15 Cox C. C. 78, 84, 149; *Wise v. Dunning* [1902] 1 K. B. 167. In the same way a dangerous lunatic may be committed to a lunatic asylum; if while at large, he might be a danger to the community. One of the most effective ways of preventing a man from communicating with the enemy or doing things such as are mentioned in s. 1, sub-s. 1 (a) and (c), of the statute is to imprison or intern him. In that as in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defence of the realm. It must not be assumed that the powers conferred upon the Executive by this statute will be abused. By the several provisions already referred to every precaution that could be reasonably taken has, I think, been taken to prevent error or abuse.

Now in the present case the prosecutor has been interned under an order of the Secretary of State for the Home Department dated October 15, 1915. It is headed "Order under Regulation 14a of the Defence of the Realm Regulations." It sets out the fact which is under this section the foundation of his jurisdiction and the main [274] cause of its exercise, namely, that the appellant is of hostile origin and association. And in view of that fact, which is not disputed, it sets out that the Secretary of State, being duly recommended in the manner prescribed, makes an order that the appellant shall be interned for the purpose of securing the public safety and the defence of the realm. The order thus sets out upon its face all the requirements necessary for its validity if the regulation under which it purports to be made be valid. On that assumption it shows upon its face jurisdiction to make it. The legal validity of this regulation, therefore, becomes the only question for decision in the case. Is it *intra vires* or *ultra vires* of the statute? Because of the frame and fulness of the order that question can be as regularly and effectively decided upon the application that the writ should issue as it could upon the return to the writ. For myself I must say that I never could appreciate the contention that statutes invading the liberty of the subject should be construed after one manner, and statutes not invading it after another, that certain words

should in the first class have a meaning put upon them different from what the same words would have put upon them when used in the second. I think the tribunal whose duty it is to interpret a statute of the one class or the other should endeavour to find out what, according to the well-known rules and principles of construction, the statute means, and if the meaning be clear to apply it in that sense. Should the statute be ambiguous, equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, it may well be that the latter should be preferred on the ground of the presumed intention of the Legislature not to interfere with it. That is a wholly different matter.

This statute, to which the Royal assent was given on November 27, 1914, is framed differently from its immediate predecessor, to which the Royal assent was given on August 8, 1914, immediately after the outbreak of the war. The latter merely empowered His Majesty during the war to issue regulations "as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces, and other persons acting in his behalf, for securing the public safety and the defence of the realm." It further provided that by these regulations he might authorize the trial by court-martial [275] and the punishment of persons contravening any of these provisions. Sect. 1, paragraph (a), is identical with the corresponding paragraph of the later of the two statutes, save that the words "or the forces of his Allies" are introduced in the latter after the words "His Majesty's forces." Now the only way contemplated in the earlier Act of preventing persons from doing something prohibited by the regulations, or omitting to do something enjoined by them, is by trial and punishment before courts-martial. The statute is entirely *punitiva* in this respect. Well, presumably, that was found to be insufficient to secure the safety of the public and the defence of the realm to the extent desired. And, accordingly, the second statute, though it covers the same ground as the first, goes much beyond the first in its scope, and differs from the first in the methods it authorizes for securing the public safety and defence of the realm, inasmuch as it provides that the regulations to be issued may not only deal with the powers and duties of the Admiralty, and so forth, and with the punishment of offenders against certain of its provisions, but it empowers His Majesty, during the war, to issue regulations for securing directly the public safety and the defence of the realm. These are wide words. They are new words. Some effect must be given to them. They obviously cover preventive methods, properly so called, for securing the desired end as well as those

methods which are truly punitive. I do not think it is legitimate to treat them as of none effect, because if effect to be given to them the liberty of the subject may possibly be restricted. And as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. If a person be of hostile origin or association it is, I think, impossible to say that, if free and unfettered, it would not be reasonably probable that he would communicate with the enemy, or obtain information for the purposes mentioned in paragraph (a), or spread the false or other reports mentioned in paragraph (c), or do some of the other things mentioned in other paragraphs of that subsection. The public safety and the defence of the realm might be prejudicially affected if he did any of these things. If the Secretary of State, [276] after receiving a recommendation such as is in the regulation mentioned, comes to the conclusion that by reason of the hostile origin or association of some person it is expedient for securing the public safety and the defence of the realm that he should be interned or otherwise dealt with in the manner mentioned in reg. 14B, it would, in my view, be as mischievous as absurd to require that the Minister, though fully warned, should remain quiescent and look on helplessly, waiting for the time when one of the crimes mentioned in s. 1, sub-s. 1, should be committed, and the perpetrator, if caught, and if sufficient proof were forthcoming, should be brought to justice and punished. The statute clearly authorizes prevention in the widest terms by means other than punitive. I think reg. 14B, enumerating and authorizing some of those means, comes within the scope of that authority. And, as I have already said, I think the precautions already referred to effectually guard against all injustice or abuse in the administration of the regulation. I am, therefore, clearly of opinion that the appeal fails, that the decision appealed from was right and should be affirmed, and this appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE.—My Lords, I reckon this appeal to be in the first class of importance. My opinion differs from that of your Lordships, and this has led me to consider and reconsider the matter with care. The gravity of the issue, and the respect which I entertain for my noble and learned friends here and for the learned judges of the Courts below, with all of whom I am constrained to differ,—these appear to me to demand a statement, fuller than usual, of the grounds of my own position.

I am of opinion that the judgments appealed from are erroneous in law, and that they constitute a suspension and a breach of those fundamental constitutional rights which are protective of British liberty.

The appellant is a naturalized citizen of this country. That is to say, on the one hand, he owes submission to, and on the other he is entitled to the protection of, our laws. That is the essential pact underlying naturalization. The war made no difference to this. In fact, immediately after its outbreak the Act 4 & 5 Geo. 5, c. 17, reached the Statute-book, and s. 3 thereof confirms the pact [277] in terms. In the language of that section, Arthur Zadig has "to all intents and purposes the status of a natural-born British subject." His person was seized, he has been interned—now for over eighteen months—without a trial, and he has just the same title, no more and no less, to challenge such an act of force as any subject of the King. This makes the question not only serious, but perfectly general.

The appellant lost his liberty and was interned by reason of a document dated October 15, 1915, signed by the Home Secretary of the day and denominated an "Order under Regulation 14B of the Defence of the Realm Regulations." [His Lordship read the order.]

This order stands or falls with the regulation upon which it purports to be founded. The appellant falls within the ambit of its terms: he is of foreign origin. The true question affects the validity of the regulation itself. [His Lordship read reg. 14B.]

I am clearly of opinion that, although bearing to be a regulation, this is, in truth and essentially, not a regulation at all, and that it was ultra vires of His Majesty in Council to issue under the guise of a regulation an authorization for the apprehension, seizure, and internment without trial of any of the lieges. In my view Parliament never sanctioned, either in intention or by reason of the statutory words employed in the Defence of the Realm Acts, such a violent exercise of arbitrary power. It follows that the order or fiat of the Secretary of State which has already been quoted is also ultra vires.

It is to be at once observed that one provision of the regulation can have no application to the case of internment. That provision is that if the person in respect of whom any order is made fails to comply "he shall be guilty of an offence against the regulations." This is the homage paid to the Act of Parliament. But to a person seized and interned under this order of internment the language has no application. The appellant has not been guilty of any offence against the regulation; there is nothing for which to try him as an offender against it. No charge is made against him; he may appeal for that

in vain. He has complied with the regulation, in the sense that he has been its victim. If he had violated it in any particular he would have had his right to trial; but his case is hopeless [278] in that regard; for his person has been seized and detained for something entirely apart from any crime or offence or from anything he has said or done or attempted. The Secretary of State's fiat has gone forth. It is one of proscription.

"Where," says reg. 14B, . . . "it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person" then he may, inter alia, issue an order of internment.

My Lords, the Act of Parliament, as we shall see, does employ the words "for securing the public safety and the defence of the realm," but there is not one word in the Act of Parliament about "hostile origin or associations" of any person, nor indeed about internment.

These are not statutory terms. Parliament might very well have taken the subject of "hostile origin or associations" into its account; and Parliament might very well have considered the subject of internment and dealt with it. Had it done so, Courts of law would have been bound to comply with any verdict on the subject which it embodied in statute.

Accordingly the first great and broad fact confronting your Lordships in this case is that in a matter so fundamentally affecting the rights of His Majesty's subjects Parliament has given no express sanction for the introduction of that language "hostile origin or associations." And what remains is the argument that Parliament, not expressly dealing with a matter pre-eminently demanding careful delimitation, must be held to have accomplished by implication this far-reaching subversion of our liberties.

To this argument I am respectfully unable to accede. I do not think that the Defence of the Realm Acts can be submitted to such a violent and strained construction.

My Lords, after the outbreak of war on August 4, 1914, it is plain from the Statute-book that Parliament was much engrossed in the subject of national security and defence. And I think it may be expedient to notice that the Act founded on, 5 Geo. 5, c. 8, is one of a series of four statutes passed in the period from August, 1914, to March, 1915, and to observe that useful light is obtained by looking at them together.

By 4 & 5 Geo. 5, c. 29, it was provided:

"1. His Majesty in Council has power during the continuance of [279] the present war to issue regulations as to the powers and duties of the Admiralty and Army Council,

and of the members of His Majesty's forces, and other persons acting in his behalf, for securing the public safety and the defence of the realm; and may, by such regulations, authorise the trial by courts-martial and punishment of persons contravening any of the provisions of which regulations designed—

"(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's forces or to assist the enemy; or

"(b) to secure the safety of any means of communication, or of railways, docks or harbours; in like manner as if such persons were subject to military law and had on active service committed an offence under section five of the Army Act."

By 4 & 5 Geo. 5, c. 63, it was provided:

"1. The Defence of the Realm Act, 1914, shall have effect as if—

"(a) at the end of paragraph (a) of section one thereof the following words were inserted, 'or to prevent the spread of reports likely to cause disaffection or alarm;'

"(b) at the end of paragraph (b) of section one thereof there were added the following words, 'or of any area which may be proclaimed by the Admiralty or Army Council to be an area which it is necessary to safeguard in the interest of the training or concentration of any of His Majesty's forces;'

"(c) at the end of section one there were inserted the following words, 'and may by such regulations also provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making byelaws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903.'"

My Lords, the scheme of the statutes was that regulations were to be issued as to the powers and duties of the Admiralty, Army Council and armed services, and of other persons acting for His Majesty for securing the public safety and the defence of the realm. The assumption is that such powers and duties already exist; but that they may be helped, made specific, or, it may be, amplified by [280] regulations. The caution, however, is instantly given as to preserving the rights and liberties of the subject. A trial by court-martial is prescribed and a punishment in respect of contravention of the regulation "in like manner as if such persons were subject to military law" and had offended against s. 5 of the Army Act. In short, the object was twofold—(1.) to draw up or make clear for the citizen a certain line of duty or course of conduct by the issue of a notification according to which that duty and conduct should be regulated, and (2.) to append the

sanction of punishment to disobedience to such regulation.

In no other sense, I am convinced, is "regulation" here meant. In this sense it is intelligible and apt. This is particularly clear in these two first Acts. The repositories of the power were various, extending to the humblest member of "His Majesty's forces." For them, as for the citizen at large, it was important that in the emergency of war their special duties should be named—as to what should be done or should be avoided; failure or disobedience on the part of the citizen to be ranked as an offence, and an offence to be tried in ways prescribed and punishment to follow. It is not very likely—I suggest this very humbly—that either Parliament itself or the repositories of the power—say the soldier or the sailor—would have ever dreamed that, so far at least as these Acts go, they vested these various authorities, high or humble, with power to suspend the liberties of the citizen or visit him at the official's own hand with punishment before he had been convicted as an offender. If any officer of His Majesty's service or other servant of His Majesty had acted in this overbearing and arbitrary manner the law would very quickly have overtaken such a transgression. The word "regulation" or the words "for securing the public safety and the defence of the realm" would have been an ineffective cover to him for such an act of violence.

To take the simplest case—namely, that of a soldier or sailor or other servant of the Crown—it would have been at once seen that not only private liberty but public order would be imperilled if the violent action of seizure of the person of a citizen for no offence and without either trial or opportunity of trial, though such seizure did not fall within the ordinary scope of his powers and duties under the law, was yet held to be justified by the words "for the public [281] safety and the defence of the realm." The law and the Government of the day would have sharply stopped such an inversion and invasion of right, and have limited the action of the delinquent officer to the procedure hitherto known to the law or prescribed by the statute itself.

It remains to be seen whether the words as to public safety and defence have any other or larger meaning in the principal Act, 5 Geo. 5, c. 8, which bears the title of "An Act to Consolidate and Amend the Defence of the Realm Acts"—those two Acts, namely, to whose provisions I have ventured to call pointed attention. Those Acts are repealed, but their provisions, shifted about, reappear in the consolidation.

Every part of s. 1 of the Act appears to me to be relevant to the problem which the

House has to solve. I say this expressly, for I think that the controversy was unduly limited to sub-s. 1. That sub-section is as follows:

"1.—(1.) His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf; and may by such regulations authorise the trial by court-martial, or in the case of minor offences by Courts of summary jurisdiction, and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed—

"(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's forces or the forces of his allies or to assist the enemy; or

"(b) to secure the safety of His Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbours; or

"(c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces by land or sea or to prejudice His Majesty's relations with foreign Powers; or

[282] "(d) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty; or

"(e) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered."

The provisions of this subsection will be presently analysed; but sufficient has already been shown to enable the House to affirm that it is a reproduction, with additions, of the earlier short Acts, and that a further enumeration is given of the things for which regulations are designed, and the breach of which will constitute offences.

Sub-ss. 2 and 3 deal with the acquisition or user of land, factories, or workshops required for Government purposes. The provisions of s. 2 will be hereafter alluded to.

Then occur sub-ss. 4, 5, and 6. They are in these terms:

"(4.) For the purpose of the trial of a person for an offence under the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law and had on active service committed an offence under section five of the Army Act:

"Provided that where it is proved that the offence is committed with the intention of

assisting the enemy a person convicted of such an offence by a court-martial shall be liable to suffer death.

"(5.) For the purpose of the trial of a person for an offence under the regulations by a Court of summary jurisdiction and the punishment thereof, the offence shall be deemed to have been committed either at the place in which the same actually was committed or in any place in which the offender may be, and the maximum penalty which may be inflicted shall be imprisonment with or without hard labour for a term of six months or a fine of one hundred pounds, or both such imprisonment and fine; section seventeen of the Summary Jurisdiction Act, 1879, shall not apply to charges of offences against the regulations, but any person aggrieved by a conviction of a Court of summary jurisdiction may appeal in England to a Court of quarter sessions, and in Scotland under and in terms of the Summary Jurisdiction (Scotland) Acts, and in Ireland in manner provided by the Summary Jurisdiction (Ireland) Acts.

"(6.) The regulations may authorise a court-martial or Court of summary jurisdiction, in addition to any other punishment, to order [283] the forfeiture of any goods in respect of which an offence against the regulations has been committed."

My Lords, it is not too much to say that so far as Parliament was concerned its intentions were directed anxiously to providing for the prompt and correct treatment according to law of the case of offenders against the regulations. Meticulous regard is paid to proceeding under the Act according to justice; provision is carefully made for trial; and, while promptitude is desired, it becomes clear beyond doubt that the right of the subject to trial in accordance with law shall be guarded and preserved.

One other striking feature of the legislation makes this intention on the part of Parliament luminously clear. It is the passing in a few months' time—namely, on March 16, 1915—of the Amendment Act, 5 Geo. 5, c. 34. The trial of offences is again anxiously handled, and in the same spirit—protection of the rights and liberties of the subject, and to make sure of that beyond a doubt. An offence against the regulations may, instead of being tried by court-martial, be tried by a civil Court with a jury. Sect. 1, sub-s. 2, is of particular importance. It provides:

"(2.) Where a person, being a British subject but not being a person subject to the Naval Discipline Act or to military law, is alleged to be guilty of an offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, he shall be entitled, within six clear days from the time when the general nature of the charge is communicated to him, to claim to be tried by a

civil Court with a jury instead of being tried by court-martial, and where such a claim is made in manner provided by regulations under the last-mentioned Act the offence shall not be tried by court-martial:

"Provided that this subsection shall not apply where the offence is tried before a Court of summary jurisdiction:

"Provided also that before the trial of any person to whom this section applies, and as soon as practicable after arrest, the general nature of the charge shall be communicated to him in writing and notice in writing shall at the same time be given, in a form provided by regulations under the said Act, of his rights under this section."

I ask myself what language could be more significant, more scrupulously regardful of liberty, than this, that on demand of the [284] person arrested he may be tried by jury, that as soon as practicable after arrest he is to be informed of the nature of the charge against him and of all his rights under the section? To all which the reply is made: "that all this scrupulous regard for liberty and the forms of trial and law is of no avail to any class of His Majesty's subjects against whom a 'regulation' of internment has gone forth. It a British citizen be seized under such a fiat, it is not because he has offended against a regulation—not at all. He has, therefore, no right to be informed of any charge against him. Charge against him there is none. Trial—he cannot choose its form; his rights are gone without trial. A 'regulation' has gone forth against him. He has been 'regulated' out of his liberty and out of every protection of the kind. He must be a passive victim."

The few words founded on here and in the Courts below in support of this supereminent and overriding power have accordingly to be examined. Enough has been said to show that if they bear the construction contended for by the Crown they are singularly at variance with that intention to pay scrupulous regard to private right which is so plain from the scheme and language of these Defence Acts as a whole.

These are the words: "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty," &c., &c. A change has occurred in this consolidation and amendment Act,—not in the important words, but in their collocation. The important words referred to are "for securing the public safety and the defence of the realm." In the earlier Acts the regulations were to be "as to the powers and duties of the Admiralty," &c., . . . "for securing public safety and the defence of the realm." Now

the regulations issue direct from the King in Council. It is perfectly plain to me how this occurred. The later details of the section show that regulations as to the powers of officers or individuals might cover ground beyond the province of those departments or persons. For example, the Board of Trade, the Post Office, or the Foreign Office might well be concerned in, or in the carrying out of, many of these details. And so the shortest and most comprehensive method was taken, namely, of transferring the general topic dealt with in [285] regulations to the Government of the day—all the rest remaining in substance as before.

It is, in my view, largely owing to this simple change, however, and from the collocation in which the words now stand that the Courts below have come to their conclusion.

From that conclusion positively stupendous results follow. The words, it is said, are perfectly general; the King in Council is vested with powers to judge of what is for the public safety and the defence of the realm, and to act accordingly. All the rest of those statutes as to trial, intimation, notification of rights; every provision for the legal disposal of the question affecting liberty—all this is on one side, the side of offence against a regulation: on the other side stands this supereminent power of the Government of the day. In the exercise of that power the plainest teachings of history and dictates of justice demand that, on the one hand, Government power, and, on the other, individual rights—these two—shall face each other as party and party. But it is not so, so it is said; here the Government as a party shall act at its own hand; the subject as a party shall submit and shall not be heard: the Government is at once to be party, judge, and executioner. When—so is the logic of the argument—Parliament took elaborate pains to make a legal course and legal remedy plain to the subject as to all the regulations which were stated in detail, there was one thing which Parliament did not disclose, but left Courts of law to imply—namely, that Parliament, all the time and intentionally, left another deadly weapon in the hands of the Government of the day under which the remainder of those very Acts, not to speak of the entire body of the laws of these islands protective of liberty, would be avoided. As occasion served the Government of the day, despotic force could be wielded, and that whole fabric of protection be gone. My Lords, I do not believe Parliament ever intended anything of the kind. We are not in the region of subtlety or obliquity. Holding the views I do of this parliamentary transaction, and forming these from the language employed, I cannot attribute to the Legislature the intention alleged.

I proceed from the collocation, and the manner in which that collocation was achieved, to consider the words themselves. There are two views of them. The one favours complete generality: this [286] has been accepted by the Courts, and to that and its importance I have just alluded.

On the contrary, I humbly think it impossible to look at the statute as a whole without seeing that the whole structure must stand together, that the power in the Government to issue regulations is—within the general sphere and purpose of public safety and defence—to prescribe a line of duty and course of action for the citizens so as, in this time of emergency, to bring their private conduct into co-operation for that general end. This and this alone is what “regulation” means: it constitutes pro tanto a code of conduct; in following the code the citizen will be safe; in violating it the citizen will become an offender and may be charged and tried summarily, or by a court-martial or a jury, and as for a felony. This is perfectly simple: it squares with all the rest of the legislation and destroys none of it. It sacrifices no constitutional principle: it introduces nothing of the nature of arbitrary condemnation or punishment; the Acts become a help and guide as well as a warning to the lieges.

I have now described and dealt with the origin and collocation of the important words of the statute falling to be construed, and have stated the construction of these words, which appears to my mind to be so plain. But I am called upon both by respect and duty to inquire—and this very anxiously—into that other view of the case which has been upheld by judicial pronouncement. The case is decided not upon specialty, but upon principle, and how far-reaching that principle is will presently be seen.

It is well to gather up the things about which there can be no dispute. The power to issue regulations for the public safety and for the defence of the realm is vested by the Act in His Majesty in Council. In the course of the discussion this was incidentally alluded to in connection with the Royal prerogative. My Lords, it has nothing to do with the Royal prerogative. If once again, and ever so slightly, that prerogative gets into association with executive acts done apart from clear parliamentary authority, it will be an evil day: that way lies revolution. Do not let the thing which has been done—in my opinion a violent thing—be associated for one moment with, or at any point be said to be supported by, Royal prerogative. Its validity depends upon the Act of Parliament alone.

[287] The form, in modern times, of using the Privy Council as the executive channel for statutory power is measured, and must be

measured strictly, by the ambit of the legislative pronouncement. And that channel itself, seeing that under the Constitution His Majesty acts only through his Ministers, is simply the Government of the day. The author of the power is Parliament: the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny. That way also would lie public unrest and public peril. On all this there is no disputing.

This reduces to comparative unimportance those apparent safeguards derived not from the Act of Parliament, but inserted into the “regulations” themselves. The language of the regulation, for instance, “where it appears to the Secretary of State” and “on the recommendation of a competent naval or military authority” is simply equivalent to a declaration that the delegate, to judge and issue, is one department of Government, and that that will, of course, act in accord with, and on the recommendation of, those other departments which are presumably versed in the situation. The Government remains master. And a proviso is made for due consideration by an advisory committee of any representations against the order; but it was frankly admitted that the Secretary of State is not bound to comply with the advice received; he may do as he likes: again the Government is master.

As these considerations are revolved the importance of the issue for liberty does not wane. The interpretation put upon this Government power to issue regulations for safety and defence is that of perfect generality. Is this generality limited? It was asked. Yes, replied the Crown; the limitations are two, and two only. In the first place, regulations can only be issued during the war—a limitation in time. In the second place, they can only be issued for the [288] public safety and for the defence of the realm—a limitation of purpose. But who is to judge of that purpose? As to what acts of State are promotive or regardful of that purpose, can a Court of law arrest the hand of a responsible Executive? Extreme cases may be figured in which personal caprice and not public considerations might be imagined, but in everything, from the lighting of a room to the

devastation of a province, no Court of law could dare to set up its judgment on the merits of an issue—a public and political issue—of safety or defence. So that this limitation, as a legal limitation, is illusory. The only one that remains is that of time. “During the war” the Government has been allowed at its own hand to do anything it likes. “Regulation” covers all: the issue of decrees, arrests, proscription, imprisonment, internment, exile,—all are covered comprehensively by the word “regulations.” Such an issue is made on grounds which are not in the region of law; judges are not fitted to interpose on these: a judgment, nay, possibly even a comment, upon them would beamirch the Bench. That course which alone is safe is, leave the domain of public need or claim or advantage to the undisturbed possession of Parliament and its delegates. I accordingly agree that a plea put forward by a subject against a Government, grounded upon an appeal to Courts of law as to public requirements, would be unavailing in the region of *ultra vires*. Once let the overmastering generality of the principle of regulation be affirmed, as has been done, all is lost; the law itself is overmastered. The only law remaining is that which the Bench must accept from the mouth of the Government: “*Hoc volo, sic jubeo; sit pro ratione voluntas.*”

I have already suggested that “regulation” means something much more limited,—as I think much more reasonable,—and certainly more in accordance with the ordinary meaning of the word, than all this. “Regulation” means, as I have ventured to set forth, the formulation of rules in the interests of public safety or defence—rules of action, behaviour, and conduct—in obedience to which the citizens may co-operate for these ends, and for disobedience to which they may be punished. But the regulation now challenged is not of that character. It is not the formulation of a rule of action, behaviour, or conduct to be obeyed by the citizen; but it is for the summary arrest and detention of his person, grounded, and grounded [289] alone, on the subject’s hostile origin or association. The one or the other might, it is to be presumed in the Government’s favour, form a motive, a temptation, a spring, all in a region incapable of proof but prolific in suspicion, for something inimical to public safety or defence. The subject may never have dreamed of such inimical conduct: he may be ardently attached to this country’s interests and cause, or he may not. Let the power go forth though it may involve the innocent with the guilty, and in such a way that that issue of innocence or guilt can never be determined; let the public end sanctify, as may be the case, this private wrong: the generality of a power to issue a regulation covers the case; it is *intra vires*.

We shall have to consider in a little while how much on this principle of generality,—this principle that during the war the Government may do what it likes—how much is repealed. Let us pursue the inquiry as to how much the power embraces. Against regulations, in their generality, as thus construed, nothing can stand. No rights, be they as ancient as Magna Carta, no laws, be they as deep as the foundations of the Constitution: all are swept aside by the generality of the power vested in the Executive to issue “regulations.” “*Silent enim, leges inter arma.*”

I observe that this is supported by the following argument, namely, that the provisions of the subsection embrace two parts, namely, prevention and punishment; that these are two separate things; and that what has been done here is prevention and is not punishment. This last may sufficiently surprise those who are subjected to it; but “stone walls do not a prison make.” Those interned are being cared for, watched over, prevented, not punished. Very different, and very properly different, from this was the view of Blackstone (*Commentaries*, i. 136): “The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment.”

Further, my Lords, I am humbly of opinion that the attempted distinction fails; and that in no event could it have the slightest bearing upon the point of construction to be determined.

For it is when, and only when, the subsection comes to categorize the heads and particulars of public safety and defence to which [290] the regulations might be directed that the word “prevent” occurs. The regulations are for preventing certain things and for securing other things—for preventing (1.) communication with the enemy, (2.) spreading false reports, &c., and (3.) assisting the enemy; and for securing (1.) safety of forces, ships, railways, or harbours, (2.) navigation according to Admiralty direction. This is the distinction, if it be a distinction—namely, between preventing and securing. But, when punishment is dealt with, such a distinction no longer holds; and if there be disobedience to regulation upon all or any one of these heads and particulars, whether for preventing danger or securing safety, then punishment may follow. The statute is careful to prescribe punishment for all. Punishment is not distinguished from either preventing or securing: it applies to disobedience or offence under both the latter heads alike.

How then, I respectfully ask, how then can it be thought possible to construe the subsection as meaning not only the grant of a power of prevention from doing certain

things, which done shall be punishable, but the reserve of some other and supereminent power of prevention, which is distinguished from punishment? There is no such reserve and no such distinction in the Act of Parliament. There might have been, but there is not; and the fact that this is so is a strong confirmation of the view that Parliament never intended the vesting of the Executive with arbitrary power, but gave power to set up a code of conduct and action and to reach the region of punishment when, and only when, that code was broken.

I pursue the consideration of the question how much the principle of generality, thus defended, embraces. Having limited the principle in the matter of time, and there being no other limitation, let us see what Government may do under this head of "regulation" and start with the one in hand. It is, "in view of the hostile origin or associations" of any person, to intern him without trial or chance of trial—by force, and not by process of law.

But does the principle, or does it not, embrace a power not over liberty alone but also over life? If the public safety and defence warrant the Government under the Act to incarcerate a citizen without trial, do they stop at that, or do they warrant his execution without trial? If there is a power to lock up a person of hostile origin [291] and associations because the Government judges that course to be for public safety and defence, why, on the same principle and in exercise of the same power, may he not be shot out of hand? I put the point to the learned Attorney-General, and obtained from him no further answer than that the graver result seemed to be perfectly logical. I think it is. The cases are by no means hard to figure in which a Government in a time of unrest, and moved by a sense of duty, assisted, it may be, by a gust of popular fury, might issue a regulation applying, as here, to persons of hostile origin or association, saying, "Let such danger really be ended and done with; let such suspects be shot." The defence would be, I humbly think, exactly that principle, and no other, on which the judgments of the Courts below are founded—namely, that during the war this power to issue regulations is so vast that it covers all acts which, though they subvert the ordinary fundamental and constitutional rights, are in the Government's view directed towards the general aim of public safety or defence.

Under this the Government becomes a Committee of Public Safety. But its powers as such are far more arbitrary than those of the most famous Committee of Public Safety known to history. It preserved a form of trial, of evidence, of interrogations. And the very homage which it paid to law dis-

covered the odium of its procedure to the world. But the so-called principle—the principle of prevention, the comprehensive principle—avoids the odium of that brutality of the Terror. The analogy is with a practice, more silent, more sinister—with the *lettres de cachet* of Louis Quatorze. No trial: proscription. The victim may be "regulated"—not in his course of conduct or of action, not as to what he should do or avoid doing. He may be regulated to prison or the scaffold. Suppose the appellant had been appointed for execution. Public outcry, public passion, public pity—these I can conceive; but I cannot conceive one argument upon the legal construction of this Act of Parliament that would have been different from the one which is now affirmed by Courts of law. It is this last matter with which these are concerned. In my humble opinion the construction is unsound. I think that if Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulations for [292] safety and defence. The expansions of such language into the inclusion of such a power appear to me to be unwarrantably strained.

The use of the Government itself as a Committee of Public Safety has its conveniences, has its advantages. So had the Star Chamber. "The Star Chamber," says Maitland (*Constitutional History of England*, p. 263), "examining the accused, and making no use of the jury, probably succeeded in punishing many crimes which would otherwise have gone unpunished. But that it was a tyrannical court, that it became more and more tyrannical, and under Charles I. was guilty of great infamies, is still more indubitable." And then occur his memorable words: "It was a court of politicians enforcing a policy, not a court of judges administering the law."

There is the basic danger. And may I further emphatically observe that the danger is found in an especial degree whenever the law is not the same for all, but the selection of the victim is left to the plenary discretion whether of a tyrant, a committee, a bureaucracy or any other depository of despotic power. Whoever administers it, this power of selection of a class, and power of selection within a class is the negation of public safety or defence. It is poison to the commonwealth.

For within the range even of one regulation—say to affect "persons of hostile origin or association"—no one can say where the axe will fall. That description applies in all ranks and classes of society. That is why I feel constrained to dissent respectfully from the suggestion that in administering this power over liberty we ought to trust the Government. With a change of Government

even during the war this very engine may be turned against its own authors. There may be such a change in the extent and lines of such a Government's discretion as to turn the engine against new bodies of citizens, a new selection within the same class, or a new selection of a class. Such zigzags and ups and downs in the region of individual liberty are on this construction possible without even altering the words of an existing regulation, once you are committed to the view that it falls within a delegation, so immense, implied in words from the Act.

And once you have abandoned the line of safety which I have sketched—namely, confining regulations to rules of conduct to be obeyed with safety or punished after trial for the breach—once that [293] is abandoned, how far may you not go? Once a discretion over all things and persons and rights and liberties, so as to secure public safety and defence, what regulations may issue? This one is founded on "hostile origin or associations." It enters the sphere of suspicion, founded not on conduct but on presumed opinions, beliefs, motives, or prepossessions arising from the land from which a person sprang. This is dangerous country; it has its dark reminders. It is the proscription, the arrest of suspects, at the will of men in power vested with a plenary discretion. If the power to issue regulations meant thus to warrant a passage from proof to suspicion and from the sphere of action to the sphere of motive or the mind, let us think how much this involves.

No far-fetched illustrations are needed; for, my Lords, there is something which may and does move the actions of men often far more than origin or association, and that is religion. Under its influence men may cherish beliefs which are very disconcerting to the Government of the day, and hold opinions which the Government may consider dangerous to the safety of the realm. And so, if the principle of this construction of the statute be sound, to what a strange pass have we come! A regulation may issue against Roman Catholics—all, or, say, in the South of Ireland, or against Jews—all, or, say in the East of London,—they may lose their liberty without a trial. During the war that entire chapter of the removal of Catholic and Jewish disabilities which has made the toleration of Britain famous through the world may be removed—not because her Parliament has expressly said so, but by a stroke of the pen of a Secretary of State.

Vested with this power of proscription, and permitted to enter the sphere of opinion and belief, they, who alone can judge as to public safety and defence, may reckon a political creed their special care, and if that creed be socialism, pacifism, republicanism, the per-

sons holding such creeds may be regarded out of the way, although never deed was done or word uttered by them that could be charged as a crime. The inmost citadel of our liberties would be thus attacked. For, as Sir Erskine May observes, this is "the greatest of all our liberties—liberty of opinion."

All this, upon analysis, is what the Government through its law officers claims at the Bar of this House, and what is involved in the [294] construction adopted by the Courts below. In my opinion the words of the statute cannot be stretched to bear anything so repugnant to liberty and the law.

I pass now from what the Act says and does to consider what, upon the vast implication given to its few words, it repeals.

My Lords, I do not think it any mistake to suggest that in substance it repeals the Habeas Corpus Acts, the 31st of Charles II. and the 56th of George III. The Habeas Corpus Acts are, it is true, procedure Acts. In one sense they confer no rights upon the subject, but they provide a means whereby his fundamental rights shall be vindicated, his freedom from arrest except on justifiable legal process shall be secured, and arbitrary attack upon liberty and life shall be promptly and effectually foiled by law. Formally in this case the writ of habeas corpus was allowed. It is now being tried. But what has been done by the Courts below is to give due formal respect to the procedure of remedy, but to deny the remedy itself by inferring the repeal of those very fundamental rights which the remedy was meant to secure. This is to allow the subjects of the King by law to enter the fortress of their liberties only after that fortress has been by law destroyed.

As will be seen in a moment, it is not that the habeas corpus has been repealed; it is not, as in so many trying periods of history, that it has been suspended. There is a repeal and a suspension much more drastic than that. There is a constructive repeal which has, so far as I am aware, no parallel in our annals—a getting behind the habeas corpus by an implied but none the less effective repeal of the most famous provisions of Magna Carta itself. It is well settled that once liberation under the writ has been granted "the legality of that discharge could never be brought in question:" *Cox v. Hakes*, 15 App. Cas. 506, 522; but in pronouncing judgment to that effect Lord Halsbury used language which I here adopt on the wider problem now in hand: "Your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed."

[295] I go accordingly at once to the notable 39th and 40th chapters of Magna Carta, wrung from John in June, 1215.

Mr. McKechnie (*Magna Carta*, 1914 ed. p. 375) translates them thus. His version is of set purpose literal:

"XXXIX. No freeman shall be taken or [and] imprisoned or disseised or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.

"XL. To no one will we sell, to no one will we refuse or delay, right or justice."

The learned author justly observes: "Its object was to prohibit John from resorting to what is whimsically known in Scotland as 'Jeddart justice.' It forbade him for the future to place execution before judgment." And on the words "*nec super eum ibimus nec super eum mittemus*" he remarks in the same spirit: "Their object was to prevent John from substituting violence for legal process. . . . He must never again attack *per vim et arma* men unjudged and uncondemned."

If there be any, my Lords, who in this time of storm and stress think these chapters useless reading or their lesson out of date, I am not of their number. I remember the penetrating judgment of Hallam on that very topic. After citing these chapters of the Charter that great author observes ("Middle Ages," 6th ed. vol. 2, p. 449): "It is obvious, that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the æra, therefore, of King John's Charter it must have been a clear principle of our Constitution that no man can be detained in prison without trial. Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became from that æra the right of every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II., but founded upon the broad basis of Magna Carta, is the principal bulwark of English liberty; and if every temporary circumstances, or the doubtful plea of political necessity, shall lead men to look on its denial with apathy, the most distinguishing characteristic of our Constitution will be effaced."

Speaking for myself, and again coming back to the words to be [296] construed, namely, "His Majesty in Council has power during the continuance of the war to issue regulations for securing the public safety and the defence of the realm," I decline to believe that Parliament ever did or intended to do by these words those stupendous things—to remove "the two main rights of civil society," to repeal "the clear principle of our Constitution that no man can be detained in

prison without trial," or to efface "the most distinguishing characteristic of our Constitution."

In *Rex v. Darnel* (1627) 3 How. St. Tr. 1, 128, Coke's great argument had embraced the famous proposition: "I. No man can be imprisoned upon will and pleasure of any but a bondman or villein. II. If a freeman of England might be imprisoned at the will and pleasure of the King or by his command, he were in worse case even than a villein . . . and III. A freeman imprisoned without cause is civilly dead." And in commenting on the case so staid an author as Broom delivers himself (*Constitutional Law*, 2d ed. p. 223) thus: "This great constitutional remedy [the writ of habeas corpus] rests upon the common law declared by Magna Carta and the statutes which affirm it; rests, likewise, on specific enactments ensuring its efficiency, extending its applicability, and rendering more firm and durable the liberties of the people . . . and the right to claim it cannot be suspended, even for one hour, by any means short of an Act of Parliament."

How hollow and worthless to the appellant is the concession of a trial of his writ of habeas corpus when the basis of his possible liberation is constructively denied! The method is not unknown to English history, but history in darker times: the method of despotism; the tyrannical fiat of the King in Council; and compliance to that as law.

It brings back to mind the constitutional struggle of 1628 and the very language of the Petition of Right: "And whereas," says ch. 2, "alsoe by the Statute called the Great Charter of the Liberties of England, it is declared and enacted that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customes or be outlawed or exiled or in any manner destroyed, but by the lawful judgment of his peeres or by the law of the land. . . . Neverthelessse [ch. 5] against the tenor of the said statutes, and other [297] the good lawes and statutes of your realme to that end provided, divers of your subjects have of late been imprisoned without any cause shewed: And when for their deliverance they were brought before your justices by your Majesties writts of habeas corpus, there to undergoe and receive as the Court should order, and their keepers commaunded to certifie the causes of their detayner, no cause was certified, but that they were detained by your Majesties speciall commaund signified by the Lords of your Privie Councell, and yet were returned backe to severall prisons without being charged with any thing to which they might make aunswere according to the lawe. . . . They doe [ch. 8] therefore humbly pray your Most Excellent Majestie . . . that no freeman in any such manner as is before mencioned be

imprisoned or detained." The grant of this Petition was wrung from Charles I., and it entered the Statutes of the Realm. And this, too, this second charter of liberty, has been borne to the ground by the tremendous sweep of an implied repeal!

The list need not be enlarged; it would include the Bill of Rights itself.

But I will venture to cite one Scotch Act which ranks deservedly high as a charter of fundamental liberties and a security against prolonged incarceration without being brought to trial. It is the Act of 1701. It was entitled "An Act for Preventing Wrongful Imprisonment and against Undue Delay in Trials."

Scotland had been greatly exercised over the excesses of arbitrary power of the later Stuarts, and liberty and life had been ruthlessly sacrificed to arbitrary power. It had no Magna Carta, no Habeas Corpus Act; but it had a loosely defined system of making application for liberation grounded on the right to be duly and properly charged, and to be tried with reasonable promptitude. By the Act of 1701—not to enter into details—it was provided that a person incarcerated could run his letters, the effect being to charge all concerned, both prosecutor and Courts of law, that tried he must be within sixty days, and if not so tried he must be set free. A further period of forty days was allowed in which new criminal letters could run. Should that period expire without the trial having been conducted and actually brought to a verdict, then on the 101st day the subject was free, and free for ever, from the charge. Magistrates or gaolers who dared to detain him were guilty of wrongous [298] imprisonment, and for them punishment was prescribed. The Act has always been a prized constitutional possession of the Scottish people. This case is English, but for aught I know there may have been in Scotland similar cases: persons may have been interned there as here for a period of eighteen months under a fiat of the Secretary of State. And I presume that that arbitrary act would be defended under the same argument that constitutional rights and liberties, however fundamental and however prized, are all under eclipse, because a regulation for public safety and defence has been expounded and construed to mean a repeal of, *inter alia*, the Act of 1701. My Lords, I repeat that I think this brief expression in the recent Act will not bear this extraordinary strain.

Nor do I overstate the value attached to that statute even by the most learned authors.

Burnett (Treatise on Various Branches of the Criminal Law of Scotland, p. 316) is loud in praise of the Act. In his commentary on it he says: "The objects indeed of this

statute are of the first importance to the security and happiness of every individual of the community; inasmuch as *the injury of unjust and illegal confinement*, while it is often the most difficult to guard against, is in its nature the most oppressive and the most likely to be resorted to by an arbitrary Government." He re-echoes the words of Blackstone, saying that the Act of 1701 may be justly termed the Magna Carta of Scotland. And he sums up his eulogy by observing that the Act "may justly be considered as more favorable to the subject than the boasted Habeas Corpus Act of England." No one will accuse Baron Hume of having been the enemy of vigorous government. But even he says, apropos of the great statute (Commentaries on the Law of Scotland respecting Crimes, vol. 2, p. 98): "It is obvious that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law,—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried,"—(the very case that is now before your Lordships' House) "nay, it may be, not informed of the charge against him, or the name of the accuser." How strangely in Hume's ears would have sounded the argument that a law had been passed giving power to the King in Council to issue regulations for public safety and defence, and that this meant [299] the repeal of the great Act itself and the reintroduction into our Constitution and our jurisprudence of "the greatest and most dangerous of all abuses of the forms of law."

Nor has the refusal lightly to imply the repeal of laws and liberties fundamental to British citizenship been confined to these islands. It has been far more widely extended. A notable instance of this is the case of *Sprigg v. Sigcau* [1897] A. C. 238, 244, 245, 248, brought on appeal to the Privy Council from the Cape of Good Hope. Sigcau was the independent native chief of Pondoland. Pondoland was in 1894 ceded to the British Crown, and Sigcau then accordingly became one of His Majesty's subjects. An Act of the Cape Legislature was passed, and s. 2 thereof provided that the territories "shall be subject to such laws statutes and ordinances" as "the Governor shall from time to time by Proclamation declare to be in force in such territories." This language was indeed general.

In June, 1895, Sigcau was arrested and imprisoned by virtue of a Proclamation issued by Sir Hercules Robinson as Governor that "the said Sigcau has by his acts in disregard and defiance of the law rendered himself liable to arrest:" and there was a proviso very much on the lines of the proviso in the present case,

that after inquiry, "and in case it may be possible to do so without jeopardy to the interests of the public peace and order" the Governor might order release and appoint a selected place for the chief's residence.

He petitioned the South African Courts, and the Supreme Court of the Cape Colony, presided over by Lord de Villiers, ordered his release, although this had been opposed by Mr. Rhodes as Prime Minister and Secretary for Native Affairs and by the Attorney-General of the day on the grounds of public safety.

On appeal to the Privy Council this judgment was confirmed by one of the strongest Judicial Committees that ever sat. Lord Watson said: "Their Lordships think it sufficient for the disposal of this appeal to point out that the Proclamation . . . exceeds any delegated authority which was possessed by the Governor in two particulars which constitute its leading features. It is a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes and ordinances which he is authorised to proclaim; and it in substance repeals the whole provisions of the [300] existing law with respect to criminal proceedings, in so far as the respondent is concerned. Upon these grounds, their Lordships are of opinion that the issue of the Proclamation was an illegal and unwarrantable act." And the liberation of Sigcau was confirmed. The entire case as reported is an instructive example of the manner in which the defence of ordinary and constitutional legal rights of a British citizen ought to be supported by Courts of law even in times of stress as against the pretensions of authority when vested merely with the authority of general words of power.

My Lords, I pass from the subject of appeal to the further proposition that what has been done on the implication supposed is alien to the practice of the Constitution. On many occasions in this island has the attention of the Legislature been called to the subject of exceptional legislation in view of foreign attack, political unrest, or civil war. And the mode of dealing has been frank, firm, and open—namely, a temporary suspension of the Habeas Corpus Act. When the authority of the King in Council was stretched out to interfere with liberty or life and to undermine the securities thereof in Magna Carta and the Habeas Corpus Acts, public unrest might grow, even a dynasty might accelerate its own ruin, but Parliament would reassert itself and sharply bring the peril to an end. But when Parliament itself devoted its energies to the task it took it up in no casual manner and left its action in no form so covert that the Bench had to expand inferentially its meaning.

Blackstone is quite clear upon the practice of the Constitution (Comm. i. 136). He searchingly treats the cases both of liberty and life as tests, both and equally, of one and the same principle, the very principle which is under scrutiny in the present case. "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But the confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the State is in real danger, even this may be a necessary measure. But the happiness of our Constitution is, that it is not left to the Executive power to determine when the danger of the State is so [301] great, as to render this measure expedient. For it is the Parliament only, or legislative power, that, whenever it sees proper, can authorise the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing."

It would take too long to enumerate the instances in English history in which this course has been followed. No instance was advanced in argument when the method was not adopted but the end reached by other means. But I will venture to recount one striking case in the close of the eighteenth century—interesting because the cases of England and Scotland were each distinctively treated, and in both the constitutional rights guaranteed by statute were recognized, and temporary suspension and repeal were accomplished, overt and express.

Everyone's mind in Europe was stirred by the events of 1789 to 1793, and the execution of Louis XVI. and his queen in the latter year precipitated parliamentary action here. But it was careful action. In 1794 the Act 34 Geo. 3, was passed. It proceeded upon the preamble: "Whereas a traitorous and detestable conspiracy has been formed for subverting the existing laws and Constitution, and for introducing the system of anarchy and confusion which has so fatally obtained in France." It enacted for England that persons that are or shall be in prison by a warrant of the King and six Privy Councillors, or by warrant of a Secretary, for treason or treasonable practices may be detained "without bail or mainprize" till February 1, 1795, and no judge should release them, "any law or statute to the contrary notwithstanding." This was plain language: it followed constitutional practice; for some months and in defined cases the Constitution was suspended.

How was Scotland dealt with? In 1707 the Union of the Parliaments had been effected; but the great Act of the Scotch Parliament in 1701, was now, in 1794, fully and separately recognized. It was enacted that the Act made in Scotland in the year of our Lord 1701, "in so far as the same may be construed to relate to cases of treason and suspicion of treason, be suspended" until the same fixed date, namely, February 1, 1795, and then the following notable proviso follows—namely, "Provided always, that, from and after the said first day of February, one thousand seven hundred and ninety-five, [302] the said persons so committed shall have the benefit and advantage of all laws and statutes any way relating to or providing for the liberty of the subjects of this realm, and that this present Act shall continue until the said first day of February, one thousand seven hundred and ninety-five, and no longer."

That, my Lords, is an ordinary and a fair sample of our constitutional practice, and of the express, the watchful, the clearly limited, and the scrupulously careful handling of our fundamental liberties whenever these are meant to be affected. Judged in the light of that practice the wide and entirely inferential construction of words about regulations for safety and defence which has been adopted by the Courts below seems to be the last resort of interpretation and to be strikingly condemned.

And before I leave the topic I may observe as bearing on the intention of the Legislature that where, in this very Act of 1914, suspension or repeal or a transaction of that nature was truly meant, Parliament knew perfectly well how to accomplish its object, and did so. By the second subsection of the very s. 1 which is under construction it is provided that "any such regulations may provide for the suspension of any restrictions on the acquisition or user of land" under the Defence and other Acts, and may supersede any enactments, &c., as to pilotage. It is to my mind inconceivable that Parliament, expressly suspending and repealing certain laws about property or pilotage, should have refrained from doing so, if it had meant to do so, in the infinitely weightier matters of the law and left the suspension and repeal of these to be implied. I do not think on ordinary principles of interpretation such a thing as this vast suspension and repeal can be inferred by law.

My Lords, the House is in possession of my construction of the words giving power to the Government to make regulations. That construction is simple. It does violence to no language. Under it regulations play their useful and their helpful part. It is entirely consistent with the rest of the Act. It operates no repeal of any statutes of the realm.

It leads to no startling or absurd results and to no upheaval of constitutional right.

In every one of these particulars it appears to be in accord with those principles of the interpretation of statutes which are embedded in our law and are unquestionable.

[303] Differing as I unfortunately and respectfully do from your Lordships, it would not be right that I should fail to add that the expanded construction adopted by the Courts below appears to me in every one of these particulars to be inconsistent with those principles of interpretation which have been long recognized. It is, I humbly think, not simple, but strained. It is repugnant to the rest of the Act. It operates repeal of statutes on an important and vast scale. It leads to startling and absurd results and to an upheaval of constitutional right.

My reasons and exposition on each of these topics are before the House. I do not think the application of legal doctrine to them is doubtful. To that I come, taking them in their order.

In the first place, my Lords, I strongly protest against the view of the Courts below of the words of the Act being taken as a literal view. The appellant has been (1.) interned, (2.) without a trial, (3.) because he is of hostile origin or associations. Parliament never said in words any one of those things. They are and are alone inferences—inferences from the delegation of a power, a power to make regulations for safety and defence. As to what may be done under such a power may be matter of far-reaching inference or wide and deep speculation, but these things do not touch the literal rule, the rule as to grammatical and ordinary sense of the actual words employed in the Act itself—the rule of Lord Wensleydale in *Grey v. Pearson* (1857) 6 H. L. Cas. 61, 106. That rule does not go far in any case of difficulty; but, in so far as it may be held to have a bearing on this case, it leaves conspicuous force to the observation that if Parliament had really meant to sanction internment without trial for the cause assigned it could have said so without the slightest difficulty, and not left a point which, I think, is so fundamental to be reached by inference.

I may add, my Lords, that, holding as I do that Parliament never intended to construct an instrument of violent and arbitrary power, but to do a much more helpful and reasonable thing, I should have come to the same conclusion even though the language had been much more plain and definite than it is. To adopt the familiar language of Lord Selborne in *Caledonian R. Co. v. North British R. Co.* (1881) 6 App. Cas. 114, 122, "the more literal construction ought not to prevail, [304] if . . . it is opposed to the intentions of the Legislature, as apparent by the

statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." I refer also on this head to the judgments of Jessel M. R. and James L.J. in *Ex p. Walton* (1881) 17 Ch. D. 746.

I turn from literal construction—which is not this case—to ask whether the construction of inference or implication is consistent with or repugnant to the rest of the Act? So consistent is the interpretation which I have ventured to put upon the subsection—namely, that regulations are the formulation of rules for the citizen's action and conduct, in obedience to which he shall be safe and in disobedience to which he shall on trial be punished—that all the rest of the Act fits in with this and makes the requisite provisions in great detail for trial and punishment accordingly. So repugnant is it to the interpretation finding favour in the Courts below—the interpretation that a power to issue regulations for safety and defence covers every power over the citizens which the Government may judge expedient for the object in view—that the entire remainder of the Act becomes surplusage. Everything could have been done by regulation. And indeed it does not stop there. For nine-tenths of the labours of Parliament are surplusage: all are covered by the same principle; all could be covered by "regulations." This construction humbly appears to me to be opposed to legal principle. Two constructions are available—one of harmony and consistency, the other of overriding and repugnancy. In my view, in all such cases it is reasonable and according to law that the former be preferred.

Upon the last point—namely, that the construction upheld implies a repeal of the ancient liberties and rights of our people and of statutes both south and north of the Tweed which have been their protection in the enjoyment of these—your Lordships have already had a statement of my views. No repeal like this, or in this manner, at once so sweeping and so covert, has ever been accomplished in the modern history of this island. That Parliament should have entertained such an intention of repeal I do not believe; that it would have recoiled from putting such an intention of repeal into words I can well understand. The law on such a subject is [305] beyond doubt or question. Such an intention is the very last resort of a Court of construction.

Your Lordships have already heard my citation from Blackstone. It holds the field. It still represents, in my opinion, both the law of the land and the practice of the Constitution. Both may have been revolutionized by the stupendous repeal implied from the words of this Act. I do not think there is any such repeal, either in word, in implication, or in intention.

In the latest edition of Maxwell on the Interpretation of Statutes, p. 268, I find the law exactly as I view it stated thus: "Repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

The construction I have ventured to propose appears to me to be not unreasonable, but to square with every familiar and accustomed canon. I think that the judgment of the Courts below is erroneous, and is fraught with grave legal and constitutional danger. In my opinion the appeal should be allowed, the regulation challenged should be declared *ultra vires*, and the appellant should be set at liberty.

LORD WRENBURY.—My Lords, the question is whether reg. 14B under the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), is *ultra vires*. I turn to the Act at once to see what upon its terms are the characteristics—the scope, the purpose, the limits, and the character—of the regulations which the Act allows. I shall then go on to inquire whether the regulation in question falls within them.

Sect. 1, sub-s. 1, of the Act of 1914 is an empowering section. It gives power to His Majesty in Council within a limit of time—"during the continuance of the present war"—to issue regulations for a defined purpose—"for securing the public safety and the [306] defence of the realm." It goes on to provide that the regulations may contain provisions "as to the powers and duties for that purpose" of certain stated administrative bodies and persons. It adds that the regulations may authorize the trial in defined ways and the punishment of persons committing offences against the regulations, and in particular against any of the provisions of regulations designed to prevent certain acts or secure certain results described under five heads (a) to (e).

This is a section (1.) empowering the issue of regulations for a defined purpose; (2.) providing machinery for effectuating the purpose; (3.) adding means for enforcing the purpose; and (4.) stating in heads (a) to (e) particular instances of acts to be prevented and results to be secured. Thus Nos. (2.), (3.), and (4.) are subsidiary provisions for illustrating and effectuating the dominant purpose No. (1.).

This Act repealed and consolidated with amendments two previous Acts—namely, 4 & 5 Geo. 5, c. 29, and 4 & 5 Geo. 5, c. 63. For the present purpose the first material observation upon these is that the consolidating Act altered the sequence of the language and enlarged in a material particular the effect of the Acts which it repealed. The Act 4 & 5 Geo. 5, c. 29, did not commence, as does the Act now in force, with the dominant words giving authority “to issue regulations for securing the public safety and the defence of the realm.” It commenced by authorizing regulations “as to the powers and duties [of defined bodies and persons] for securing the public safety and the defence of the realm.” Upon the latter words a contention might have been open that the authority was only to make regulations controlling existing powers and duties. That contention is not open upon the words of the present Act. There is a plain authority to issue regulations for a purpose. Those are the initial and dominating words.

A second material observation is that the Act now in force extended the particular instances which in the former Act were two only, namely, (a) and (b), by enlarging (b) and adding three more, (c), (d), and (e). The additions enlarge by way of illustration, if it were needed, the field over which the regulations may extend. For all these (a) to (e) may be included in the regulations. The statute says so.

[307] So far I am satisfied—provisionally, at any rate—that the word “regulations” in this statute does not connote something in the nature of a by-law or a rule of procedure or administration, but something much greater. The “regulation” may create an offence, e. g., obtaining information such as mentioned in subclause (a), and may fix the punishment for it. This is enactive.

Looking further into the statute I find this view of the nature of a “regulation” confirmed in a manner beyond possibility of dispute. A “regulation” may affect a previously existing statute. For under s. 1, sub-s. 2, a “regulation” may provide for the suspension of restrictions imposed by existing statutory enactments. Again, under s. 1, sub-s. 6, a “regulation” may order the forfeiture of goods.

There is room for difference of opinion whether what I may call legislation by devolution is expedient; whether a statute ought not to be self-contained; whether it is desirable that a statute should provide that regulations made by a defined authority or in a defined matter shall themselves have the effect of a statute. But I think it clear that this statute has conferred upon His Majesty in Council power to issue regulations which,

when issued, will take effect as if they were contained in the statute.

The appellant’s counsel, however, argue that an authority “to issue regulations for securing the public safety and the defence of the realm” does not authorize preventive detention, which is, they say, imprisonment without trial. They contend that there must be express words where the liberty of the subject is to be affected; that the general words of this statute are not enough. My Lords, I find no ground upon which this contention can be supported. For instance, the statute says in so many words that a regulation may prevent persons communicating with the enemy (subclause (a)). What is the man to be tried for before he is so prevented? The very purpose is not to punish him for having done something but to intercept him before he does it and to prevent him from doing it. What limit does the statute place upon the steps that may be taken so to prevent him? There is no limit. No doubt every statutory authority must be exercised honestly. There is, I conceive no other limit upon the acts that the regulations may authorize to achieve the defined object.

[308] These being the provisions of the statute, reg. 14B is one which provides that where, on the recommendation of a defined authority, “it appears to the Secretary of State that, for securing the public safety or the defence of the realm, it is expedient, in view of the hostile origin or associations of any person,” to intern him he may be interned. The appellant is interned under an order made under that regulation. He says the result is that the Habeas Corpus Act is in substance suspended when it has not been suspended in fact. This is a complete misapprehension. If his case were that he had neither hostile origin nor associations he could have his writ of habeas corpus on the ground that that was so, and if he established the fact he would be discharged. The application before your Lordships is for a writ of habeas corpus, and the ground advanced is that reg. 14B is ultra vires. If that were established he would be discharged. The Habeas Corpus Act is in full force; but this statute and the regulations made under it have provided machinery for achieving in a way other than that of suspending the Habeas Corpus Act the preventive detention of persons who are not alleged to have committed any offence, but whom it is desired to prevent from committing one. The regulation is, in my judgment, one within the authority given by the Act. The contention that it is ultra vires fails. It results that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

NOTE.

Internment of Person of Hostile Origin or Association.

In the reported case it is held that under the British Defense of the Realm Consolidation Act, which provides that the King in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defense of the realm, Parliament has conferred the power to make an order for the internment of a person of hostile origin or association.

There is apparently but one case other than the reported case dealing with the internment of a citizen because of his hostile origin or association. In *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159, the facts were stated by the court as follows: "This was an action of trespass brought by Madison Y. Johnson against J. Russell Jones, Elihu B. Washburne, John C. Hopkins, Oliver P. Hopkins and Bradner Smith. The declaration alleges that on the 28th day of August, 1862, in the county of Jo Daviess, and state of Illinois, the defendants with force and violence assaulted and arrested the plaintiff, and conveyed him on board the railway cars; that they transported him by the cars to Chicago where they restrained him of his liberty for the space of two days; that they then conveyed him by force to the city of New York; that he was there imprisoned in Fort Lafayette for the space of two months; that he was then taken to Fort Delaware, in the state of Delaware, where he was imprisoned for the further space of three months, when he was set at liberty without trial or examination or any offense being charged against him. All the defendants pleaded not guilty. The defendants Jones, Hawkins and Hopkins also filed special pleas, in which they set up the then existence of the rebellion, and aver that the plaintiff was an active member of a disloyal secret society known as the 'Knights of the Golden Circle'; that this society was in league and sympathy with the rebels, and was a co-operating branch of the rebellion in the northern States, and plotting with the rebels for the overthrow of the government; and that said plaintiff was deeply engaged in aiding said society in their treasonable purposes, and was in fact levying war against the United States. The pleas further aver that the defendant Jones was at that time United States marshal for the northern district of Illinois, and that said defendants Hawkins and Hopkins were his deputies; that as such marshal he was ordered by the President of the United States to arrest said plaintiff, as a measure proper for the suppression of the rebellion, and convey him to Fort Lafayette; and that he did so arrest him and convey him to said fort in a comfortable manner, and there deliv-

ered him to the custody of the officer in command of said fort, after which time the plaintiff was not in the custody of the defendant." Holding that the plaintiff could not be arrested and held as a prisoner of war, the court said: "The plaintiff, if guilty of these offenses, merited not only the condemnation of all loyal and honorable men, but the severest legal punishment. On the 17th of July, 1862, which was prior to his arrest, Congress had passed a law designed to reach cases of this character. The act authorized imprisonment not exceeding ten years, and a fine not exceeding ten thousand dollars, in the discretion of the court, to be pronounced against any person found guilty of giving aid and comfort to the rebels. Under this law a warrant might have been sued out in legal form against the plaintiff, by virtue of which the marshal could have arrested him and delivered him into the custody of the law for trial in the United States Court for the Northern District of Illinois. But do these offenses, charged in these pleas, make the plaintiff a belligerent, to be captured and held as a prisoner of war? If the plaintiff was a belligerent, as insisted by the defendant's counsel, the order of the President was wholly unnecessary to authorize the arrest. Any soldier has the right, in time of war, to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose—even unto death. This is the law of war, to which the defendants appeal for their justification. Have counsel considered to what this theory of belligerency among our own citizens would have led, if reduced to practical application in the late war? It is however a contradiction in terms to speak of a citizen of a loyal state, remaining in such state, and not engaged in the war, as a belligerent. A belligerent is a subject of the hostile power, and his character, in that regard, depends upon that of the community to which he belongs. In the case of *Ex parte Milligan*, recently decided in the Supreme Court of the United States, the same point was made, and set at rest by the court in the following language: 'But it is insisted that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If, in Indiana, he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured,

are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties? . . . This is decisive authority as to whether the plaintiff in the present case can be considered as having been arrested and imprisoned as a belligerent or prisoner of war. The principle indeed had already been settled by the same court in the prize cases above quoted, where they held that all persons residing in the rebel states, whose property might be used to support the hostile power, were liable to be treated as enemies without reference to their personal loyalty. This is the settled doctrine, that the status of any person, as to the question of belligerency, depends upon his citizenship or nationality. The late rebellion grew to such consistency and magnitude, that our own as well as foreign governments recognized the people of the rebel states as belligerents, but the citizen and resident of a northern state did not become a belligerent, whatever may have been his sympathies, or however wicked his plots. So far, then, as it is sought to justify the arrest of the plaintiff by assuming that he was arrested as a belligerent, and held as a prisoner of war, the argument is untenable. He was not a prisoner of war."

The internment of alien enemies is considered in the note to *Daunler Co. v. Continental Tyre, etc. Co.* Ann. Cas. 1917C 170. As to the power of the military authorities in the enforcement of martial law to try and imprison citizens guilty of specific overt acts, see the note to *State v. Brown*, Ann. Cas. 1914C 1.

HOBBS ET AL.

v.

HINTON FOUNDRY, MACHINE AND PLUMBING COMPANY.

West Virginia Supreme Court of Appeals—
June 9, 1914.

74 W. Va. 443; 82 S. E. 267.

Infants — Contracts — Voidable or Void.

Contracts by minors are generally not void, but voidable only, and may be ratified or disaffirmed after majority.

Ratification of Infant — What Constitutes.

While ratification is generally a question of intention, the purpose to ratify need not be expressly declared. Such purpose may

be, and ordinarily is, inferred from the free and voluntary acts of the party to be charged, although he may not have in mind any definite intent or purpose to ratify.

[See 18 Am. St. Rep. 659, 689.]

Same.

To effectuate a ratification, however, the acts must be inconsistent with any other purpose, as where, after attaining his majority, he retains and for an unreasonable length of time enjoys the beneficial use of property purchased while a minor, or exercises such acts of ownership over it as clearly evince a purpose to ratify.

Same.

Whether he acts within a reasonable time after full age, and what acts constitute a ratification, are ordinarily questions of fact.

Time for Disaffirmance by Infant.

While much depends upon the promptitude with which acts are performed by way of confirmation or disaffirmance after attaining full age, no time has been, or in the nature of things can be, definitely fixed as alike applicable to all cases.

[See note at end of this case.]

Same.

An infant's contract, wholly consummated by him before or after full legal age, requires more prompt action and a less degree of confirmatory conduct than one not thus performed.

[See note at end of this case.]

Same.

The retention, for three months after full age, of possession of property purchased by an infant, his enjoyment of the beneficial use thereof, payment of part of the consideration therefor, and his offer for sale of part thereof do not preclude right to disaffirm or authorize the inference of an intention to ratify.

[See note at end of this case.]

Effect of Disaffirmance — Discharge of Security.

A disaffirmance after full age of a contract made while an infant, and a return, or offer to return, to the vendor of the property purchased, will effect the discharge of a trust lien given to secure payment of the consideration, and to acquit both principal and surety therefrom.

(Syllabus by Court.)

Appeal from Circuit Court, Summers county.

Action by T. E. Hobbs et al., plaintiffs, against Hinton Foundry, Machine and Plumbing Company et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

A. D. Daly for appellants.

E. C. Eagle and H. A. Bolin for appellees.

[445] LYNCH, J.—Does one who, while a minor, purchases personal property, and

thereafter and for three months next ensuing his majority uses and operates it in the conduct of a foundry and plumbing business, taking unto himself the profits, if any, arising therefrom, advertises it for sale but sells no part of it, pays part of the consideration therefor and a rental on a building leased to him by the seller, thereby ratify his contract, and bind himself to pay the residue of the consideration? Or may be, notwithstanding these acts on his part, subsequently disaffirm the contract, and thereby exonerate himself from further liability thereon? If so, does his disaffirmance operate to discharge the lien of a deed of trust by himself and wife and a brother to secure the payment of the consideration and rental payable under the contract and leasehold? A proper answer to each of these inquiries determines the issues involved in this cause.

On April 17, 1911, T. E. Hobbs, then a minor, purchased of the Hinton Foundry, Machinery and Plumbing Company its machinery and plumbing outfit. The consideration therefor, and the rental on the building in which the property was then located and used, was secured by a deed of trust by plaintiff, his wife (also then a minor) and his brother on the machinery and appliances and on undivided interests in a lot in the town of Hinton, plaintiff alone signing the note thus secured.

From the date of the purchase until September 1, 1911, plaintiff used the property in the operation of a general foundry and plumbing business, contracting for work appertaining to such business, and taking to himself the profits, if any, arising from the conduct thereof; he also paid part of the original purchase price, and the rental as it became due, advertised part of the property for sale but did not sell any of it, and in addition purchased and operated with it other like machinery and appliances. But on September 1, 1911, by notice in writing duly served, the notified defendant of his disaffirmance of the contract, offered to return the property purchased of it, and demanded a cancellation of the note and trust deed.

[446] With few exceptions not necessary to be noted here, the contracts of infants are voidable, and not void. *Blake v. Hollandsworth*, 71 W. Va. 388, 76 S. E. 814, 43 L.R.A. (N.S.) 714. But whether an infant should, within a reasonable time after arriving at full age, to some affirmative act indicative of an intention on his part to repudiate, we are not now called upon to decide, because of plaintiff's notice and offer; though whether he acted within a reasonable time does become an important inquiry in connection with the facts recited, which, according to defendant's contention, operated as a ratification prior to the service of such notice.

While ratification is, generally speaking, a question of intention, it is not essential that the purpose to ratify shall be expressly declared. It may be, and ordinarily is, inferred from the free and voluntary acts and conduct of the party sought to be charged, although at the time he may not have had in mind any definite idea or purpose of ratification. But, to effectuate a ratification, his acts, words or conduct must be inconsistent with any other purpose; as where, after arriving at age, he retains for an unreasonable length of time the property purchased by him while in infancy, or uses it as his own, or exercises such acts of ownership over it as clearly evinces a purpose to ratify. *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Dixon v. Merritt*, 21 Minn. 196; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574; *Mustard v. Wohlford*, 15 Grat. (Va.) 329, 76 Am. Dec. 209. Whether he acts within a reasonable time after full age, and, if he does, what acts constitute a confirmation of contracts made in infancy, are questions of fact, to be determined in the usual manner, either by a jury under proper instruction or by the chancellor when properly submitted to him. *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521; *Irvine v. Irvine*, 9 Wall. 617, 19 U. S. (L. ed.) 800.

While much depends upon the promptitude with which acts are performed by way of ratification or disaffirmance after attaining his majority, no period of time generally applicable in all cases has been, or in the nature of things can ever be, definitely fixed. The acts and conduct relied on for confirmation, and the reasonableness of the time, must be determined from the facts and circumstances of each particular case; for what may be a reasonable time, and what a ratification, [447] under some conditions, may be unreasonable and insufficient under other conditions. An infant's contract wholly consummated by him either before or after full legal age requires more prompt action and a less degree of confirmatory conduct than one not fully performed by him, as in this case; for as to plaintiff the contract remains executory, though executed by defendant. A like distinction is noted and upheld between sales to infants and sales by them, and between conveyances of their lands and purchases of land by them. For if, after full age, one, who while a minor sells lands belonging to him, stands by an unreasonable length of time, and without notice or warning of an intention to repudiate his contract or deed, sees his vendee make valuable improvements on the land, he will thereby estop himself from the assertion of a right to annul the contract or deed and to demand a rescission and reconveyance. These distinctions are discussed in *Gillespie v. Bailey*, 12 W.

Va. 70, 29 Am. Rep. 445, and *Blake v. Hol-landsworth*, supra.

Did plaintiff act, or fail to act, within a reasonable time after June 3, 1911? Or did he, by his acts and conduct thereafter and before notice to the defendant, preclude right to disaffirm? These are questions so inseparable that both may to some extent be properly treated and answered together. In *Hook v. Donaldson*, 9 Lea (Tenn.) 56, a delay of four years was held unreasonable, while in *Gaskins v. Allen*, 137 N. C. 426, 49 S. E. 919, a delay of three years was deemed reasonable. In *Green v. Wilding*, 59 Ia. 679, 13 N. W. 761, 44 Am. Rep. 696, and *Kline v. Beebe*, 6 Conn. 494, a delay of four years was held unreasonable. But payment, four months after full age, of part of the consideration for land purchased while an infant, does not alone imply a ratification. *Rapid Transit Land Co. v. Sandford*, 24 S. W. (Tex.) 587. Acknowledgment of the validity of the debt and oral promise to pay it are insufficient. *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Hinely v. Margaritz*, 3 Pa. St. 428; *Hatch v. Hatch*, 60 Vt. 160, 13 Atl. 791. Nor does part payment of the debt alone constitute a legal affirmation. *Kendrick v. Neisz*, 17 Colo. 508, 30 Pac. 245. See also *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221, where after majority he paid rent arrearages previously due. Mere inactivity is insufficient. *Thomas v. Pullis*, 56 Mo. 211.

[448] These cases sustain ratification of contracts made in infancy, where after majority he continued in the possession, use and enjoyment and exercising acts of ownership inconsistent with an intention to disaffirm: *Boody v. McKenney*, 23 Me. 517, where it seems the property was personalty, only a small part of which came into his possession after majority, but which he retained for three years and then sold, the residue having been consumed or otherwise disposed of during his minority; *Ellis v. Alford*, 64 Miss. 8, 1 So. 155, where an infant exchanged his for other lands which she occupied and used for 9 years after full age; *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848, where an infant purchased and for nine months after majority retained possession of a team of horses, using them, and twice promised to pay the note executed by him therefor; *Lawson v. Lovejoy*, 8 Greenl. (Me.) 405, 23 Am. Dec. 526, where the facts were similar to those in the *Luce* case; *Robinson v. Hoskins*, 14 Bush (Ky.) 393, where infant purchased a horse which after majority he sold, and appropriated to use the proceeds thereof; *Boyden v. Boyden*, 9 Metc. (Mass.) 519, where the infant purchased goods (not necessities) on credit, and retained and used them an unreasonable time (duration not

noted), without offer to restore or notice of disaffirmance; *Cheshire v. Barrett*, 4 McCord L. (S. C.) 241, 17 Am. Dec. 735, where infant purchased a horse, and sold it after his majority. A suit for specific performance is a ratification. *Carrell v. Potter*, 23 Mich. 377.

But while, in the case under consideration, the acts on which defendant relies for confirmation consist only in the retention by plaintiff for three months after full age of the property sold to him, and the beneficial use and profits derived from it during that period, payment of part of the consideration therefor and of rent accruing under the lease, and offering the property for sale but not selling or otherwise disposing of it, cannot so far operate to defendant's prejudice as to warrant the conclusion either that plaintiff delayed his disaffirmance an unreasonable length of time, or that his acts authorized the inference of an intention to ratify or amounted to a ratification of the contract; especially since it appears, at least it is not denied or alleged, that plaintiff offered to restore to defendant the property, which so far as disclosed virtually remains in the same condition as at the [449] date of the contract. And, while by the decree complained of the defendant was required to refund part of the consideration paid to it, plaintiff was virtually required to pay defendant the rent due under the leasehold to September 1, 1911, the date of plaintiff's notice of disaffirmance.

That a contract made by an infant may be repudiated by him after he attains his majority is, of course, elementary. It is not questioned here. Nor is his right to disaffirm within a reasonable time after his majority. Having that right, and exercising it, as he did, within three months from the time he could legally act by way of confirmation or repudiate, we cannot say the time was unreasonably prolonged, or that plaintiff's acts indicated an intention on his part to ratify his purchase. This conclusion is reached without any intention to assert or deny the application to the facts of this case of clause 2, § 1, ch. 98, Code, cited but not argued.

Does the discharge of T. E. Hobbs from further liability on his contract also discharge the trust lien by his coplaintiffs? While the rule seems well established that, although the principal in a note for the payment of money may be discharged because of his minority at the date thereof, the surety remains liable, it is nevertheless not without exception. To apply it to the facts of this case would be inequitable and unjust; for where the consideration for which liability was incurred has totally failed, the surety is discharged. In that event, the promisee cannot have relief against either principal, or surety, even if both were otherwise legally

bound. Story, Bills, § 184. If by a disaffirmance of an infant's contract his vendor recovers the property, the suretyship is thereby extinguished. *Baker v. Kennett*, 54 Mo. 83. He cannot have a recovery on the obligation to pay, and at the same time the property for which it was assumed. The same court in *Patterson v. Cave*, 61 Mo. 439, held the surety of an infant released, though the note in suit was negotiable, but had passed by delivery and not by endorsement to the plaintiff. Also in *Keokuk County State Bank v. Hall*, 106 Ia. 540, 76 N. W. 832, the court held "a surety on a promissory note of a minor is not liable thereon where the minor upon attaining majority disaffirmed the contract and returned the property for the purchase price of which the note was given." That defendant in this [450] case is now without possession of the property sold by him to the plaintiff, solely because he refused to accept it when tendered by plaintiff, does not now avail against W. C. Hobbs or plaintiff's wife, both of whom joined as grantors in the trust deed, but not as makers of the note thereby secured. As plaintiff's wife and brother thus joined in the trust, the first to pass her inchoate right of dower, the second to bind his one eighth interest in the real estate conveyed, they did not improperly unite as coplaintiffs with T. E. Hobbs to annul the deed. *Sandusky v. West Fork Oil, etc. Co.* 63 W. Va. 260, 59 S. E. 1082; *Coffman v. Hope Natural Gas Co.* 74 W. Va. 57, 81 S. E. 575.

Finding no error, we affirm the decree from which defendant has appealed.

Affirmed.

NOTE.

What Constitutes Reasonable Time for Infant to Disaffirm Contract after Majority.

Generally, 413.

Periods of Time Held Reasonable, 413.

Periods of Time Held Unreasonable, 414.

Generally.

It is the purpose of this note to review the decisions passing on the question what constitutes a reasonable time for an infant to disaffirm a contract, other than a deed, after majority. For a discussion of what constitutes a reasonable time after majority for the disaffirmance of an infant's deed, see the note to *Lanning v. Brown*, Ann. Cas. 1912C 772.

What constitutes a reasonable time within which a contract made by a person while an infant may be disaffirmed by him after his

attainment of the age of majority is to be determined from the facts and circumstances of each particular case. See the reported case and cases cited throughout the note. It has been said that the reasonable time within which to disaffirm a contract concerning land, is such time after the minor making the contract reaches his majority, as a person of ordinary prudence and diligence would require in which to disaffirm the contract under the same or similar circumstances. *Havard v. Carter-Kelly Lumber Co.* (Tex.) 181 S. W. 756. And the determination of the question is ordinarily one for the jury. *Walker v. Pope*, 101 Ga. 665, 29 S. E. 8; *Wiley v. Wilson*, 77 Ind. 596; *Havard v. Carter-Kelly Lumber Co.* (Tex.) 181 S. W. 756. And see the reported case. *Compare Murray v. McKenzie*, 23 Ont. L. Rep. 287, 21 Ann. Cas. 968, 18 Ont. W. Rep. 747. However, the question may be one of law under some circumstances. *Gannon v. Manning*, 42 App. Cas. (D. C.) 206.

The doctrine that the time within which a person, who has made a contract while an infant, may disaffirm the contract after his arrival at the age of majority, is to be determined by analogy to the statute of limitations, has received some support. *Bozeman v. Browning*, 31 Ark. 364; *Chicago Telephone Co. v. Schulz*, 121 Ill. App. 573; *Highland v. Tollisen*, 75 Ore. 578, 147 Pac. 558. See also *Meriweather v. Herran*, 8 B. Mon. (Ky.) 162. In other cases, however, that doctrine has been denied. *Wallace v. Lewis*, 4 Har. (Del.) 80; *Wiley v. Wilson*, 77 Ind. 596. In *Wallace v. Lewis*, supra, the court said: "To hold that this power [of a person to disaffirm a contract made while an infant] necessarily continues through the period of legal limitation of the action, would be to make it a dangerous weapon of offense."

Periods of Time Held Reasonable.

In each of the following cases it was held that the period named was a reasonable time under the circumstances described within which a person could disaffirm after majority a contract made by him while an infant:

—eighteen days, *Gannon v. Manning*, 42 App. Cas. (D. C.) 206 (purchase of moving picture theatre; disaffirmance eighteen days after majority within reasonable time as matter of law);

—one month, *Peck v. Cain*, 27 Tex. Civ. App. 39, 63 S. W. 177 (lease of house to infant);

—thirty-two days, *Leacox v. Griffith*, 76 Ia. 89, 40 N. W. 109 (settlement between infant and administrator of his father's estate of claim by administrator by reason of being compelled as surety to pay notes given by infant);

—two months, *Helland v. Colton State Bank*, 20 S. D. 325, 106 N. W. 60 (contract of suretyship);

—three months, see the reported case.

—three and one-half months, *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089 (mortgage);

—four months, *Darlington v. Hamilton Bank*, 63 Misc. 289, 116 N. Y. S. 678 (repudiation of note four months after attainment of majority and two months after note passed into hands of bona fide holder); *Rapid Transit Land Co. v. Sandord* (Tex.) 24 S. W. 587 (purchase of land);

—five months, *International Text Book Co. v. Connelly*, 208 N. Y. 188, 99 N. E. 722, 42 L.R.A.(N.S.) 1115, *affirming* 140 App. Div. 939, 125 N. Y. S. 1125 (contract for correspondence course, it not appearing that any benefit was derived from contract after infant attained majority);

—seven months, *International Text Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255 (contract for correspondence course repudiated one month before infant attained majority but return of books deferred until seven months afterwards. But the court said: "Had there been no avoidance during infancy, as a consequence of which the books were sent back after full age was reached, a different question would be presented");

—eight months, *Fletcher v. A. W. Koch Co.* (Tex.) 189 S. W. 501 (contract for purchase of lots, it not appearing that seller suffered any injury from failure to repudiate sooner);

—one year, *Pedro y Varona v. Pedro y Baro*, 71 Misc. 296, 127 N. Y. S. 997 (indenture of trust);

—eighteen months, *Johnson v. Storie*, 32 Neb. 610, 49 N. W. 371 (note signed by infant as surety);

—two years, *Chicago Telephone Co. v. Schulz*, 121 Ill. App. 573 (release of right of action for personal injuries, court holding that repudiation might be made at any time after majority within period equal to that within which action for personal injuries must be brought); *Tyler v. Gallop*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336 (note; mere silence for two years after majority);

—three years, *Chandler v. Jones*, 172 N. C. 569, 90 S. E. 580 (contract for sale of land); *Kansas City, etc. R. Co. v. Meakin* (Tex.) 146 S. W. 1057 (release of liability for personal injury, court holding reasonableness of time to be question for jury); *Murray v. McKenzie*, 23 Ont. L. Rep. 287, 21 Ann. Cas. 968, 18 Ont. W. Rep. 747 (gift of jewelry to person exercising influence over infant);

—five years, *Watson v. Peebles*, 102 Miss. 725, 59 So. 881 (written authority to trustee to cancel deed of trust);

—six years, *Highland v. Tollisen*, 75 Ore. 578, 147 Pac. 558 (family agreement whereby infant released right as heir in land; court held that right was not barred until lapse of time sufficient to bar action for recovery of land, namely, ten years);

—eight years, *Groesbeck v. Bell*, 1 Utah 338 (infant signed note as surety and denied liability eight or nine years afterwards);

—thirteen years, *Gilkinson v. Miller*, 74 Fed. 131 (release of claim in lands devised to infant; purchaser of lands having actual knowledge of devise).

Periods of Time Held Unreasonable.

In each of the following cases it was held that the period named was not a reasonable time under the circumstances described within which a person could disaffirm after majority a contract made by him while an infant:

—one month, *Forsyth v. Hastings*, 27 Vt. 646 (contract by minor to labor for one year held ratified by his continuance in employ of master for one month after his majority);

—two or three months, *Aldrich v. Grimes*, 10 N. H. 194 (note given for potash kettle irons, leaches, etc., purchased by infant under conditional contract to return if not satisfactory; demand made by vendee for return of kettle when purchaser reached age of majority, but no offer of return made until two or three months afterwards);

—five months, *In re Blakely Ordnance Co.* (1868) L. R. 4 Ch. (Eng.) 31 (affirmance of status as shareholder by failure to repudiate for five months after majority during which period he made transfer of part of his shares);

—six months, *Jones v. Jones*, 46 Ia. 466 (contract between father and infant son whereby latter agreed not to make any claim to father's estate, not disaffirmed by son until six months after attaining his majority, father having died in meantime); *Hoover v. Kinsey Plow Co.* 55 Ia. 668, 8 N. W. 658 (note signed by infant as surety and no circumstance tending to excuse delay);

—eight months, *Delano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617 (acceptance of note of third person in payment of labor performed by infant who retained it for eight months after majority when maker of note became insolvent);

—nine months, *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848 (note given for team of horses which were used by infant nine months after attaining majority);

—eleven months, *Hastings v. Dollarhide*, 24 Cal. 195 (assignment of non-negotiable note);

—one year, *Walker v. Pope*, 101 Ga. 665, 29 S. E. 8 (ratifying acts of one assuming

to act as trustee in disposing of property and allowing paper to remain of record in court of ordinary for two years, when property passed into hands of innocent purchaser, infant having attained his majority about one year previously; question held one for jury; Willson v. Smale, 25 Ont. 144 (act of infant in bringing action with others to stop infringement of patent, action being dismissed for want of prosecution with costs, no attempt having been made by infant to repudiate action until more than one year after he attained his majority);

—fourteen months, *In re Constantinople, etc. Hotel Co.* (1870) L. R. 5 Ch. (Eng.) 302 (affirmance of status as stockholder by acquiescence for fourteen months after majority);

Phillips v. Sutherland, 22 Manitoba L. Rep. 491 (sale of land scrip by infant half breed, failure to offer return of consideration);

—eighteen months, *Freeman v. Montreal Bank*, 26 Ont. L. Rep. 451 (deposit by infant of amount exceeding sum authorized to be received by bank from infants, deposit having been paid out on infant's check);

—twenty-two months, *Clemmer v. Price*, 59 Tex. Civ. App. 84, 125 S. W. 604 (purchase of land, sale made by vendee without actual or constructive notice of purchaser's infancy);

—two years, *Boyden v. Boyden*, 9 Metc. (Mass.) 519 (purchase of horse and other articles; retention of some of them two or three years after majority); *Re Sovereign Bank of Canada*, 35 Ont. L. Rep. 448, 27 Dominion L. Rep. 253, 9 Ont. W. N. 328, 402 (gift to infant of shares in bank which afterwards became insolvent; affirmance of status as shareholder so as to become liable as contributory by failure to repudiate for nearly two years after majority);

—three years, *Boody v. McKenney*, 23 Me. 517 (note given for purchase of personal property part of which was retained for three years after majority and then sold); *Shepard v. Bruner*, 31 West. L. Rep. (Alberta) 721, 24 Dominion L. Rep. 40, reversing 19 Dominion L. Rep. 869 (assignment of interest in contract for purchase of land);

—four years, *Hook v. Donaldson*, 9 Lea (Tenn.) 56 (contract for purchase of land, purchaser having paid several instalments after majority and land having become greatly depreciated in value shortly before attempt made to disaffirm);

—five years, *Edwards v. Carter* [1893] A. C. (Eng.) 365 (marriage settlement entered into by male infant); *Wise v. Loeb*, 15 Pa. Super. Ct. 601 (judgment note, minority not pleaded in petition to open judgment but first pleaded at trial five years after attain-

ment of majority); *Mission Ridge Land Co. v. Nixon* (Tenn.) 48 S. W. 405 (contract for purchase of land, controlling and assuming to act as owner during period of five or six years after majority);

—ten years, *Deason v. Boyd*, 1 Dana (Ky.) 45 (sale by infant of wife's share in estate of her father for keel boat which he sold several months after attaining majority);

—thirteen years, *Krbel v. Krbel*, 84 Neb. 160, 120 N. W. 935 (contract to furnish supplies to father in consideration of land received, infant retaining land long after majority and receiving some benefits therefrom); *Highland v. Tollisen*, 75 Ore. 578, 147 Pac. 558 (family agreement whereby infant released right as heir in land; court held that statute of limitations relating to actions for recovery of land was applicable);

—nineteen years, *Carnell v. Harrison* [1916] 1 Ch. (Eng.) 328, 85 L. J. Ch. 321, 114 L. T. N. S. 478, 60 L. J. 290 (marriage settlement by female infant. Compare *In re Jones* [1893] 2 Ch. (Eng.) 461);

—twenty-four years, *Meriweather v. Her- ran*, 8 B. Mon. (Ky.) 162 (transfer of share in estate of father);

—thirty years, *Bozeman v. Browning*, 31 Ark. 364 (bond for title; court said that disaffirmance should have been made within period of limitation which commenced running at majority);

—"many years," *Thomasson v. Boyd*, 13 Ala. 419 (purchase of note by infant who gave order on third person therefor; order not being paid or note returned by infant for many years); *Alexander v. Heriot*, Bailey Eq. (S. C.) 223 (purchase of slave by minor and retention of possession for many years after majority).

KUHN ET AL.

v.

BUHL.

Pennsylvania Supreme Court—January 3, 1916.

251 Pa. St. 348; 96 Atl. 977.

Contracts — Public Policy — Withdrawal of Competing Proposal for Public Land.

The state of Idaho, by Rev. Codes Idaho, §§ 1613-1634, accepted the provisions of the acts of Congress relating to the reclamation of desert lands (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [U. S. Comp. St. 1913,

§ 4685]; Act June 11, 1896, c. 420, § 1, 29 Stat. 413 [U. S. Comp. St. 1913, § 4686]; Act March 3, 1901, c. 853, § 3, 31 Stat. 1188 [U. S. Comp. St. 1913, § 4687]), established a complete system for carrying into effect their provisions, and vested in the state board of land commissioners the selection, management, and disposal of such lands, authorizing the board on due application to contract on behalf of the state for the construction of irrigation works, and giving it exclusive power to pass on any application. While competitive proposals filed by two applicants for the reclamation of certain land were pending, one applicant orally agreed with the other that he would withdraw his bid for a certain consideration. A written contract executed subsequently in Pennsylvania, instead of providing that the applicant should withdraw its proposal, stipulated that it should sell to the other applicant its maps, plans, surveys, and estimates and interest in its application for the sum orally agreed upon. In accordance with the oral agreement the proposal was withdrawn and an award made to the other applicant, who paid a part of such sum on account, the maps, etc., being duly delivered. It is held that the written contract, being void as against public policy and the real consideration therefor being illegal, could not be enforced for the amount remaining due under it.

[See generally 6 R. C. L. tit. *Contracts*, p. 741 et seq.]

Same.

Where a public right is to be disposed of by government officers or agents, public policy forbids that one competing applicant shall contract for the extinguishment of another's competition, and invalidates all contracts made for that purpose.

Effect of Infringing Public Policy — Necessity of Harmful Result.

A contract prohibited by public policy will be declared illegal, though no actual injury may have resulted to the public in the particular instance; the test being the evil tendency of the contract, and not its actual result.

Validity as Question of Law.

Whether a contract is against public policy is a question of law for the court to determine from all the circumstances in each case.

[See 11 Ann. Cas. 124.]

Contract to Control Governmental Action — Validity.

All agreements for pecuniary considerations to control the business operations of the government are void as against public policy, without reference as to whether improper means are attempted or used in their execution.

Partial Illegality of Contract — Effect.

Where the consideration of a contract is indivisible, and a part is illegal, it falls as a whole.

[See 117 Am. St. Rep. 495.]

Parol Evidence to Show Illegality.

Evidence aliunde is admissible to show the illegality of the consideration of a con-

tract attacked on the ground that it is violative of public policy; it being the court's duty in such case to inquire into the entire transaction unembarrassed by any technical rules as to the admissibility of evidence.

[See note at end of this case.]

Findings — Necessity of Finding — Requests Covered by Findings Made.

Under Act April 22, 1874 (P. L. 109), relative to trials without a jury, the court need not specifically answer on the record all requests for findings of fact, if the findings made cover the material facts stated in the request.

Appeal from Court of Common Pleas, Mercer county: WILLIAMS, Judge.

Action by William S. Kuhn et al., plaintiffs, against Frank H. Buhl, defendant. Judgment for defendant. Plaintiffs appeal. **AFFIRMED.**

[350] The case was tried without a jury under the Act of April 22, 1874, P. L. 109.

From the record it appeared that the case involved a consideration of the Act of Congress of Aug. 18, 1894, c. 301, Sec. 4, 28 U. S. Stat. 372, 422, commonly known as the "Cary Act" (See 2 U. S. Comp. Stat. 1935, 1937, Sections 4685, 4686, 4687), which provides, "That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers," the secretary of the interior, with the approval of the president, is authorized and empowered, upon the application of any state in which there are such desert lands, to contract and agree, binding the United States to donate, grant and patent to such state free of cost such desert lands, not exceeding one million acres in any one state, as such state may cause to be irrigated, reclaimed, occupied and [351] in a measure cultivated by actual settlers. Any state acting under this statute is authorized to make all necessary contracts to cause the lands to be reclaimed and to induce their settlement and cultivation.

The case also involved a consideration of the laws of Idaho. By appropriate legislation enacted in the year 1899, the State of Idaho accepted the conditions of the Cary Act and established a complete system for carrying out its provisions. See Sections 1613 and 1634 of the Idaho Revised Code. In establishing or assigning the jurisdiction over the subject, Section 1613 provides as follows: "The selection, management and disposal of said land shall be vested in the State Board of Land Commissioners, as constituted by Section 7, of Article IX, of the Constitution of the State of Idaho." This section of the Constitution is as follows: "The governor, superintendent of public instruction, secretary of state and attorney

general shall constitute the State Board of Land Commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law." The laws of Idaho do not authorize the construction of irrigation works by the state itself, but provide for the construction of such works by individuals, companies of persons, associations or corporations, by contract with the state, and under state supervision. The proceedings by which individuals, companies or corporations may obtain contracts from the state for constructing irrigation works for the reclamation of desert lands under the Cary Act and the laws of Idaho, as stated, are fully prescribed by these statutes. The manner of instituting such proceedings is set forth in Section 1615 of the Idaho Code. The first step is the filing with the Board of Land Commissioners of a request by the applicant for the segregation, or setting aside, of the particular lands designated by the applicant for reclamation, and this request must be accompanied with a proposal on the part of the applicant to construct the irrigation [352] works necessary for the complete reclamation of the designated lands. The statutory requirements of the applicant's request and proposal are as follows: "The proposal shall be prepared in accordance with the rules of the Board of Land Commissioners, and with the regulations of the U. S. Department of the Interior. It shall be accompanied with the certificate of the state engineer that an application has been filed in his office for a permit to appropriate water, together with the state engineer's report thereon. It shall state the source of the water supply, the location and dimensions of the proposed works, the estimated cost thereof, and the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, the perpetual water rights to embrace a proportionate interest in the irrigation works, together with all the rights and franchises attached thereto. If the applicant is a corporation, there shall be set forth the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid up capital. If the applicant is not a corporation, the name or names of the party or parties applicant shall be given, together with such facts as will enable the board to determine his or their financial ability to carry out the proposed undertaking. The request and proposal must be accompanied with a certified check for not less than \$250 nor more than \$2,500 as may be determined by the rules of the board, as a guaranty of the execution of the contract by the applicant in

accordance with his request and proposal, in case of the approval of the same by the state, the check to be forfeited to the state in case of the applicant's failure to enter into such contract. The applicant shall have filed with the state engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the board, this application to be of a form prescribed by the state engineer, and accompanied by two copies of a map [353] of the land to be selected, showing accurately the location and dimensions of the proposed irrigation works, and prepared in accordance with the regulations of the state engineer's office and the rules of the U. S. Department of the Interior."

Article XV of the Constitution of Idaho declares the use of the waters of the state to be a public use, and that the right to collect rates for the same is a "franchise."

When the application is in proper form, it is submitted to the state engineer to examine and make a written report thereon to the Board of Land Commissioners, upon the following points, viz.: "Whether the proposed works are feasible. Whether the proposed diversion of the public waters of the state will prove beneficial to the public interest. Whether there is sufficient unappropriated water in the source of supply. Whether or not a permit to divert and appropriate water through the proposed works has been approved by him. Whether the capacity of the proposed works is adequate to reclaim the land described. Whether or not the proposed cost of construction is reasonable. Whether or not the maps filed in his office comply with the requirements of said office and the regulations of the U. S. Department of the Interior. Whether the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the Act of Congress and the rules and regulations of the U. S. Department of the Interior thereunder."

When the state engineer has made his report on any application, the report is laid before the State Board of Land Commissioners for its consideration. If the application is approved by the board, a request is filed with the U. S. Land Office for the segregation or withdrawal of lands covered by the application, and when the lands are so withdrawn by the U. S. Department of the Interior, it is made the duty of the Board of Land Commissioners to enter into a contract with the applicant, which contract shall contain complete specifications of [354] the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works, the price and terms per acre at which such works and perpetual water rights shall

be sold to settlers, and the price and terms upon which the state is to dispose of the lands to settlers. The applicant is required to give a bond conditioned for the faithful performance of the provisions of his contract with the state. For the benefit and security of applicants who contract with the state, the statutes provide that the lands irrigated shall be disposed of by the state only to purchasers of water rights from the contractor, and a lien is given the contractor for the amount due him under any sale of water rights, both upon the water rights sold and the land itself.

The whole power and authority to grant or refuse any application is vested exclusively in the State Board of Land Commissioners, but it is provided by Section 1619 of the Idaho Code, that no application shall be approved on which the state engineer has reported adversely upon any of the following matters, viz.: "The sufficiency of the water supply, the feasibility of the construction, the cost or capacity of the works, and the character of the lands." It is expressly directed, however, by Section 1620 that, if the state engineer reports adversely upon any application, the Board of Land Commissioners shall notify the applicant of such action and the reasons therefor, and that the applicant shall then have sixty days in which to submit a satisfactory proposal.

The foregoing is a summary of the constitutional provisions, statutes, rules and regulations governing the irrigation and reclamation of desert lands in the State of Idaho, "and the settlement, cultivation and sale thereof in small tracts to actual settlers," that were in force at the time of the agreement in suit.

The following, with some immaterial eliminations, are the facts as formally found by the court below: That in the making of the contract in suit, and in all of the [355] negotiations leading up to the same, F. H. Buhl, the defendant, acted for and as the representative of the Twin Falls Land and Water Company, a corporation of which he was the president, and not for himself individually, and on August 10, 1908, that company expressly ratified and approved the agreement as made by Mr. Buhl. That the first installment of \$25,000.00 on the purchase-money called for by the written contract was paid by the Twin Falls Land and Water Company, and this amount covered and recompensed the plaintiffs for all their expenditures in connection with their application, including the value of their permits, maps, plans, surveys and estimates. That the two applications and proposals of the plaintiffs and the Twin Falls Land and Water Company to the Idaho State Board of Land Commissioners, for the

segregation of, and the right under a subsequent contract with the state to irrigate and reclaim, the Bruncau Desert Lands, were competitive and rival applications for the same public right or franchise, and the granting of either application would necessarily mean the refusal, and consequent extinction, of the other. That these two applications and proposals differed from each other materially as to the quantity of land to be irrigated and reclaimed, the plan, construction, extent, and cost of the irrigation works, and the price per acre at which perpetual water rights and proportionate interests in the irrigation works would be sold to settlers; the plaintiffs' proposal as to this last item being five dollars per acre lower than the Twin Falls Land and Water Company's proposal. That at the time the contract between the plaintiffs and the defendant was agreed upon at Sharon, Pa., viz., July 30, 1908, these two applications and proposals were both pending and undetermined before the State Board of Land Commissioners of Idaho, and said board had already fixed a date in the near future for an official meeting of the board for consideration thereof upon their respective merits. That the purpose which all parties to the contract in suit had in view, [356] throughout their negotiations, was to bring about the grant of the Twin Falls Company's application for segregation, by the Idaho State Board of Land Commissioners, by means of the elimination of the plaintiffs' competitive application, and the \$300,000 which the defendant agreed to pay to the plaintiffs was nearly all, if not wholly, in consideration for the plaintiffs' participation in this object and purpose. That the covenant of the plaintiffs to sell to the defendant its permits, maps, plans, surveys and estimates was not the chief purpose of the written contract, but merely an incident thereto, the chief purpose being the elimination of the plaintiffs' application for segregation, then pending before the Idaho State Board of Land Commissioners, in order to bring about the granting by the said Board of the Twin Falls Company's rival application for the same public rights and franchises. That the contract between the parties, as made and agreed upon verbally, was for the absolute withdrawal of the plaintiffs' application then pending before the State Board of Land Commissioners of Idaho, and, on July 30, 1908, the day the contract was agreed upon verbally, it was mutually arranged that this withdrawal should take place at a meeting of the said board, to be held at Boise, Idaho, on August 10, 1908, which was six days after the written contract was executed. That the inducement which led the defendant to execute the written contract was the agreement

of the plaintiffs to appear before the land commissioners of Idaho and withdraw their application for segregation, and it was upon the faith of this agreement that the defendant executed said contract. That in pursuance of their agreement so to do, three of the legal plaintiffs, acting for themselves and their associates, appeared before the land commissioners of Idaho, at a meeting held in Boise, Idaho, on August 10, 1908, and then and there publicly withdrew their application for segregation. That the object and purpose of the plaintiffs in withdrawing their application for segregation was to induce [357] and bring about the granting of the Twin Falls Company's like application, and thereby fix the liability of the defendant to pay to the plaintiffs the sum of \$300,000 as provided by the terms of the written contract in suit; but the representative of the plaintiffs who addressed the meeting of the land commissioners at the time of the withdrawal of the application merely stated that an arrangement had been made with Mr. Buhl (the defendant) by the Kuhn interests (which meant the legal plaintiffs), by which plaintiffs' maps, filings, rights or priorities were to be transferred to Mr. Buhl, and in explanation of why plaintiffs were withdrawing their application for segregation he assigned but one reason, and that was that the Kuhn interests were already engaged in a great many large enterprises there, and had about as much as they could handle for the next two or three years. That immediately upon, and as a direct result of, the withdrawal of the plaintiffs, the Board of Land Commissioners granted the Twin Falls Company's application for segregation by the adoption of the following minute, viz.: "The Twin Falls Land and Water Company's proposal, dated June 3, 1908, for the segregation of about 380,000 acres of land, lying between the Salmon and Bruneau rivers, in Owyhee County, Idaho, this being the only proposal for said lands now before the board, it is ordered that said company be granted these lands and that it be allowed to amend its proposal, including more lands which may be susceptible of irrigation under such system, and that the state engineer make a further and separate report upon said system." That at the time of the withdrawal of plaintiffs' application and the granting of the Twin Falls Company's application, the Board of Land Commissioners had no notice or knowledge of the written contract in suit, or of the fact that the plaintiffs were to receive \$300,000 or any other sum of money from the defendant in consideration of the withdrawal or other use or manipulation of plaintiffs' application, for segregation so as to bring about the [358] granting of the Twin Falls

application, and neither the said board in its official or organized capacity, nor any individual member thereof, had any knowledge of the true nature of the agreement then existing between the plaintiffs and the defendant, or of the amount of the consideration which the defendant was to pay to the plaintiffs. That, while no official vote or action had been taken by the State Board of Land Commissioners upon the comparative merits of the two applications and proposals of the plaintiffs and the Twin Falls Company for the segregation, irrigation and reclamation of the Bruneau Desert Lands before the withdrawal of the plaintiffs' application and proposal, the distinctive features and merits of the two rival applications and proposals had been considered and discussed by the members of the board in an informal way, and they were equally divided in opinion as to which application and proposal should receive favorable action.

One member of the land board testified: "Q. And you knew that if both of those applications or proposals remained undisposed of or not withdrawn, that the duty was going to be imposed upon the board of deciding which one should have it, you knew that, didn't you? A. I knew that, yes. Q. And you knew that you were going to have to determine, or take into consideration, the difference between the plans and the specifications proposed by each one of these parties respectively? A. Yes, sir. Q. And you knew that you were going to have to take into consideration the question of which was the best calculated to irrigate the lands at the least cost to the settler, you knew that? A. Yes, sir. Q. And you knew you were going to have to take into consideration the number of acres that each enterprise was going to redeem and water? A. Yes, sir. Q. And you knew you were going to have to take into consideration the price at which the contractor would ultimately sell the water and water rights, or the water rights to the settlers, that is right, isn't it? A. We didn't have to do that at that [359] time. Q. But you knew that ultimately you were going to have to do it? A. Certainly. Q. That those were elements you were going to take into consideration? A. Yes, sir. Q. You also recognized the fact that those parties were competitive applicants for the construction of a system to redeem and water these lands, didn't you? A. In a certain sense." Another member testified: "Q. Did you think that those were competitive propositions? A. They were. Q. You told Mr. Edwards, I believe, that during the time you were a member of the land board there were two contests, two pieces that came before the land board, in which there was an apparent con-

test between applicants for the segregation, did you not? A. I think there was two, but possibly more. Q. And you told him that in cases where the standing of the applicants was both good with regard to their financial ability, and the character of the work which they were going to construct, that the price named in their proposal was a consideration with the land board? A. Yes, sir." A third member testified: "Q. So that you considered the Kuhn application was the most advantageous to the interest of the state? A. I think so. I naturally would consider the amount of acreage to be reclaimed. Q. And you looked upon it in that light up to the time that you received information that the Kuhn application was to be withdrawn, did you not? A. Yes, sir. Q. And also looked upon it in that light until the Kuhn application was in fact withdrawn? A. Yes, sir." One of the plaintiffs testified: "Q. Now, for what purpose were you and Mr. Buhl to attend this meeting? A. To explain to the land board the fact that we desired Mr. Buhl to be placed in our position; that is, that there were not going to be two contending forces in the requests that are usually to be made in all the preliminary steps of getting a segregation."

The court entered judgment for defendant. Plaintiffs appealed.

George B. Gordon, T. C. Cochran, S. A. Gilmore and Sidney J. Watts for appellants.

Q. A. Gordon, James P. Whittle, H. C. Edwards and J. N. Martin for appellee.

[361] MOSCHZISKE, J.—This case was tried in accordance with the Act of April 22, 1874, P. L. 109, by a judge without a jury; the action was in assumpsit, the plaintiffs claiming \$275,000 under a written contract. After receiving evidence of the steps leading up to what the trial judge found to be the agreement in question, also concerning the conduct of the parties at the time of, and immediately after, the execution of the writing sued on, the court below concluded that the contract was void as against public policy, and entered judgment in favor of the defendant; the plaintiffs have appealed.

The material facts in the case as found by the trial judge are given more at length in the notes of the reporter published in connection herewith; but, so far as [362] necessary to develop the principles involved, they may be more briefly stated thus: Under what is known as the "Cary Act," the State of Idaho was granted authority to control, to a certain extent, the public lands of the federal government within the confines of that Commonwealth. In pursuance of this authority, the general assembly of Idaho es-

tablished a system for carrying out the provisions of the federal statute, and the parties to the present controversy proceeded under this legislation. A State Board of Land Commissioners was constituted, consisting of four members, and this board was authorized to pass upon all applications, or proposals, for the segregation of public lands for purposes of irrigation and subsequent sale to settlers. The Idaho statute does not authorize the reclamation of the lands through irrigation by the state itself, but provides for the doing of this by others, under a contract with the state. In order to obtain a contract to do such work, one has to file with the Board of Land Commissioners an application, or proposal, setting forth certain details prescribed in the statute, and this must be accompanied by a certified check "for not less than \$250 and not more than \$2,500 . . . as a guarantee of the execution of the contract by the applicant in accordance with his request and proposal in case of the approval of the same by the state." On March 14, 1908, the five legal plaintiffs in this case filed a request for the segregation of, and proposal to irrigate and reclaim, approximately 600,000 acres of desert land. On June 3, 1908, the Twin Falls Land and Water Company, a corporation, filed a like request and proposal for about 380,000 acres of the same lands included in the application of the plaintiffs. Frank H. Buhl, the defendant, was the president of the Twin Falls Company, and, in all the subsequent dealings hereinafter referred to, acted for that corporation. On June 22, 1908, at one and the same time, the land commissioners ordered an examination of both applications. While the applications in question covered, in whole or in part, the same [363] lands, the proposals differed in several particulars, viz.: in the source of the water supply and the points where the waters were to be diverted, in the plan or system of irrigation and cost thereof, and finally, in the fact that the plaintiffs proposed to "sell water rights and proportionate shares in the completed irrigation works to settlers at \$45 per acre, payable \$3 per acre at the time of sale, and the balance in not less than ten equal annual installments, while the proposal of the Twin Falls Company was to sell the same water rights and proportionate shares to settlers at \$50 per acre, to be paid in five equal annual installments, with interest on the deferred payments at the rate of 6 per cent per annum." Both the Kuhn interests (represented by the plaintiffs) and the Buhl interests (represented by the defendant) had been engaged within the State of Idaho in irrigation projects for some years, and the state officials were anxious to retain the

active participation of each of these groups in this field of endeavor. In the latter part of July, 1908, when the two applications were pending before the State Board of Land Commissioners, one of the legal plaintiffs came to Pennsylvania for the purpose of conferring with the defendant relative to their rival proposals. After several talks, on July 30, 1908, at East Sharon, Pennsylvania, an agreement was reached that Mr. Buhl, acting for the Twin Falls Company, should pay \$300,000 to the plaintiffs, and that the latter should formally appear before the land commissioners in Idaho and withdraw their pending application, thus leaving the field open to the defendant and the interests which he represented to secure the sought-for irrigation rights.

In pursuance of the agreement as just stated, on August 4, 1908, the written contract in suit was prepared and executed, and six days thereafter the parties appeared at a meeting of the land commissioners in Idaho, which had been arranged for the purpose, and the plaintiffs' proposal was formally withdrawn. In making this withdrawal a representative of the plaintiffs addressed [364] the commissioners and assigned as a reason for abandoning their application that his people were engaged in a great many large enterprises within the State of Idaho, and, therefore, felt that they had about as much as they could handle for the next two or three years. The written contract between the parties did not stipulate the formal withdrawal of plaintiffs' application, but it provided that, for a consideration of \$300,000, the plaintiffs should sell and transfer to the defendant all their interest therein, and also "all maps, plans, surveys and estimates made by or for them in connection with the segregation or irrigation of the lands referred to in said application," adding, "such assignment to be made in the event that the said Frank H. Buhl or his associates shall be able to procure the segregation already applied for by him;" it further provided that \$25,000 of the consideration mentioned must be paid to the plaintiffs "ten days after the State Land Board of Idaho should formally signify their intention to recommend the segregation (of the lands in question) to the party of the second part and his associates (being the defendant and the interests he represented)."

The fact of the existence of this written contract was not made known to the board of land commissioners, nor was anything said at the meeting concerning the consideration called for therein. The minutes of the meeting show the withdrawal of the plaintiffs' application "for the segregation of about 600,000 acres of land," and the granting of the defendant's application for "about 380,-

000 acres," with the right to the Twin Falls Company to amend its proposal by including more land, it being expressly stated, after noting the withdrawal of the plaintiffs' proposal, that the application of the defendant was "the only proposal for said lands now before the board." Immediately after this meeting of the land board, the Twin Falls Company held a meeting and authorized the payment of the \$25,000 stipulated for in the written agreement, and this sum was subsequently handed to the legal plaintiffs. When [365] the time fixed in the contract for the payment of the balance, or \$275,000, arrived, it was not forthcoming, and the plaintiffs instituted the present action to recover the amount with interest.

The plaintiffs contend, as they did in the court below, that the sought-for grant was not a franchise, that there was no competitive situation, and therefore, the contract in suit was in no sense harmful to the public; that the balance of the \$300,000 named in the written agreement was due to them as a consideration for the assignment and transfer to the defendant of the maps, plans, surveys and estimates mentioned therein, together with any interest which they might have, or be entitled to claim, under their application, which was filed more than two months prior to that of the defendant's company; that, since their application was filed before the proposal of the defendant, it was prior in time, and hence prior in right, and for that reason it had a value which (like a location or entry upon lands under the homestead and other such laws) they had a legal right to realize upon by sale or otherwise; that if their interest in this application had no substantial value which could be disposed of by sale, still, since the transfer of tangible property, i. e., maps, plans, etc., was provided for in the agreement, that was sufficient to support the consideration and carry the contract; and finally that, since the writing was valid upon its face, and the plaintiffs were not obliged to prove any facts aliunde the written contract in order to establish their case, the defendant should not have been permitted to introduce oral evidence of the negotiations leading up to the making of the contract or concerning the subsequent actions of the parties in interest, and thus to attack its validity. Further, the appellants complain because the court below did not answer specifically their requests for findings, and they contend that, owing to this failure, many material facts were not passed upon or given effect. On the other hand, the defendant contends, as he did below, that the [366] real purport and purpose of the written agreement, and the actual value contemplated to be delivered for the \$300,000 there-

in provided to be paid, were the elimination and withdrawal of the application, or proposal, filed by the legal plaintiffs, in order that the field of competition might be cleared and the proposal of the Twin Falls Company (represented by the defendant) granted without opposition. The court below did not sustain any of the contentions of the plaintiffs, but found in favor of the defendant, saying, "The fact that the subject of the contract in suit, and the thing for which the defendant agreed to pay the \$300,000 claimed, was the withdrawal and entire elimination of the legal plaintiffs as competitors of the Twin Falls Land and Water Company before the State Board of Land Commissioners of Idaho, for a contract with the state to carry out the Bruneau irrigation project, is so conclusively shown and firmly established by the evidence in this case that no contrary theory can be entertained."

The manifest purpose of the legislation referred to in the beginning of this opinion, and stated more at large in the reporter's notes to this case, was to encourage and promote the reclamation of public desert lands, to the end that they might be distributed in small tracts among actual settlers upon the cheapest and most inviting terms, so as to bring about their ultimate ownership, occupation and cultivation by the largest possible population; and the fact that, in effect, the ownership of the irrigation works also would eventually pass to these settlers, cannot affect the character of the original grant as a public franchise, if it was such. In the present case, official responsibility, to work out the contemplated results, was placed upon the Idaho State Board of Land Commissioners, and, the laws upon the subject being complied with, they had the right, and were fixed with the duty, when the occasion should arise, of deciding which of two or more applications, or proposals, for irrigating any given district, should be granted; of [367] course, in exercising this power, the board would be obliged ultimately to contract with the applicant who offered, or was willing to accept, the terms which promised most to the eventual settler upon the land. The mere fact that the statutes involved do not expressly provide for the manner of determining cases where more than one application is presented for the same general district, does not preclude such a situation, or alter the plain duty of the board when it arises, as it did in the present case.

Here each proposal was to irrigate and reclaim desert lands under a contract with the State of Idaho, and we feel that this constituted an application for a privilege in the nature of a public franchise. The law is established that, where any public right, fran-

chise, contract or privilege is to be disposed of by government officials or agents, whether by a public letting or awarding upon bids, or by the exercise of official discretion without public bids (*Hunter v. Nolf*, 71 Pa. St. 282; *Gulick v. Ward*, 10 N. J. L. 87, 18 Am. Dec. 389; *Boyle v. Adams*, 50 Minn. 255, 52 N. W. 860, 17 L.R.A. 96), it is against public policy for one competing applicant, candidate or bidder to contract for the extinguishment of another's competition: *Greenhold on Public Policy*, Rule 172, page 178; *Kennedy v. Murdick*, 5 Har. (Del.) 458; *Swan v. Chorpennig*, 20 Cal. 182; *Ray v. Mackin*, 100 Ill. 246; and other authorities, *infra*. It was the duty of the board of land commissioners to receive the applications and proposals of all persons desiring to compete for the present privilege, franchise, or contract, and after a careful investigation to grant that particular application which in the judgment of the board, all things being considered, was most advantageous to the public, without regard to the priority in date of one over others; for there is nothing in the statutes upon the subject recognizing any right gained by priority of filing. This is as it should be, because, there is no true analogy between the taking up of land under the homestead and other such laws and a case [368] like the one before us; there the terms of the bargain are absolutely determined in advance, and all must accept the government grant on these fixed terms, while here they are largely subject to negotiations between the applicants and the State, the terms of the final bargain to be reduced to a contract for the benefit of the public, i. e., the eventual settlers upon the land. Under the circumstances and evidence at bar, the court below properly found that the plaintiffs and defendant (the latter representing the Twin Falls Land and Water Company) were competing applicants for a public franchise. Both applicants prepared their respective proposals in accordance with the statutory requirements and submitted them to the land board for its consideration and decision upon their ultimate relative merits, and this created a competitive situation; which fact was clearly recognized by at least one of the plaintiffs and several of the land commissioners, as shown by excerpts from their testimony reproduced in the reporter's notes. The two rival proposals were pending and undetermined before the land board when the agreement in suit, stigmatized by the trial court as a corrupt contract for the sale and elimination of the plaintiffs' competition, was entered into.

While we shall not stop to analyze the proofs, yet, we agree with the court below it clearly appears that the chief aim and purpose of the agreement between the parties

were to eliminate the plaintiffs' actual and threatened competition, and that the consideration of \$300,000, named in the written contract, was to be paid chiefly to accomplish this end, the sale of the maps, etc., being merely incidental to the prime purpose in view. In considering the effect of such a state of affairs, it is of no significance that the land board is not required to grant any particular application, but has the power to refuse all proposals submitted to it; neither is it of any consequence that the applications in question were preliminary in their nature and would not in themselves [369] amount to a contract with the state, even if granted. No matter what the usual practice was before the land board, or what were the views of certain of its members, it will not do to depreciate or underestimate the importance of these preliminary proposals, for they are provided for with the greatest detail in the written law and must be viewed seriously; the mere fact that the board can permit their amendment and dictate the terms of the final bargain, without regard to the figures in the initial proposals, only makes possible a greater degree of competition when two or more applicants are seeking a particular grant. As just said, the proceedings are statutory, and applications such as here filed are expressly prescribed as the first step necessary to be taken. Every one desirous of entering upon a project like the one contemplated at bar must take this first step, and he can take no other until that is done; therefore, competition begins as soon as two applications are filed with the land board, and the suppression of this situation by an agreement between the applicants is as illegal at one stage of the proceedings as at another.

The court below has found that, at the time the plaintiffs withdrew their application, the land board was ignorant concerning the terms of the bargain between the competitors, but, if all the facts had been known, that would not legalize the transaction. The fraud was not against the land board, but the public, and even though the remaining application were, in fact, the better of the two, that would not be decisive of the case, for such transactions are condemned not so much for the harm done in any particular instance as because of their general evil public tendency. While we have not been referred to a case, and our own research has not disclosed any, which on its material facts is precisely like the one at bar, yet, the law upon the general subject in hand is firmly established, and the relevant applicable principles are well stated in the following excerpts from the authorities: "Where a contract belongs to a class [370] which is reprobated by public policy, it will be declared

illegal though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract and not its actual result:" 15 Am. & Eng. Enc. of Law (2d ed.) 934. "In other words its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not its actual injury to the public in a particular instance:" 9 Cyc. 481-2. "In the absence of any legislative prohibition of a particular agreement which may be brought before a court, the latter, to declare it void on this ground, must find that such contracts have a tendency to injure the public—are against public good, or inconsistent with sound policy and good morals as to the consideration or thing to be done:" 9 Cyc. 482. "Whether a contract is against public policy is a question of law for the court to determine from all of the circumstances in each case. It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts and agreements, therefore they are not to be held void as being contrary to public policy unless they are clearly contrary to what the legislature or judicial decision has declared to be the public policy, or they manifestly tend to injure the public in some way. On the other hand the interests of the public do require that there shall be some restrictions on the freedom of persons to enter into contracts; and if an agreement binds a party to do or not to do anything, the doing or omission of which is manifestly injurious to the public interests, the courts must declare it contrary to public policy, and therefore illegal and void:" 9 Cyc. 483-5. In *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 56, the rule is stated thus: "All agreements for pecuniary considerations to control the business operations of the [371] government . . . are void as against public policy, without reference to the question whether improper means are attempted or used in their execution; the law looks to the general tendency of such agreements and closes the doorway to temptation by refusing them recognition." In *Ormerod v. Dearman*, 100 Pa. St. 561, 564, 45 Am. Rep. 391, we state that the authorities "establish the principle that contracts which have for their subject-matter any interference with the creation of laws or their due enforcement are against public policy and therefore void;" and in *Swing v. Munson*, 191 Pa. St. 582, 588, 43 Atl. 342, 71 Am. St. Rep. 772, 58 L.R.A. 223, we say that "in

enforcing a policy in the interests of the whole public, the law takes but little note of the conduct of the immediate parties to the contract; the rule is, that courts having in view public interests, will not lend their aid to the enforcement of an unlawful contract." Again, in the recent case of *Pittsburg v. Goshorn*, 230 Pa. St. 212, 227, 79 Atl. 505, we say: "What results to a contract against public policy is a total and irremediable paralysis, which leaves it absolutely without any force or effect whatever, so that it cannot, under any circumstances, be made the basis of a cause of action. The law when appealed to will have nothing to do with it, but will leave the parties just in the condition in which it finds them." See also the discussion on this subject in *Enders v. Enders*, 164 Pa. St. 266, at p. 271, 27 L.R.A. 56, 44 Am. St. Rep. 598, 30 Atl. 129; *McMullen v. Hoffman*, 174 U. S. 639, 19 S. Ct. 839, 43 U. S. (L. ed.) 1117; *Gibbs v. Smith*, 115 Mass. 592; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678. These principles, when applied to the facts found by the trial judge, fully justify the legal conclusion reached in this case; but, after distinguishing one alleged controlling authority cited by the appellants, we shall examine some other reasons urged by them against the validity of the judgment entered by the court below.

Irvin v. Irvin, 169 Pa. St. 529, 32 Atl. 445, 29 L.R.A. 292, largely relied upon by the appellants to sustain their contention that the sale of the maps, plans, etc., mentioned in the written agreement was sufficient to sustain the contract in suit, has no application, [372] in that respect, to the present case. The gist of the *Irvin* decision is simply that, where a written contract is upon its face free from any taint of illegality, an accompanying collateral parol agreement, although against public policy, which does not actually enter into the substance of the written contract, cannot be introduced to defeat the latter. A reading of the opinion in that case will show we regarded the written contract there at issue as a transaction which stood by itself, separate and apart from the alleged collateral agreement, and this is made additionally plain when the decision in question is considered in connection with *Kilborn v. Field*, supra. The present case differs from *Irvin v. Irvin*, supra, for here the illegal agreement of the plaintiffs to sell their competition was not incidental to the transfer of something else, but entered into the very essence of the transaction before us; in other words, the written contract at bar had no real foundation to stand upon when separated from the illegal parol agreement that the plaintiffs and the defendant were to appear together before the State Board of Land

Commissioners, and the former were, then and there, formally to withdraw their application and leave the field open to the latter (which was done). The two agreements were in no way inconsistent, but entirely in harmony with each other and had in view the same result, namely, the withdrawal of the application of the plaintiffs and the granting of the application of the defendant, and upon the accomplishment of this result depended the payment of the consideration. In the *Irvin* case the defendant undertook to set up an independent, collateral and illegal agreement concerning a subject not mentioned or hinted at in the written agreement, while in the present case the written contract by its very terms provided that no formal transfer of tangible property should take place, and that the first installment of the consideration, viz., \$25,000, should not be paid until the land board favorably acted upon the defendant's application; which, of [373] course, could mean only that the application of the plaintiffs would then cease to have any value, and probably, since the two irrigation plans were different in many respects, although covering practically the same territory, the maps, plans, etc., would then be greatly depreciated in value. The plaintiffs, however, received the \$25,000, and the court below has found that the amount was sufficient to compensate and reimburse them for their entire investment in connection with the subject-matter of the contract in suit; although, in this connection, it may be stated that the consideration was indivisible, there being no stipulation, either verbal or written, and no agreement, as to how much of the \$300,000 named in the contract should go to the plaintiffs for giving up their application, and thus relinquishing their competition, or as to the amount to be paid them for the maps, plans, surveys, etc. It is settled that where the consideration of a contract is indivisible, and a part is illegal, it falls as a whole: *Trist v. Child*, 21 Wall. (U. S.) 441, 22 U. S. (L. ed.) 623; *Meguire v. Corwine*, 101 U. S. 108, 112, 25 U. S. (L. ed.) 899; *Hazleton v. Sheckells*, 202 U. S. 71, 78, 6 Ann. Cas. 217, 26 S. Ct. 567, 50 U. S. (L. ed.) 939.

As to the appellants' complaint concerning the admission of evidence aliunde the contract. The rule is established that, "where a written instrument is attacked upon the ground that the contract is offensive to law and violative of public policy, the whole transaction should be inquired into, and the court will not suffer itself to be embarrassed by any technical rules regarding the admissibility of evidence." 21 Am. & Eng. Enc. (2d ed.) 1099; also see 9 Cyc. 562, where it is said that, in such instances, "the substance, not the form, of the agreement is looked at

... , therefore, in order to arrive at the substance of it, the court will not confine its attention to the mere words in which it is expressed," and page 766, to this effect: "Where a contract is assailed on the ground that it is illegal and void, the defense may be and generally is established by evidence aliunde." See also *Coverly v. Terminal Warehouse Co.* 70 N. Y. [374] App. Div. 82, 88; 85 App. Div. 488, 83 N. Y. S. 369; *Greenhood on Public Policy*, 126. Speaking of the rule just cited, in *Irvin v. Irvin*, 169 Pa. St. 529, at p. 544, 32 Atl. 445, 29 L.R.A. 292, we said: "A distinction has been taken between those contracts in which the consideration affects only the parties, and those in which it affects the public . . . ; so, while the rule laid down in *Evans v. Dravo*, 24 Pa. St. 62, 62 Am. Dec. 359, and *Swan v. Scott*, 11 S. & R. St. 155, and other cases, is that a demand on an illegal transaction will be enforced, if the plaintiff can make out his case without disclosing the illegality, that rule has not been invariably applied to contracts where the illegal consideration is . . . an immorality detrimental to the public. In such cases, the courts may overlook the parties and consider the question one of public policy." See also *Kilborn v. Field*, 78 Pa. St. 194, 196, where suit was brought on a note which was perfectly good on its face, but the court received evidence to show a prior accompanying agreement concerning the procuring of a divorce, which was void as against public policy, and then held: "If the consideration of the note sued upon was in part or in whole that the respondent should not appear and oppose the divorce, the note was void; whether such was the consideration was a question of fact which ought to have been submitted to the jury." Before leaving this branch of the case, it may be well to state we are not persuaded that the contract being one which concerned property located in a foreign jurisdiction, has any weight under the circumstances in this case. The contract was made and executed in Pennsylvania, and must be judged by the laws of this State; but, since nothing has been shown to the contrary, we assume it would be equally void, as against public policy, in every other state of the Union, including Idaho. The case of *Rumsey v. New York, etc. P. R. Co.* 203 Pa. St. 579, 585, 53 Atl. 495, simply decides that "contracts valid by the law of the place and time where they are made and are to be performed, are valid everywhere;" that decision has no particular bearing [375] here. Finally we note that proof of the Idaho statutes was admissible properly to develop the facts involved in this case, and in order to show that the parties in interest were respectively applying for a grant in the nature of a public franchise.

We fail to see merit in the appellants' complaint concerning the trial judge's failure to answer their requests for findings of fact; as recently stated in *Com. v. Altoona School Dist.* 241 Pa. St. 224, 229, 88 Atl. 481. "There is no requirement in the Act of 1874 that the court shall specifically answer upon the record all the requests for findings of fact submitted by counsel (*Com. v. Monongahela Bridge Co.* 216 Pa. St. 108, 8 Ann. Cas. 1073, 64 Atl. 909), but, of course, the court's findings must cover all facts stated in the requests which are material to a proper determination of the issues involved." When the well stated opinion filed by the court below is read as a whole, it is clear that the trial judge substantially complied with the requirements of the established practice under the act in question. Some of plaintiffs' requests were so drawn that they could not be answered by a simple affirmation or negation; many of them were negatively answered by an affirmative finding of converse propositions included in the series of facts specifically found by the trial judge; others, such as those dealing with the individual attitude of commissioners toward competition among rival applicants, and the actual practice before the land board relating to matters positively regulated by statutory enactments, were wholly immaterial, as we have hereinbefore indicated; moreover, during the course of this opinion, incidentally, we have endeavored to point out that, in several instances, facts which the appellants seemed to consider of prime importance were, under what we have decided to be the governing principles of law, of no real materiality.

After a careful study of the entire record, and the most excellent briefs of counsel, it seems clear to us that the privilege sought by the respective applicants [376] was a right in the nature of a public franchise, and it is equally clear that the proposal, or application, withdrawn by the plaintiffs, was in the nature of a preliminary bid, or offer, for this franchise. In each instance, the consideration, or amount of the bid, consisted of the merits of the proposed plan of irrigation, as set forth in the application, including, of course, the price which the applicant suggested he was willing to accept for water rights from future settlers upon the land. The right to reclaim desert land, by an irrigation project such as the parties had in mind, was one granted by the national government to the state itself, with the privilege in the latter of enfranchising others by contract to perform the work and, incidentally, to reap a proper recompense or profit therefrom; it could only be conferred by the state through its board of land commissioners, and these officers, acting in the administration of a public trust, when disposing of

the franchise, were bound by every principle of law to obtain the best possible plan for the work to be done, the most competent and responsible contractor to do it, and the most favorable terms for the eventual settlers. In the present instance, that there was competition between the respective applicants is clear, else why should one be willing to pay the other \$300,000 to step aside? In cases of this kind, it is plain that a premium paid to prevent competition is, almost invariably, either directly or indirectly, charged upon the public; for it is but reasonable to assume that in the end the terms will be calculated to cover all expenditures, and therefore, if the successful contractor pays a given sum to induce a rival to stand out of the way, he can, if not compelled to make such payment, afford to perform the work in question for the recompense he is to receive less the amount paid to avoid competition. As we have already shown, the law reprobates transactions such as the one before us, owing to their general tendency for evil, irrespective of the results in any special case; but, aside from this aspect of the [377] matter, there is but little force in the appellants' contention that, in this case, the public officials of Idaho were anxious to avoid competition because of their fear that both applicants might relinquish the whole Bruneau Desert irrigation project, for a reading of the testimony shows that the real apprehension entertained by some of the land commissioners, who appear to have been equally divided as to the merits of the respective proposals, was not that the two applicants might abandon the particular project then before them, but that, if they were not both pleased, the state might, in the end, lose, as a general operator in the field of irrigation, the one who was not favored by their grant; or to express the situation in the words of one of the commissioners: "The board looked at it from this standpoint, they wanted to keep both interests operating in the state, they thought they were good people for the state." This attitude on the part of certain of the commissioners was altogether too fanciful to save the plaintiff's case. Of course administrative officials oftentimes are placed in a position where they must decide between two interests, each of which they would like to please, both for personal and official reasons, and, in such instances, they have a natural desire to avoid the disagreeable duty of selecting one as against the other, but this attitude on their part, while readily understood, cannot be given material weight in deciding a case of the character of the one now before us. *Hyer v. Richmond Traction Co.* 80 Fed. 839, 844, 42 U. S. App. 522, 26 C. C. A. 175, and 168 U. S. 471, 18 S. Ct. 114, 42 U. S. (L.

ed.) 547, is cited by both sides; although the opinions there reported contain much interesting discussion on the general subject at present under consideration, nevertheless, the decision in that case is not at all a controlling authority here. It remains but to say that, while we do not deem it necessary to pass specifically upon each of the forty-two assignments, yet, we are not convinced of material error in any respect.

The judgment of the court below is affirmed.

NOTE.

Admissibility of Parol Evidence to Show Illegality of Contract.

The recent cases including the reported case are in accord with the holding in *Muskogee Land Co. v. Mullins*, 165 Fed. 179, 16 Ann. Cas. 387, 91 C. C. A. 213, that a written contract fair and lawful on its face may be shown by parol to be contrary to law, morals or public policy. In *re Canfield*, 190 Fed. 266; *Little v. State Nat. Bank*, 105 Ark. 281, 152 S. W. 281; *Smith v. David B. Crockett Co.* 85 Conn. 282, 82 Atl. 569, 39 L.R.A. (N.S.) 1148; *Wright v. Vaughan*, 137 Ga. 52, 72 S. E. 412; *Hentz v. Booz*, 8 Ga. App. 577, 70 S. E. 108; *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596; *Roberts v. Arnall*, 9 Ga. App. 328, 71 S. E. 590; *Hines v. Cureton-Cole Co.* 9 Ga. App. 778, 72 S. E. 191; *Farmers' Oil, etc. Co. v. Rosenthal*, 10 Ga. App. 416, 73 S. E. 428; *McNamara v. Georgia Cotton Co.* 10 Ga. App. 669, 73 S. E. 1092; *Citizens' Nat. Bank v. Kerney*, 59 Ind. App. 96, 108 N. E. 139; *Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231; *Taylor v. Perkins*, 171 Mo. App. 246, 157 S. W. 122; *Howard v. Farrar*, 28 Okla. 490, 114 Pac. 695; *Southern States Phosphate Co. v. Arthurs*, 97 S. C. 358, 81 S. E. 603; *Maybank v. Rodgers*, 98 S. C. 279, 82 S. E. 422; *Kilbourn City v. Southern Wisconsin Power Co.* 149 Wis. 168, 135 N. W. 499; *Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co.* 152 Wis. 73, Ann. Cas. 1914C 449, 138 N. W. 624, 42 L.R.A. (N.S.) 847.

Thus it has been held recently that it is competent to show by parol evidence that a contract which appears to be legal on its face is a gambling contract or a wager. *Wright v. Vaughan*, 137 Ga. 52, 72 S. E. 412; *Hentz v. Booz*, 8 Ga. App. 577, 70 S. E. 108; *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596; *Roberts v. Arnall*, 9 Ga. App. 328, 71 S. E. 590; *Hines v. Cureton-Cole Co.* 9 Ga. App. 778, 72 S. E. 191; *McNamara v. Georgia Cotton Co.* 10 Ga. App. 669, 73 S. E. 1092; *Farmers' Oil, etc. Co. v. Rosenthal*, 10 Ga. App. 416, 73 S. E. 428. Parol

evidence is competent to show that the parties to a contract for the sale of a commodity contracted in pursuance of a mere speculative venture, with the intention of settling according to the difference existing at the time of delivery between the market value of the property and the purchase price as fixed in the contract. *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596; *McNamara v. Georgia Cotton Co.* 10 Ga. App. 669, 73 S. E. 1092. The party attempting to show by parol evidence that a contract is a wagering contract must prove that the intention and understanding of the parties to execute an illegal contract was mutual. *Farmers' Oil, etc. Co. v. Rosenthal*, 10 Ga. App. 416, 73 S. E. 428. It is competent to show by parol evidence that the consideration of a note was a gambling contract. *Hentz v. Booz*, 8 Ga. App. 577, 70 S. E. 108. So it may be shown that a note was given for the premium on a wagering policy of insurance. *Little v. State Nat. Bank*, 105 Ark. 281, 152 S. W. 281.

The general rule applies to usurious contracts and it is held that parol evidence is competent to show that a contract is usurious. *In re Canfield*, 190 Fed. 266.

It may be shown by parol evidence that a contract is founded on an immoral consideration. Thus it has been held that parol evidence is admissible to show that a contract was made to lease a house for the purposes of prostitution and the illegal sale of liquor. *Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231.

It has also been held recently that parol evidence may be admitted to show that a contract was illegal because made as a preference by a bankrupt, *Citizens Nat. Bank v. Kerney*, 59 Ind. App. 96, 108 N. E. 139; or made in consideration of a champertous agreement by an attorney, *Taylor v. Perkins*, 171 Mo. App. 246, 157 S. W. 122; or made in consideration of a sale of untagged fertilizer, *Southern States Phosphate Co. v. Arthur*, 97 S. C. 358, 81 S. E. 663; or involving the transfer of an Indian allotment, *Howard v. Farrar*, 28 Okla. 490, 114 Pac. 695; or involving the evasion of a statute, *Kilbourn City v. Southern Wisconsin Power Co.* 149 Wis. 168; or involving the bribing of a salesman, *Smith v. David B. Crockett Co.* 85 Conn. 282, 82 Atl. 569, 39 L.R.A.(N.S.) 1148.

Where the parol evidence offered is wholly insufficient to invalidate the contract it is properly rejected. *Illinois Surety Co. v. O'Brien*, 223 Fed. 933, 139 C. C. A. 413.

PORTER

v.

UNION TRUST COMPANY ET AL.

Indiana Supreme Court—January 20, 1915.

182 Ind. 637; 108 N. E. 117.

Wills — Rules of Construction — Intent of Testator.

The intent of the testator must be sought by a construction of the entire will.

Effectuating All Provisions.

Effect should be given, if possible, to every provision of a will.

Avoiding Conflicts.

In construing a will, conflicts should be reconciled, and that construction which will give effect to all provisions should be preferred.

Avoiding Partial Intestacy.

A will should be construed so as to avoid partial intestacy.

Repugnancy — Effect.

Where two clauses are equally specific and clearly repugnant, the latter controls, though, when the effect of the latter gift is merely to enlarge the former, there is no repugnancy.

Same.

Specific language generally controls that of a general nature.

Gifts by Implication.

Gifts by implication are not favored, though they will be given effect when clearly appearing.

Erroneous Recital as Implied Gift.

A bequest may be implied from an erroneous recital in a will of a previous specific gift in the will but not from a recital in reference to a disposition by an instrument other than the will.

[See note at end of this case.]

Equitable Conversion — Devise to Trustees with Power of Sale.

For a testator to devise his land to trustees, with power to sell land and invest the proceeds in personalty, does not work an equitable conversion, though the sale and reinvestment has that effect.

[See 17 Ann. Cas. 643; Ann. Cas. 1915D 434.]

Wills — Power of Testamentary Disposition — Right to Limit.

The right to dispose of property by will is a creature of statute; and hence such right may be limited.

Wills — Construction — Bequest of Income — Accumulation.

A testator devised and bequeathed all his property to a trustee, with directions that the trustee should collect the income, and out of the net proceeds pay his wife \$300 per month. At the time the will was made, two of the testator's three daughters, who were his only children, were married, while the youngest lacked a number of years of

reaching her majority. The testator expressed his confidence that his wife would maintain the youngest daughter, and provided that, in case of emergency or insufficiency of the income, the trustee might sell the principal to meet immediate necessities. There was no intimation that the testator intended the daughters to share in the property during the life of their mother, and the last clause of the will recited that it was his wish that the wife during her life should have the entire benefit of his estate. It is held that, in view of Burns' Ann. St. 1914, § 9724, prohibiting accumulations, unless for the benefit of a minor, and to terminate with the expiration of the minority, the wife was entitled to take all of the income from the property.

Appeal from Probate Court, Marion county: Ross, Judge.

Action by Carrie R. Porter, plaintiff, against Union Trust Company et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

Elmer E. Stevenson for appellant.

Miller, Shirley, Miller & Thompson for appellees.

[638] MORRIS, J.—Suit by appellant, widow of Edward B. Porter, deceased, against appellee Union Trust Company, as executor and trustee, and three daughters of appellant and decedent, as legatees and devisees. The complaint sought a construction of the will. Certain facts were alleged and proven, showing the conditions surrounding testator when the will was executed. Issues were formed and a trial had resulting in a finding and judgment for appellees. Error is assigned in the overruling of appellant's motion for a new trial, which was grounded on the insufficiency, in fact and law, of the evidence to support the court's decision. The record discloses no controversy of fact. The will was executed in 1902. The first item provides for the payment of debts and funeral expenses. The second gives the widow the household furniture, library and other chattels. The remainder of the will, relating to the disposition of the estate, reads as follows:

"Item. Third. All the rest and residue of my estate of which I may be possessed at the time of my death, real, [639] personal or mixed and wherever situated, I give, devise and bequeath to The Union Trust Company of Indianapolis, Indiana, as trustee; said trustee shall take and hold the same however for the purposes hereinafter named, with the rights and powers and subject to the liabilities following, that is to say. My said trustee shall have full and absolute power in its

own discretion to sell, assign, pledge, mortgage or convey any or all of my estate coming into its hands when in its discretion it is advisable or necessary for the purpose of changing investments or borrowing money or otherwise carrying out the purposes of this trust; and it shall have like power in respect to any other property which it may thereafter become possessed of by purchase or otherwise as a part of the trust estate held by it under the terms of this will. And in making any such transfer or conveyance it shall be guided solely by its own discretion and shall have full power and authority to execute proper instruments of conveyance without procuring the consent to or subsequent approval of the same by any court or by any other person whatsoever. It shall have full power to and shall be charged with the duty of managing all such property as may come into its hands, collect the rents and income therefrom and paying all taxes, assessments insurance premiums and such other items of expense as may be a proper charge against the same. Said trustee shall out of the net income of my estate pay to my said wife the sum of \$3,600 per annum, payable in equal monthly installments on or about the first of each calendar month. And in event the net income payment of charges from my estate shall be insufficient in any year to make such payment to my said wife, then said trustee shall out of the principal of my estate make good any such shortage in the income. And by the foregoing I mean to say that it is my desire that my said wife shall have a fixed income of \$300 per month irrespective of whether the income of my estate in the hands of said trustee produces said amount or not. And moreover it is my wish and my will that in event any extraordinary sickness or calamity should overtake my said wife, so that in the discretion of my said trustee said sum of \$300 per month is insufficient to defray the expenses which may have to be incurred, it is authorized to pay such additional sum over and above the provision herein made as may be necessary to give my said wife every necessity, comfort, or convenience which she may desire during the continuance [640] of any such unfortunate situation. It is also my wish and my will that my wife shall have the option of continuing to reside in the residence occupied by us at the time of my death without payment of any rent so long as she may desire or until my said trustee shall find it desirable in the management of the trust hereby created to sell the same; and in event she shall desire to live elsewhere or in event my said trustee shall sell the same, then said trustee shall pay to her an additional sum of \$400 per year payable in equal

monthly installments to take the place of said residence hereinabove provided for her. Upon the death of my said wife, said trustee shall divide my estate or so much thereof as may be then on hand and distribute the same in equal parts among my three children, Kate Porter Varney, Eleanor Porter Jelleff and Ann V. Porter, and in event any of my said children shall be then dead, leaving child or children then surviving, such child or children shall be entitled to the portion which its parent would have received if living. Item Fourth. My daughter Ann V. Porter, being now only thirteen years of age, she will necessarily need provision made for her support and education for a number of years to come, and while I do not mean to make the same compulsory upon my wife, yet it is my wish, desire and expectation that out of the provision hereinbefore made for my wife, she will be able to and will defray the expense of our said daughter's support and education, in case at the time of my death she is dependent upon her parents for support. In making the foregoing provisions for my beloved wife, my sole desire has been to give to her the entire benefit of my estate during her lifetime and at the same time to relieve her altogether of any worry, care or risk in connection with the management thereof, and I felt that it would be far better for her to be relieved of all responsibility in the management of my property and left with a fixed income entirely ample to meet her wants. Item Fifth. I hereby nominate and appoint The Union Trust Company of Indianapolis, executor of this my last will and testament."

Testator and appellant were married when she was quite young. When the will was executed she was forty-six years old, and at that time they had two married daughters, appellees Kate Porter Varney and Eleanor Porter Jelleff. The [641] third child, appellee Anne V. Porter (now Pangborn) was then thirteen years old. She was married after testator's death. The three daughters were the only children of appellant and testator. He was a banker long before and after he made his will and received a salary as cashier of the Indiana National Bank ranging from \$3,000 to \$4,000 per annum. When the will was executed he owned property worth \$60,000 from which he derived an annual net income of \$3,500 to \$4,000. He owned the residence where the family then resided. Testator died in October, 1909. He ceased working in the bank a year before his death because of ill health. Three or four years after the will was executed he came in possession of property worth \$70,000, derived from the estate of his father, Governor Albert G. Porter. It is probable that this estate vested in testator before the will in controversy was

executed, though the evidence thereof is somewhat indefinite. At about the same time he also came in possession of property inherited from deceased brothers which was of the value of \$32,000. After the will was executed testator made improvements on certain Indianapolis real estate that increased the rentals therefrom many fold. Since 1908 the average annual net income from the estate has been about \$7,200, about \$2,800 of which accrued from the personal estate. Appellee Union Trust Company qualified as executor and also as trustee. All of decedent's debts have been paid. The annual living expenses of testator's family ranged from \$3,000 in 1897 to \$6,000 in 1908. Appellant lives in the family residence occupied by testator when he died. No calamity nor extraordinary sickness has overtaken appellant. After the decedent's debts were all paid, appellee trust company, at first paid to appellant all the net annual income, but subsequently, on legal advice, refused to pay her more than \$3,600 per annum unless on order of the probate court in an action to construe the will. Because of such refusal this action was instituted.

[642] Appellant contends that the will evinces the testator's intention to give her the entire net annual income of the whole estate during her life; that the fixed income of \$300 per month was intended as her minimum income regardless of earnings. Counsel for appellees insist that notwithstanding the clause "In making the foregoing provisions for my beloved wife, my sole desire has been to give her the entire benefit of my estate during her lifetime," it must be held, under well recognized rules of construction, that appellant, under the facts disclosed, is entitled only to a fixed income of \$3,600 per annum, payable in monthly installments of \$300. That the will contains ambiguities, and therefore requires the application of rules of construction, is conceded. Nor is there any controversy about the existence of the rules we will notice. The dispute turns on the application, or the extent thereof, to the subject-matter.

The intent of the testator must be sought by a consideration of the entire will, in the light, if any, of the surroundings disclosed by the parol evidence admitted. Effect must be given every word or clause, if possible, and provisions apparently conflicting must be reconciled if such result be rationally attainable. Where two constructions are suggested, the one disregarding a word or clause of a will, and the other giving effect to a will as a whole, the latter must be adopted. Where one proposed construction of an ambiguous provision assumes an intention to make an unlawful gift, while another does not, the

latter will be accepted, if possible without doing violence to the testator's purpose. Partial intestacy will be avoided, unless a contrary intention clearly appears. Where two clauses are equally specific and clearly repugnant the latter controls, but when the effect of the later gift is merely to enlarge the former, there is no repugnancy. Page, Wills, § 469. Specific language generally controls that of a general nature. *Cleveland, etc. R. Co. v. Blind* (1914) [643] 182 Ind. 398, 105 N. E. 483, 491. Gifts by implication are not favored, but where an intention to make a supposed gift clearly appears from a consideration of the entire will the intention must be given effect although not expressed by direct language. Case note to *Conner v. Gardner* (1907) 15 L.R.A.(N.S.) 73. Of course such implication must be grounded on language found in the will, and not on conjecture, and the implied intent may not affect property otherwise expressly bequeathed. *Kelly v. Stinson* (1847) 8 Blackf. (Ind.) 387. A bequest may be implied from an erroneous recital. Where a will recites a specific provision to a designated person as previously made therein, such recital though incorrectly, but nevertheless clearly showing the testator's intention to make such disposition, a gift is implied. 1 *Jarman, Wills* (6th ed.) 491-493; Page, Wills, § 468; 40 *Cyc.* 1391; 30 *Am. & Eng. Enc. of Law* (2d ed.) 698; *Hawes v. Kepley* (1902) 28 Ind. App. 306, 310, 62 N. E. 720. However, no gift by implication arises from an erroneous recital in reference to a disposition by an instrument other than the will. *Smith v. Smith* (1910) 113 Md. 495, 77 Atl. 975, 31 L.R.A.(N.S.) 922, 140 *Am. St. Rep.* 435.

When the will in question was executed the testator must have contemplated that the annual net income of the estate might exceed \$3,600, and that his wife, then 46 years old, might possibly live for half a century. Before he died he evidently knew that the average annual income was greatly in excess of \$3,600. There is no direct gift of the excess income over \$3,600 (aside from the ones contingent on calamity, extraordinary illness or removal from the homestead) and yet it could not rationally be held that testator intended to die intestate as to any of his property. Consequently the testator must have intended by the will to bequeath such excess income either to his wife, or to his three daughters "in equal parts." But it is equally clear that he did not intend that his married daughters at [644] least, should come into the enjoyment of his bounty to any extent, until after appellant's death; nor that even the younger one should to any extent, unless appellant, contrary to his expectation and desire might fail to furnish the means

necessary to her support and education during the possible time of her dependence. Even the intention that the youngest daughter might in any contingency look to the trustee, instead of the mother, for support and education during the years of her possible dependence, must appear by implication, if at all, for it is not expressed. The bequest to the three daughters appears in the last clause of the third item, and provides for the division and distribution of the remaining estate to them "upon the death of my said wife." If, therefore, appellees' theory be correct it must have been the testator's purpose for the excess annual income above the sum of \$3,600 to accumulate from year to year during the possibly long period that appellant might live. The testator realized that after his death the entire income might arise from personal property, for he clearly gives the trustee untrammelled authority to convert the real estate into personal property. True as counsel for appellees contend, no equitable conversion resulted at testator's death because of such authority, but the subsequent exercise thereof by the trustee would operate as a conversion whenever the realty might be sold. The will vests the trustee with unlimited discretion in the matter, of sale and reinvestment, but if a concededly better one might be made by changing from realty to personalty the trustee would be morally bound to make the change. The right to dispose of property by will is a creature of statute, and consequently the State may limit the right as it sees fit. *Donaldson v. State* (1915) 182 Ind. 615, 101 N. E. 485. In Indiana, a testamentary provision for the accumulation of income from personalty, to commence at testator's death, is void unless for the benefit of a minor, and to terminate with the [645] expiration of the minority. 2 *R. S.* 1852, p. 245, § 9724 *Burns* 1914. The origin of this limitation is traceable to the will of an English merchant who died in 1797. This will devised property worth about \$3,000,000 to trustees, to accumulate the income during the lives of all his sons, grandsons and grandson's children living at his death, and then, at the death of the survivor, to transfer the property to the three living, oldest, male descendants of his three sons, and failing them to the Crown of England for the sinking fund. It was then estimated that the trust might last for 75 years and with most skillful management, the total accumulation could reach \$125,000,000. It was held, however, that the trust did not conflict with the then existing rule against perpetuities. *Thellusson v. Woodford* (1798) 4 *Ves. Jr. (Eng.)* 227. The danger to public interests of such possible accumulations caused Parliament to promptly enact the law

of 39 and 40 Geo. III, Ch. 98, popularly called the Thellusson Act, and our statute (§ 9724 Burns 1914, *supra*) is the outgrowth of that legislation.

When testator died his youngest daughter was twenty years old. The theory of appellees' counsel involves the intent of the testator to make a disposition that might violate the law in relation to accumulated income from personalty, and such intent should not be imputed, if from the whole will there may rationally be inferred a purpose on testator's part to make a disposition that would not conflict with such law.

Counsel for appellees call our attention to the provision that requires the payment of \$3,600 "out of the net income," which, they claim, implies an intent not to bequeath the entire income to appellant. They also point out the provision in regard to "fixed income," and call our attention to the evidence which shows that before any of the daughters were married the entire family expenses did not exceed \$300 per month. It may be conceded that were it not for the recital that in the foregoing provisions for appellant [646] it was the testator's desire "to give to her the entire benefit" of the estate during her life, the position of counsel for appellees could not well be assailed even though it resulted in partial intestacy. But the recital has the effect of clearly showing a purpose to give her the entire income and the duty devolves on this court of reconciling the apparent inconsistency if reasonably possible. Viewing the will as a whole, in the light of the testator's surroundings, we are constrained to hold that such reconciliation is feasible. The will reveals the testator's tender affection for the wife of his youth, and evinces a watchful care for her future welfare and comfort, and we are of the opinion that the provision in relation to a fixed income was intended by the testator as a minimum one, and that it was his purpose, in any event, to give her each year the entire net income of the estate. This conclusion avoids any possibility of partial intestacy, and in our judgment gives effect to his real intention, though such purpose was not expressed in apt language.

Judgment reversed with instructions to sustain appellant's motion for a new trial.

NOTE.

Implied Devise or Bequest from Recital in Will.

Introductory, 431.

Recital of Gift as Made in Will, 431.

Recital of Conveyance by Instrument Other than Will, 433.

Recital of Ownership or Title in Another, 436.

Introductory.

It is the purpose of this note to consider only those cases treating of the effect as a devise or bequest by implication of a recital in a will of ownership in another independent of the will, or a recital of a gift as made in the will itself or by some other instrument. No attempt is made to discuss those cases dealing with the general doctrine of devises or bequests by implication, or with the character of the estate or interest that may be created by implication. The question of cross-remainders by implication is considered in the note to *Addicks v. Addicks*, Ann. Cas. 1916B 709.

Recital of Gift as Made in Will.

The construction of a recital in a will as a devise or bequest by implication rests solely on the efforts of the courts to ascertain and carry out the intention of the testator; and so, where a testator in one part of his will recites that he has given a legacy or devised realty to a certain person, but it does not appear that any such bequest or devise has been made, the courts will consider the recital as conclusive evidence of an intention to make a devise or bequest and give the erroneous recital the effect of an actual gift by way of a devise or bequest by implication. *Yates v. Thomson*, 3 Cl. & F. (Eng.) 572; *Marsh v. Hague*, 1 Edw. (N. Y.) 174; *Culhane v. Fitzgibbons*, 42 Misc. 331, 86 N. Y. S. 710. And see the reported case.

In *Atwood v. Geiger*, 69 Ga. 498, it appeared that a testatrix bequeathed all her property to such of her sons and daughters as might be living at the time of her death, absolutely and in fee simple, excluding entirely from all inheritance the representatives of deceased children. By a codicil she changed the scheme of the will, both as to the legatees and legacies. She included her grandchildren, who had been excluded from any legacy, and limited the legacies of the children from an absolute fee to a life estate in each, with remainder over in fee to her grandchildren. In making this alteration of her original will, she said: "I hereby alter and change all those items, sections and parts of my said last will and testament, whereby the property therein mentioned is bequeathed to my sons, . . . and to my daughters, . . . and to my granddaughter, Ann Margaret Geiger, so that my said sons, . . . and my said daughters, . . . and my said granddaughter, Ann Margaret, shall each have and enjoy only a life interest in the property mentioned in my said last will and testament as bequeathed to each of them." Construing the will and codicil the court said: "It is undoubtedly true that the words of the codicil show that the testatrix

believed that she had given the complainant an equal proportion of her property, and that it was so expressed in her will. If, then, she so thought, and used words in the codicil to show that it was still her intention for the complainant to have it, though in a modified form, it is the duty of the courts to give effect to that intention by sustaining this last 'legal expression of her wishes as to the disposition of her property after her death.'

So it has been held that a devise over to B of lands, described as those given to A, was a devise by implication to A, though no prior devise had been made to A. *Bibin v. Walker*, Ambl. (Eng.) 661. Similarly, where a testator made a will and two codicils, by none of which he gave anything to St. Catherine's College, and many years afterwards made another codicil, describing it as a codicil to his last will, and thereby, after reciting that by his said will he had bequeathed £1000 to St. Catherine's College, he confirmed that bequest and gave to the college, in addition to the £1000, a sum of £5000, it was held that the recital in the last codicil amounted to a bequest by implication and that the college was entitled to a legacy of a total of £6000. *Farrer v. St. Catherine's College*, L. R. 16 Eq. (Eng.) 24. Where a testator in his will gave to A a contingent annuity of forty pounds and also a legacy of thirty pounds, it was held that a recital in a codicil "And I increase the immediate annuity of fifty pounds" gave to A an annuity of fifty pounds in addition to the contingent annuity of forty pounds. *Ives v. Dodgson*, L. R. 9 Eq. (Eng.) 401. In *Jordan v. Fortescue*, 10 Beav. (Eng.) 259, wherein it appeared that a testator by a codicil gave to A, "£500 in addition to £1500 which he had before bequeathed to him," when in fact the only legacies which the testator had previously made were two of £500 each, it was held that by implication the legatee A was entitled to £2000.

But in the case of *In re Smith*, 2 Johns. & H. 594, 70 Eng. Rep. (Reprint) 1196, the court declared a recital in a codicil concerning a prior gift to be governed by the rule applicable to recitals of a prior gift in a different instrument, stating the rule to be as follows: "Where you find a recital that a particular person is entitled under another instrument, that does not in general amount to a gift by the instrument which contains the recital, because the testator, supposing the interest already to exist, cannot intend by that instrument to create it; but where a testator says in any testamentary instrument that he has by that very document made a particular gift, there the court will lay hold of this as conclusive evidence of an intention to confer such bounty, and will give to the

erroneous recital the effect of an actual gift." And in the case of *Re Arnold*, 33 Beav. 163, 9 Jur. N. S. 1186, 9 L. T. N. S. 530, 12 W. R. 4, 55 Eng. Rep. (Reprint) 329, the court said: "The expression of the testator in a codicil, as to the way in which he understands or construes his own words, is conclusive and must be followed; but if the testator, in the codicil, recites that by his will he has made a devise or bequest which does not there appear, then the codicil does not, by such recital, create that bequest or devise."

Where the recital has reference to a prior devise which has actually been made, the language of the specific devise must control, as there can be no implied devise or bequest except in cases where, but for the implication, no other person can take. Thus in *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 235, the specific devise and recital read as follows: "I do give and devise unto Samuel Pugsley, William Pugsley and James Pugsley, near Cayuga lake in this state, the farm where I now reside, in the town of Westchester aforesaid, containing about one hundred and sixty acres, called the Cow Neck farm. I do also give and devise unto the said last named Samuel, William, Benjamin and James, two houses and lots: One of said houses is numbered (31) thirty-one Hester street, and the other, No. 14 Norfolk street, in the city of New York; also one house and lot number 353 Division street." Holding that the recital did not operate to give Benjamin an interest in the Cow Neck farm by an implied devise the court said: "If Benjamin Pugsley took any interest in the premises, under the will, it must have been by implication. That is a question of law which could not be elucidated by any extrinsic evidence as to the intention of the testator, nor justify its admission. As to that, what is stated in the instrument must control. The rule in such cases is well expressed by Mr. Jarman in a note to *Powell on Devises* (Vol. 1, p. 336) as follows: 'that if a testator unequivocally refer to a disposition as made in that his will which in fact he has not made, the court will regard it as an inadvertent omission, and will accordingly supply it.' In this case the testator does not unequivocally, or at all, refer to a disposition in favor of Benjamin Pugsley of any part of the farm in question, as actually made. The language used by him simply raises a conjecture that he may have supposed that he had included his name as one of the devisees, but it is too remote either to alter the estate expressly given to others, or to confer any upon him. My opinion is, that Benjamin Pugsley took no part of the Cow Neck farm, under the will."

In *Skerratt v. Oakley*, 7 T. R. (Eng.) 492, it appeared that the testator had given his

wife a life estate in certain property at Northwood, and to another person a life estate in property at Wrentnall. By a codicil he recited that the bequests made to his wife should be in full of demands to which she should be entitled out of his estate except the estate for life of his wife and her assigns in the premises at Wrentnall, anything in the will to the contrary thereof contained in any wise notwithstanding. In answer to the contention that the wife was entitled to a life estate in the premises at Wrentnall the court stated the rule to be that an erroneous recital concerning a gift validly made in a prior part of the will could not operate as a devise by implication.

In *Smith v. Fitzgerald*, 3 Ves. & B. (Eng.) 2, the rule was stated as follows: "If in the preceding Part there was nothing, that could in any Way answer the Description of what he here says he had willed to them, there would then be Room for the application of the Doctrine, that a Declaration by a Testator, that he had given something, is sufficient Evidence of an Intention to give it; and amounts to a gift: but the Question here is, whether he did not mean to describe, however inaccurately, that, which he had before actually given. . . . Without denying, that the Recital of a Gift, as antecedently made, may amount to a Gift, the Court ought to see very clearly, that there is nothing in the Will, to which the Recital can refer, before it is turned into a distinct Bequest: otherwise an inaccurate Testator may be held to make a second Bequest, when he has only made an incorrect Reference to the first."

In *Mackenzie v. Bradbury*, 36 Beav. 620, 55 Eng. Rep. (Reprint) 1036, it appeared that a will gave a legacy of £1000 to the children of the testator's niece and by a codicil it was recited as follows: "Whereas, by my will or a codicil thereto, I have bequeathed to Francis, the son of my late husband's niece, Mary Bradbury, the sum of £1000, payable as therein mentioned: Now I hereby declare that the said legacy shall not be payable until the said Francis Bradbury shall attain the age of twenty-one years, but with power to the trustees or executors of my will to pay or apply the interest or income thereof in or towards his maintenance or education, in such manner as they shall, in their discretion, think best." The court held that the recital was insufficient to create a bequest by implication and that the nephew was entitled only to his share of the £1000.

It has been held that a recital of an intention to make a certain bequest in a subsequent part of the will, which is not in fact done, is insufficient to create a bequest by implication. Thus in *Frederick v. Hall*, 1

Ves. Jr. (Eng.) 396, wherein it appeared that the testator bequeathed to his wife all his personal estate, except his plate, "which is hereinafter given to my daughter," but made no further mention of the plate in his will, it was held that the plate was not disposed of by the will as the recital was insufficient to create a bequest to the daughter by implication.

Recital of Conveyance by Instrument Other than Will.

The rule as to the effect of an erroneous recital in a will of a gift contained in that instrument is inapplicable to recitals of a gift or conveyance by an instrument other than the will, the rule being that where the erroneous recital refers to an estate created by another instrument, the recital cannot operate to create an estate by implication. *Benson v. Hall*, 150 Ill. 60, 36 N. E. 947; *Stodder v. Hoffman*, 158 Ill. 486, 41 N. E. 1082; *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L.R.A. (N.S.) 645; *Knapp v. Burton*, 7 Civ. Pro. (N. Y.) 448. And see the reported case. Thus in *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L.R.A. 185, wherein it appeared that a testator declared in plain terms that he had deeded certain property in trust for the purpose of establishing a public library, when in fact he had made no such deed, though he had had one drawn up which he had never executed, it was held that the recital could not be construed to be a devise by implication. The court stated the rule as follows: "Where the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital, property, when, in truth and in fact, he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the deviser to give by the will, and, in such case, resort must be had to the other instrument, and not to the will, by persons interested. . . . Here, the recital has no reference whatever to a gift or devise created by or under the will, but it refers to a deed of trust—an instrument in no manner connected with the will under which the title to the property passed; and, under the rule announced, reliance cannot be placed on the erroneous recital in the will to pass the title to the property to the persons named as trustees in that recital."

In *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316, a recital in the will under consideration read as follows: "Whereas, I have this day made and executed a deed conveying to J. Monroe Zimmerman the farm whereon I now reside, I do hereby give and bequeath unto him, the said James Monroe Zimmer-

man, all my personal property of whatever description and wheresoever situate." The court, denying that the recital amounted to a devise by implication, said: "If the deed had been sustained, Zimmerman would have held title under it and not under the will. Clearly he could not have held the same estate under both the deed and the will at the same time. If the deed had prevailed he would then have held under it, and it only, because it would then have conveyed the grantor's entire interest to the grantee, being ostensibly a deed in fee simple. If it had effectively conveyed a fee, then it would have divested the grantor's whole interest in the property, and having been executed prior to the will, there would have been no estate left in the grantor for the will to operate upon. But as the deed was in form sufficient, had it been allowed to stand, to convey to the donee the grantor's entire title to the farm, the will, which does not purport or even inferentially profess to give the same farm to the same or to any other person, in the event or on the contingency that the deed should fail to be operative, cannot, upon any known rule of construction, be interpreted as alternatively disposing of the property that failed to pass under the deed. The deed was stricken down because it was void, and it was void because it had been procured by undue influence. It was consequently tainted from the beginning. Now, the recital in the will following the words 'whereas,' is to the effect that the testator had, by an instrument other than the will, given to Zimmerman the farm named in the recital; but in truth and in fact, though he had executed the deed, he had not, by reason of the deed's invalidity, conveyed that property to Zimmerman at all. This recital in the will was, or at least turned out to be, erroneous, because the deed did not convey the title, though it was actually made and executed. Such an erroneous recital does not disclose a purpose or intention on the part of the testator to give the same property by the will. The doctrine as to the effect of erroneous recitals in wills is well established, namely, that if the erroneous recital in a testamentary instrument be of a gift contained in this instrument the recital may operate as being in itself a devise or bequest by implication of that very property. But where the erroneous recital refers to an estate created by another instrument, that recital cannot operate to create an estate by implication." And in that case it was further held that the expression in the will of a desire that the grantee in the conveyance should enjoy his whole property to the exclusion of his other relatives did not serve to alter the rule, the court saying on that

point: "It is perfectly obvious that the will makes no direct disposition of the real estate. It expressly recites that the testator had on the same day conveyed the farm to Zimmerman by deed, and it then proceeds to give to him, not the farm, but personal property only. Having done this the testator immediately assigns, in the next paragraph, a reason for what he had done—that is to say, he explains why he had given the real estate by the deed and the personal property by the will—but there is nothing in the language thus employed to indicate the most remote intention to give anything whatever by this purely explanatory clause. After first stating that he had made the deed conveying the farm, and then distinctly bequeathing his personal estate, he declares, not by way of further devise or bequest, but by way of explanation of what he had already done, 'I thus give to the said J. Monroe Zimmerman all my property and estate, because he is married to my niece, etc.;' and he then expresses his desire that they, the beneficiaries, 'shall enjoy the same'—the real estate given by the deed and the personal estate given by the will—to the exclusion of my other relatives.' But if the deed failed from any cause to convey the land, the mere expression in the will of a wish, that the donee should enjoy that which the testator then supposed he had given him by the deed, cannot operate as a direct devise of the land, or as a devise thereof by necessary implication, even though coupled with a declaration that he desired his other relatives to be excluded from any participation in his estate."

A recital in a will that the testator had given a bond to aid in paying the indebtedness of a college has been held not to amount to a bequest of the amount of the bond where for certain reasons it was held that the bond was unenforceable in itself. *Columbian College v. Clopton*, 7 Grat. (Va.) 168.

A recital in a will of an intention to convey property cannot be construed to be a devise by implication. *Hurlbut v. Hutton*, 42 N. J. Eq. 15, 6 Atl. 286, wherein the recital under consideration read as follows: "I am about conveying to Mrs. Henrietta Hutton, wife of my son, Charles G. Hutton, the house and lands at Bilhere, as now occupied by my son, for her separate use and benefit. This grant of this property is not to be charged against my said son or his said wife as an advancement or otherwise, nor is it to affect any provision of my will in behalf of my said son or of his said wife." The court holding the recital to be ineffective as a devise said: "The property in question did not pass to Charles G. Hutton's wife by the clause in the seventh codicil. That clause is merely expressive of an intention on the part of the testator to convey the property, at a future

time, to his daughter-in-law, and it provides that in the event of his making such conveyance, the grant should not be charged to her or to her husband, either as an advancement or in any other way, and that it should not affect any provision in the will in favor of either of them—that is, in case he should convey the property to her, it was to be regarded as a gift, independent of any provision of the will, in favor of them, or either of them. This mere expression of an intention to grant by deed, or other appropriate conveyance, *inter vivos*, is not, and cannot be construed to be, a devise. The provision is not only not a devise, but it is not even expressive of an intention to devise. The law upon the subject of implied devises is thoroughly settled. The policy of the law, and the leaning of the courts, is against the doctrine of devises by implication. . . . To create a devise by inference, the implication must be a necessary one, there must be such a strong probability of an intention to devise that an intent to the contrary cannot be supposed."

In *Kentucky*, whether a recital of a prior conveyance amounts to a devise by implication seems to be made to depend on the validity of the conveyance. Thus in *Koger v. Koger*, 92 S. W. 1167, the court stated the doctrine as follows: "Where the testator has previously made a valid disposition of his property, and in his will refers to this disposition theretofore made, it will be considered as a devise by implication of the property mentioned; but whether devises by implication will stand or not depends primarily on the question as to whether or not the previous disposition was a valid or enforceable one, or such a one as the law would permit the persons therein named to hold and claim as their part of the estate. On the other hand, if the previous disposition of the property mentioned in the will was not a valid disposition, or such a one as the parties could take and hold the property under, then it cannot be held a devise by implication, because, when the previous conveyance or contract is set aside or held invalid, the devise by implication necessarily falls with it. A devise by implication presupposes a previous valid disposition of the property mentioned in the will." However, in that case the court cited and quoted from *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316, as authority for the rule, although in the paragraph quoted it was specifically held that if the prior conveyance had been valid the grantee would have held title under it and not under the will by way of an implied devise, for if the conveyance was valid the grantor was divested thereby of his interest in the property, leaving nothing for his will to operate on.

Where the erroneous recital of a gift by another instrument is accompanied by apt

words of gift in the will the two construed together will operate as a valid devise. Thus in *Lander v. Lander*, 217 Ill. 289, 75 N. E. 487, the clause under consideration read as follows: "First—I have already transferred to my wife, Letitia Lander, by absolute deed for life, remainder to my and our daughter, Louise Lander, in fee simple—the grounds and buildings composing my livery stable property in Bloomington, Ill., as the full share of my said daughter Louise in my estate, and by deed of gift and transfer, bearing even date herewith. I also give, transfer and set over all of my personal property to my said wife, Letitia Lander, subject to the payment of a note of mine to my daughter, Ida Lander, for \$750, and also subject to the payment of all debts, if any, I may now owe at this date. Now it is my will that she my said wife shall have and take her life interest in said real estate and her absolute title to said personal property as evidenced by said deeds of transfer, as and for her full share, interest and dower in my estate, and that our said daughter, Louise Lander, shall have and take her said residuary interest in said real estate as her full share in my estate." The court, distinguishing *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L.R.A. 185, said: "If the first sentence of section 1 of the will now under consideration be considered by itself, the contention of appellants would be correct. The fact, that Charles W. Lander may have made a deed, such as he declares in his will that he did make, was not a devise of the property in question. But the will of Charles W. Lander is different from the will referred to in *Hunt v. Evans*, supra. It not only contains a statement that the testator had theretofore executed the deed in question, but it proceeds in the third sentence of section 1 to make the following statement: 'Now it is my will that she, my said wife, shall have and take her life interest in said real estate, and her absolute title to said personal property as evidenced by said deeds of transfer, as and for her full share, interest and dower in my estate, and that our said daughter, Louise Lander, shall have and take her said residuary interest in said real estate as her full share in my estate.' The third sentence of section 1, as above quoted, is something more than a mere declaration that a deed had been executed. It is a statement by the testator that it is his will, then at the time when he executed his will, that his wife should take a life estate, and his daughter a residuary estate in said property, described in section 1. It is not necessary here, in order to establish a devise by the testator, to rely solely and exclusively upon the first sentence of the will, but such first sentence of the will must be construed in connection with the third sentence, and, in

our opinion, the latter, construed with the former, certainly does devise the property to the widow, and the daughter, Louise, independently of the declaration as to the deed, made in the first sentence."

Recital of Ownership or Title in Another.

The construction of an erroneous recital in a will of ownership in another independently of the will is closely analogous to and is governed by the same rules as that of an erroneous recital of a gift by an instrument other than the will, the courts generally holding that the erroneous recital in a will of ownership or an interest of another in property cannot serve to operate as a devise or bequest of the property by implication. *Box v. Barrett*, L. R. 3 Eq. (Eng.) 244; *Langslow v. Langslow*, 21 Beav. (Eng.) 552; *Dashwood v. Peyton*, 18 Ves. Jr. 27, 34 Eng. Rep. (Reprint) 227. Thus in *Adams v. Adams*, 1 Hare (Eng.) 540, it appeared that a devise and bequest to trustees of real and personal estate was stated to be subject to the dower and thirds at common law of the testator's wife in and out of his real estate, on trust to receive the income and pay the same or the surplus thereof after deducting the dower or thirds of his wife for the maintenance of his children. The interest of the testator in the real estate was not liable to dower. The recital was held not to give to the wife by implication an interest in the estate. The Vice-Chancellor said: "I certainly think that this is a hard case upon the widow; but, whatever my opinion in that respect may be, I cannot make a provision for her, which the testator has not directed. The question in all these cases is whether the testator has actually made any gift; and the gift, if there be any, must be found either in express words or by implication. Where a testator, in one part of his will, has recited that he had given a legacy to a certain person, but it has not appeared that any such legacy was given, the court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift. Where, however, the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication. The distinction between the two cases is marked and obvious. In the former the erroneous recital is evidence of an intention to give by the will, inadvertently not expressed. In the latter, as it is expressed by Mr. Jarman (*Jarman on Wills*, vol. 1, p. 460), 'such recitals do not in general amount to a devise; for, as the testator evidently con-

ceives that the person referred to possesses a title independently of his own, he does not intend to make an actual disposition in favor of such person.'"

In *Williams v. Allen*, 17 Ga. 81, it appeared that the testator made no provision for his wife's maintenance, assigning as a reason that she was possessed of certain property as her separate estate. In answer to the contention that the recital amounted to a devise to her of the property the court stated the doctrine as follows: "The recitals in a will by a testator, in which he erroneously states title to be in a third person, which, in fact, belongs to himself, do not amount to a devise or bequest of said property by the will. And this is so, even though it may appear that the testator was influenced in the disposition of his property by the mistake. . . . This is undoubtedly a correct position." In that case, however, the court, on equitable grounds, decreed the property to the wife, saying: "But this is a different case from that before us, where that title which the testator recites as being in his wife, in equity and good conscience should have been there, or would have been there conveyed, if a court of equity had been asked so to convey it. And where, in such a case, the testator's representative appeals to a court of equity to correct the mistake made in this recital, if the court thus takes jurisdiction of the matter, it should decree according to the equities of the parties."

In *Wright v. Wyvell*, 2 Vent. (Eng.) 56, it appeared that a testator bequeathed to his wife a sum of money to be paid to a third person in payment for certain lands, which he had theretofore purchased from him, with the recital that the lands so purchased had already been settled on his wife for her jointure. On its appearing that no settlement had ever in fact been made it was held that the lands descended to the heir and the recital in the will could not be construed as giving the wife an estate by implication. In *Hatch v. Ferguson*, 68 Fed. 43, 29 U. S. App. 651, 15 C. C. A. 201, 33 L.R.A. 759, the clause under consideration recited that the property devised to his children consisted of his one-half interest in the community property of himself and wife. Holding this recital to be ineffectual to give to the wife one-half of the property the court said: "It may be conceded that Ezra Hatch believed both his pre-emption claim and his homestead claim to be the community property of himself and his wife, and it is possible that, had he known the nature of his estate in the two claims, he might have made a different testamentary disposition thereof. But the specific devise of all his interest and estate to his children cannot be controlled or diverted by the expression of his belief that the estate so de-

vised was the one-half interest in community property. . . . Neither do we find any warrant for holding, as contended by the appellants, that the provision of the will just quoted is in law a devise upon the part of Ezra Hatch to his wife, giving to her a one-half interest in the land. There is nothing in the will to indicate a purpose upon his part to devise to her any portion of his interest in real estate. He bequeathed to her the sum of \$5, evidently with the intention that, as to her, he should not be deemed to have died intestate. The reference to the community property tends only to prove that he entertained the erroneous belief that both claims were community property, and that Josephine owned the undivided one-half of each, whereas, in fact, the children took under the will all of the pre-emption claim, and the widow took under the homestead law all of the homestead claim."

[Where a testator under the mistaken impression that a part of the property is controlled by the will of a third person and that he has no right to give it by will, so recites that fact, it is generally held that in the absence of other apt words of gift, the erroneous recital cannot be construed to be a devise or bequest by implication. *Westcott v. Culliford*, 3 Hare (Eng.) 265; *Right v. Hamond*, 1 Stra. (Eng.) 427. In *Clamorgan v. Lane*, 9 Mo. 446, the recital under consideration read as follows: "Wishing and intending as far as in me lies, to place my several children on equal footing in a pecuniary point of view, and as regards their worldly advancement, at the time of my dissolution, and forasmuch as my second son and child, Henry, has been sufficiently provided for and established in the world by the will of his uncle Cyprian Martial Clamorgan, deceased, and placed in a better situation in a pecuniary point of view than I remain able to place the balance of my children, therefore I will ordain and require of my executor hereinafter named, so to execute this, my last will and testament, that said Henry shall receive no portion nor any part of any real estate except as hereinafter mentioned, but shall only be entitled to his equal portion of the proceeds of the personal property which I may leave at the time of my death." On its appearing that the property devised by Cyprian Clamorgan was in fact the property of the testatrix, the court in answer to the contention that the recital of ownership in her son Henry amounted to a devise of the property by implication said: "If Apauline Clamorgan believed that her son, Henry, already had a title, independently of any act of hers, and that belief is to be fairly inferred from the language of this recital, how can it be maintained that she intended to exercise any power of disposition in his favor? Though

she may be influenced in the disposition of her property, by this supposition, yet it does not follow, that she intends to give to Henry that benefit, to which she takes it for granted, he is already entitled. How are we to come to the conclusion, that in the event of the failure of Henry's title, under the will of Cyprian, she designed and intended by her will, to give him that estate?"

In *Lane v. Wilkins*, 10 East 241, 103 Eng. Rep. (Reprint) 766, the recital under consideration read as follows: "I give to the widow of my late brother Edw. Howorth, and to her daughter Mrs. Louisa Lane, £5 each; and I give them these small sums only, in consideration of the ample provision made for them after my decease by the late Dr. Thomas Griffiths, who has by his will devised to them certain estates in the county of Radnor, now in my possession, and which, though I could now legally dispose of, I mean fully to confirm to them according to the intent of the said will." This the court held to be insufficient as a devise by implication and on its appearing that the testator had acquired absolute title to the property in question by suffering a recovery it was held that the persons mentioned in the recital took only the small amount expressly bequeathed to them.

In *Circuitt v. Perry*, 23 Beav. 275, 2 Jur. N. S. 1157, 5 W. R. 15, 53 Eng. Rep. (Reprint) 108, wherein it appeared that a testator recited that the property which he had derived from his father would by his father's will devolve on his nephews, when in fact the property formed a part of the estate of the testator, it was held that the property did not pass under the will by the recital. The court stated the reason for the rule as follows: "When a testator states what his estate consists of, and that it is this which he intends to dispose of, the gift cannot extend beyond. Thus where he expressly states that he disposes of all his estate, but that something which he specifies does not form part of it, this excepted part will not pass by the gift."

It has been held that an erroneous recital in a will to the effect that the testator's first wife and children by her were entitled to the proceeds of an insurance policy was ineffective as a bequest by implication. *Smith v. Smith*, 113 Md. 495, 77 Atl. 975, 140 Am. St. Rep. 435, 31 L.R.A.(N.S.) 922, wherein it was said: "Whatever may have been the terms of the policy, the object and purpose of the bill is to obtain a construction of the will, and the question to be determined in this connection, is, does it contain a valid bequest to the children of testator's first wife of the proceeds of the policy? That the testator intended them to have the benefit of his life insurance cannot be doubted, for all

of the provisions of the will are evidently based upon the assumption that they would receive the \$3,000, or whatever amount was realized on the policy. But that does not answer the question. The precise inquiry is, did he intend to give them the proceeds of the policy by his will? and its answer must be found in the terms of the will. The only parts of the will in which the policy is referred to are in these words: 'I hold in the New York Mutual Life Insurance Company a policy on my life of three thousand (\$3,000) dollars; this policy is in favor of my first wife Eliza Ann C. Smith, and of my two children by her, namely: George Miffin Smith and Eliza Ann C. Smith, and this sum of money with the interest due thereon they will receive under and by virtue of said policy at my death; after all my estate is converted into cash I desire that the sum of three thousand (\$3,000) dollars from my estate (or such sum as the said policy may pay at the time of my death) shall be set apart and invested for the use and benefit of my present wife, Margaret Emily Smith, and Margaret Slaughter Smith, my daughter, and to any other child or children we may hereafter have,' etc. 'After the sum of three thousand dollars (\$3,000) or the sum equivalent to the value of said life insurance policy from the corpus of my estate is set apart for the use and benefit of my wife, Margaret Emily Smith, and of her said child or children, I devise and bequeath the residue of my estate to be divided as follows:' Here there are not only no words of gift, but the testator expressly states that the policy was in favor of his first wife and her children, and that said children would receive the proceeds 'under and by virtue of said policy' at his death. This language clearly shows that the testator did not regard the amount to be realized on the policy as a part of his estate, or attempt to dispose of it by his will, and that he treated the policy as a provision made for the children of his first wife outside and independent of his will. As he thought they would receive the amount of the policy under and by virtue of the policy, he could not have intended to give it to them by his will. The recital in the will that the policy was in favor of or payable to his first wife and her children, and that her children would receive the proceeds under and by virtue of the policy, cannot operate as a bequest by implication. . . . As the will contains no bequest of the proceeds of the policy to the plaintiff and her brother, the amount received by the executrix on account of the policy, if it belongs to the estate, passes under the residuary clause of the will." But in *Hall v. Lietch*, L. R. 9 Eq. (Eng.) 376, the contrary doctrine was announced, the court saying: "The testator having affected this policy on the

joint lives of himself and his wife, made his will under the erroneous impression that his wife, if she survived him, would be entitled to the policy money, and, accordingly, he excepts from the general bequest of his personal estate 'the sum of £500 payable under a policy of insurance to my wife Hannah Hall, and to which she is absolutely entitled under the said policy.' I think that this must be construed as showing the intention of the testator that his wife should take the £500 absolutely; if the policy did not give it her she was to take it under the will. It is just as if a testator had by a codicil disposed of all his personal estate, 'except £500, which I have given to A by my will,' and he had not given £500 to A by his will; that would give the £500 to A by implication. The answer to the question, therefore, will be that upon the true construction of the will the £500 is payable to the plaintiff."

LEATHEM ET AL.

v.

JACKSON COUNTY.

Arkansas Supreme Court—January 24, 1916.

122 Ark. 114; 182 S. W. 570.

Counties — Contracts — Ratification of Unauthorized Contract.

A county may ratify an unauthorized contract made in its behalf, if it is one which the county could have made in the first instance.

[See 7 R. C. L. tit. *Counties*, p. 947.]

Power of Board — Employment of Expert Accountant to Examine Books.

Const. art. 7, § 28, gives county courts exclusive original jurisdiction in regard to disbursement of money for county purposes, and in every other case necessary to internal improvement and local concerns of the counties. Kirby's Dig. § 1375, invests county courts with original jurisdiction to audit, settle, and direct payment of all demands against the county, and in all other cases necessary to the internal improvement and local concerns of the counties. Section 7162 requires all collectors, sheriffs, clerks, constables, and other persons chargeable with moneys, to make settlement with the county court. Section 7167 provides for adjustment by the county court of accounts of delinquent officers. Section 7171 empowers the county court to re-examine, settle, and adjust prior settlements on showing of cause, and section 7174 provides for adjustment at any time within two years. Sections 1162 and 1163 provide for settlement by the county treasurer

with the county court. A county judge contracted with the claimants as expert accountants to examine the books of certain officers of the county. It is held that the county court, being charged with the auditing and settlement of accounts, could employ expert accountants, and therefore could ratify a contract which it could have made in the first instance; such employment not being an illegal delegation of the power to audit, but necessary owing to the character of the work to be done.

[See note at end of this case.]

Same.

In such case, the power of the county court to audit the accounts of the county is not taken away by the grant of similar powers to the circuit court, made under Kirby's Dig. §§ 625-640, passed subsequent to the enactment of the acts delegating the power to the county court; there being no such inherent power in the circuit court as vested under the constitution in the county court, and such sections being designed to aid the circuit court in the enforcement of the criminal laws of the state.

[See note at end of this case.]

Appeal from Circuit Court, Jackson county: COLEMAN, Judge.

Action by E. F. Leathem et al., plaintiffs, against Jackson County, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. **REVERSED.**

Jno. W. & Jos. M. Stayton for appellants.
Otis W. Scarborough and Campbell & Suits for appellee.

[116] HART, J.—The county judge of Jackson County employed appellants as expert accountants to examine the books and accounts of certain officers of said county at an [117] agreed price. Subsequently the county court entered of record an order ratifying the employment of appellants and stating the reasons therefor. Appellants performed services under the contract in a satisfactory manner and presented to the county court a demand for \$500 to be applied on their contract. A tax payer of the county filed a remonstrance. The county court made an order allowing the claim of appellants and an appeal was taken to the circuit court. The circuit court held that there was no authority in law for the county court to make the contract with appellants; that the contract as made was void; and that the order ratifying it was also void. The allowance made to appellants was set aside and the order of the county court ratifying the contract was also set aside. From the judgment rendered appellants have duly prosecuted an appeal to this court.

(1) It will be noted that the county judge first made the contract with appellants. The county court subsequently entered of record

an order ratifying the contract and setting forth the reasons which caused the court to make the contract. The county may, like an individual, ratify an unauthorized contract made in its behalf if it is one the county could have made in the first instance. Such ratification will be equivalent to original authority. Second Dill. Mun. Corp. (5 ed.), section 797; *Steiner v. Polk County*, 40 Ore. 124, 66 Pac. 707; *Cunningham v. Umatilla County*, 57 Ore. 517, 112 Pac. 437, 37 L.R.A. (N.S.) 1051.

The county court set forth at length in the order entered of record its reasons for making the contract with appellants. The county judge also testified at the trial of the case and gave at length his reasons therefor. It is not claimed or proved that the county court acted arbitrarily or capriciously in making the contract with appellants; nor was it claimed or proved that the contract was the result of fraud on the part of the county judge or collusion between him and appellants. The sole ground on which the contract and allowance was attacked was that the county judge was without authority to make the same. For this reason it will not be necessary to set out [118] the reasons given by the county judge for making the contract.

A board of county commissioners or supervisors ordinarily exercises the corporate power of the county. Such boards are in a sense the representative and guardian of the county, having the management and control of its property and financial interests and having original and exclusive jurisdiction over all matters pertaining to the county affairs. 11 Cyc. 388-9.

(2) By the Constitution of 1874 the county courts were made successors and continuations of the former boards of supervisors of the county and were given exclusive original jurisdiction in all matters necessary to the internal improvement and local concerns of their respective counties. *Dodson v. Ft. Smith*, 33 Ark. 508; *Worthen v. Roots*, 34 Ark. 356.

Article 7, section 28, of our Constitution reads as follows:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, . . . the disbursement of money for county purposes and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. . . ."

Section 1357 of Kirby's Digest, is as follows:

"The county court of each county shall have the following powers and jurisdictions: Exclusive original jurisdiction in all matters relating to county taxes . . . to audit, settle and direct the payment of all demands against the county . . . to disburse money

for county purposes, and in all other cases that may be necessary to the internal improvement and local concerns of the respective counties."

Section 7162 of Kirby's Digest provides that all collectors, sheriffs, clerks, constables and other persons chargeable with moneys belonging to any county shall render their accounts and settle with the county court at each regular session thereof.

[119] Section 7167 of Kirby's Digest provides that if any of the officers thus chargeable shall neglect to render their accounts or settle as aforesaid, the county court shall adjust the accounts for such delinquent, according to the best information that can be obtained and ascertain the balance due the county.

Section 7171 of Kirby's Digest provides that upon good cause being shown for setting aside such settlements the county court may re-examine, settle and adjust the same.

Section 7174 of Kirby's Digest provides that whenever any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the county court at any time within two years from the date of such settlement to reconsider and adjust the same.

Sections 1162 and 1163 of Kirby's Digest provide for settlement by the county treasurer with the county court.

(3) Thus it will be seen that, under our Constitution and laws, the county court had jurisdiction and it was its duty to audit the account presented by its officers named in the statute for settlement and if found correct to approve them, and if not, to cause them to be corrected.

Under the sections of the Constitution and statutes to which we have just referred the state of officers' accounts belong properly to the jurisdiction of the county court and their correctness was a proper subject of inquiry. Counsel for appellee concede that the county court represents the county and that if it conceived it to be necessary to make a detailed investigation of the official affairs of the county and to overhaul and restate the accounts of its various officers, it has the power to do so; but they insist that the employment of an expert accountant by the county court to make such investigation is a delegation of authority and that there is no law authorizing the county court to delegate its power in this respect to another.

[120] (4) Counsel for appellants have cited decisions from several states to the effect that where the county court is the general fiscal agent of the county and is possessed of a supervisory power over the collection and preservation of its funds it has implied power to employ an expert accountant to audit the official accounts and public records of

county officers. In *Duncan v. Lawrence County*, 101 Ind. 403, commissioners—who in that state correspond to our county courts—employed an expert accountant to examine and report on the accounts of the treasurer of the county and the accountant having done the work asked payment for his services. It was held that the commissioners had full authority with reference to the adjustment of the accounts of public officials and as an incident thereto to employ an accountant. The grounds of this decision were that the statute of that State in cases of indispensable public necessity authorizes the making of such a contract.

In the case of *Garrigus v. Howard County*, 157 Ind. 103, 60 N. E. 948, it was contended that the title to the Indiana act was insufficient, that the act was, therefore, unconstitutional, and that the county board had no inherent authority to enter into the contract. The Supreme Court held the act valid, and, further, that if this was error the board had very full powers to enter into contracts for the benefit of the property of the county and that these powers were amply sufficient to sustain the contract.

The claim was made there that the board could not delegate the performance of its duty to others and the court in overruling the contention, said:

"The complaint averred that 'the existence of these claims, and each item thereof, could be ascertained only by long, laborious, and careful search of experts.' Such a search was not that of 'auditing accounts of officers,' which the statute imposed upon the board. It was plainly a duty the board could not perform, but one which, from its nature, must be committed to others. The employment of the expert accountants for the purposes named [121] in the agreement did not involve any abandonment or delegation of the official powers and duties of the board. The proceedings of the accountants were at all times subject to the supervision and control of the board, and the persons so empowered were mere agents and servants of the county."

See also *Perry County v. Gardner*, 155 Ind. 165, 57 N. E. 908; and *Lockyear v. Spencer County* 180 Ind. 464, Ann. Cas. 1916B 1033, 103 N. E. 100.

The statutes of Kentucky give the fiscal court jurisdiction "to regulate and control fiscal affairs and property to the county," and the Court of Appeals of that State held that the statute authorized the court to contract for the employment of an accountant for the purpose of investigating the affairs of the county officers. *Taylor v. Riney*, 156 Ky. 393, 161 S. W. 203. The court there said:

"The fiscal court is charged by the statute with the duty of looking after the fiscal affairs of the county, and this puts upon it

the responsibility that attaches to any other business body, and, if it could not, when the occasion seemed to demand it, have an investigation made of the books, and accounts, and records of any one or more of the officers, agents, or employees of the county who have the control of or right to receive or pay out the funds of the county, the court could not, in any proper manner, perform the duty required of it in the management of the fiscal affairs of the county. There is scarcely a business institution in the State of any magnitude that does not have its books examined by some skilled accountant, and there are many good reasons why the fiscal court should be permitted to exercise this character of supervision over the persons charged with the collection or expenditure of the public funds."

In the case of *Blades v. Hawkins*, 240 Mo. 187, 112 S. W. 979, 144 S. W. 1198, Ann. Cas. 1913B 1082, the court said that the statute of Missouri contained no grant of authority to the county court to employ an expert to audit and examine the books and accounts of the county and its officers; that if this authority existed it was because the law implied it as essential to the due exercise of powers [122] specifically vested in the county court by statute, or the performance of a duty specifically required of said tribunals. The court further said that in determining whether or not the county court had authority to employ such expert it must call to mind the duties of such a court.

There, as here, the county court is the general fiscal agent of the county and is possessed of a supervisory power over the collection and preservation of its funds. There, as here, various officials are required to report to and make settlements with the county court. The Missouri statutes contain provisions similar to our own in making it the duty of the county courts to adjust the accounts of delinquent officials and to ascertain the balance due the county. The court, after mentioning these statutes, said:

"The various provisions of the statutes demonstrate that it is not only within the power, but is the duty, of the county court to look after public funds, examine and investigate the accounts of the different officials and other persons, enforce the collection of money due the county, and order suits to be brought on the bonds of delinquents. In short, responsibility for the safety of public moneys, the accuracy and honesty of the accounts and settlements of officials, and the collection of defalcations, is imposed on county courts. The question for decision is whether the express delegation of those powers and duties by the Legislature carried with it the authority to employ an expert to look over books and documents in order

to ascertain whether officials and other persons chargeable with public moneys had rendered correct and faithful accounts, and had made just settlements with the court. In our opinion this question ought to be answered in the affirmative. While it is true the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authorities and duties expressly delegated, and indispensable to their performance, [123] may be exercised. 7 Am. & Eng. Enc. of Law (2 ed.) 987, 989, and cases cited in the notes."

See also *Donlevy v. Sims*, 175 Ill. App. 290; *Harris v. Gibbins*, 114 Cal. 419, 46 Pac. 292.

We regard the cases cited as squarely in point and approve the reasoning quoted from the opinions and for that reason it is not necessary to repeat what has been said on the subject.

We are not without authority on the subject in our own court. In the case of *Lee County v. Abraham*, 31 Ark. 571, the court held that if the circuit court neglected to require the clerk of the circuit court to render an account during his term of office, the county court may, under its general jurisdiction, force him to settle. The court said: "But if the circuit court neglected to rule him to report during his whole term of office, we see no reason why the county court, having original jurisdiction in matters why the county taxes, etc., might not force him to a settlement," citing *Miller's Dig.*, section 214.

That section of *Miller's Digest* is section 22, chapter 41, of the revised statutes and is the same as section 7167 of *Kirby's Digest*.

In that case the county court employed a special attorney to examine the reports and settlements of all the county officers who were required by law to make a settlement with the county court of all funds in their hands belonging to the county and to report all delinquents. The report of the special attorney is copied in the opinion and shows that he performed such services as are usually performed by an expert accountant. It is true there is no express adjudication in that case of the right of the county court to employ a special attorney or expert accountant to audit the accounts of the county officers, but the question was not there raised. And the court by its silence recognized the authority of the county court to make the employment.

In the case of *Oglesby v. Ft. Smith Dist. of Sebastian County*, 119 Ark. 567, 179 S. W. 178, 1199, we held that the county court has the power in proper cases to employ [124] counsel other than the prosecuting attorney to represent the county in civil suits in which the county is interested. In that case we

recognized that county courts can only exercise such powers and rights as are clearly granted by the language of the Constitution or acts conferring them, or such as are derived therefrom by necessary implication. If the county court in its discretion had the inherent power to employ an attorney to represent the interest of the county in a proper case, we do not see why it should not also have the power to employ an expert accountant when it becomes necessary for the best interests of the county to do so.

(5) Finally it is insisted that the court was without authority because under chapter 22 of Kirby's Digest the circuit court is empowered to appoint three commissioners of accounts for each county whose duty it shall be to examine the books of the county officers and report their findings to the circuit court. If we are correct in holding that under our Constitution and statutes the county court had the inherent power to make the contract under consideration, it is obvious that that power could not be taken away by granting similar powers to another court. Chapter 22 of Kirby's Digest was first passed in 1885, which was subsequent to the passage of the acts above referred to and discussed.

The evident purpose of the Legislature in enacting chapter 22 of Kirby's Digest was to aid in the enforcement of the criminal laws of the State. Neither the circuit court nor the grand jury had any inherent power in the matter but only had such power as was conferred upon them by the statute. The circuit courts could only act pursuant to the authority given them by the statute and are limited in the exercise of such power by the words of the statute. It is manifest that the Legislature by the passage of chapter 22 of Kirby's Digest did not intend to take away any of the powers of the county court with regard to the settlement and adjustment of the accounts of the county officers and we are of the opinion that chapter 22 did not have that effect.

[125] It is not contended that the county court abused its discretion in making the contracts in question.

It therefore follows from what we have said that the circuit court erred in refusing to allow the claim of appellants and in setting aside the order of the county court making the contract with them. For the error the judgment will be reversed and the cause remanded with directions to render judgment in favor of appellants.

NOTE.

The reported case holds that from the general supervisory power of a county court over the county funds there is implied a

power to employ an expert accountant to audit the books of the county officers, and that the implication of such a power is not affected by a statute authorizing the circuit court to appoint commissioners of accounts for that purpose. The power of a county or other municipal corporation to employ an expert accountant to examine the public books and records is discussed in the note to *Blades v. Hawkins*, Ann. Cas. 1913B 1082.

THE STEAMSHIP APPAM.

BERG ET AL.

v.

BRITISH AND AFRICAN STEAM NAVIGATION COMPANY.

BERG ET AL.

v.

HARRISON.

United States Supreme Court—March 6,
1917.

243 U. S. 124; 37 S. Ct. 337.

War — Prize — Right to Bring into Neutral Port.

The neutrality of the United States, under the principles of international law, is violated by the action of a belligerent in bringing a prize captured at sea into a port of the United States under a prize crew, for the purpose of laying her up there indefinitely. [See note at end of this case.]

Same.

The failure of the United States to proclaim that its ports are not open to the reception of captured prizes does not warrant the attempted use of one of its ports by a belligerent as a place in which to store a prize indefinitely, especially where no means of taking it out are shown except by augmentation of the crew, which would be a clear violation of established rules of neutrality.

[See note at end of this case.]

Same.

The bringing of a prize captured at sea by a German cruiser into a neutral port of the United States under a prize crew, for the purpose of laying her up there indefinitely, is not justified by the provision of art. 19 of the Treaty of July 11, 1799 (8 Stat. L. 172), with Prussia, that vessels of war, public and private, of both parties, shall carry freely wheresoever they please the ves-

sels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others, and that such prizes shall not be arrested, searched, or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show.

[See note at end of this case.]

Admiralty — Jurisdiction — Restoration of Illegal Prize.

The admiralty courts of the United States have jurisdiction to order restitution to the private owners of a vessel and cargo brought into a port of the United States by a prize crew of a belligerent nation, for the purpose of laying her up there indefinitely, in violation of the rights of the United States as a neutral.

Effect of Decision of Foreign Prize Court.

The institution in a prize court of the captor nation of proceedings for the condemnation as a prize of a vessel brought into a port of the United States by a prize crew, for the purpose of laying her up there indefinitely, cannot oust the jurisdiction of an admiralty court of the United States to order restitution of the vessel and cargo to the private owners for such a violation of the rights of the United States as a neutral.

Appeals from United States District Court, Eastern District of Virginia.

Actions by British and African Steam Navigation Company, and by Henry G. Harrison, Master of Steamship "Appam," plaintiffs respectively, against Hans Berg, Prize Master in charge of Prize Ship "Appam" and L. M. Von Schilling, Vice-Consul of German Empire, defendants in each action. Judgments for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Frederick W. Lehmann, John W. Clifton, Norvin R. Lindheim, Robert M. Hughes and Walter S. Penfield for appellants.

Frederic R. Coudert, James K. Symmers, Howard Thayer Kingsbury, Herbert Barry, Floyd Hughes, Ralph James Bullowa and Munroe Smith for appellees.

[142] DAY, J.—These are appeals from the District Court of the United States from the Eastern District of Virginia, in two admiralty [143] cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, Appam, to recover possession of that vessel. No. 722 was a suit by the master of the Appam to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the fifteenth day of January, 1916, the steamship Appam was captured on the high seas by the German cruiser, Moewe. The Appam was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English Government. She had a crew of 160 or thereabouts, and carried a three-pound gun at the stern. The Appam was brought to by a shot across her bows from the Moewe, when about a hundred yards away, and was boarded without resistance by an armed crew from the Moewe. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the Appam. An officer from the Moewe said to the captain of the Appam that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the Appam, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let any one touch the gun on board. The officers and crew of the Appam, with the exception of the engine-room force, thirty-five in number, and the second officer, were ordered [144] on board the Moewe. The captain, officers and crew of the Appam were sent below, where they were held until the evening of the seventeenth of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the Moewe, were ordered back to the Appam and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the Appam he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The Appam's officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the Appam as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the Appam after its cap-

ture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

[145] On the night of the capture, the specie in the specie-room was taken on board the *Moewe*. After Lieutenant Berg took charge of the *Appam*, bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam*, pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moewe*, were armed and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moewe*, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the thirty-first of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States; the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely, [146] Punchello, in the Madeiras, 130 miles; from

Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The *Appam* was found to be in first class order, sea-worthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

"Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer 'Appam,' and has orders to bring this ship into the nearest American harbor, and there to lay up. Kommando S. M. H. Moewe. Count Zu Dohna, Cruiser Captain and Commander. (Imperial Navy Stamp:) Kommando S. M. H. Moewe."

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the [147] respondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam*'s cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the

court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over \$600,000, are now in the registry of the court, and the unsold portions of the cargo are now in custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law. Second, was such use of an American port justified by the existing treaties between the German Government and our own. Third, was there jurisdiction and right to condemn the Appam and her cargo in a court of admiralty of the United States.

[148] It is familiar international law that the usual course after the capture of the Appam would have been to take her into a German port, where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the Appam was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and in a note from His Excellency, The German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice (*Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties*, Department of State, *European War No. 3*, p. 331), and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the Appam (*Idem*, p. 333), in which it was stated:

"Appam is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she [149] pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the Appam was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to seaworthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, § 391, and accords with our own practice. Moore's Digest of International Law, vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, [150] which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of

nations. Moore on International Arbitration, vol. 4, 3987 et seq.

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to Article 23, which provides:

"A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war-ship, the prize crew may go on board the conveying ship.

[151] "If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to the "reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat. Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestered pending the

decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899-1907, vol. II. p. 237 et seq.

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no [152] means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that Article XIX of the Treaty of 1799 justifies bringing in and keeping the Appam in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, The German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, supra, p. 335 et seq.); and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799 (7 Fed. St. Ann. 767) using the translation adopted by the American State Department, reads as follows:

"The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible." (The provision con-

cerning the treaties between the United States and Great Britain is no longer [153] in force, having been omitted by the Treaty of 1828. [7 Fed. St. Ann. 768.] See *Compilation of Treaties in Force, 1904*, pp. 641 and 646.)

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process, when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the Appam came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass v. The Betsey*, 3 Dall. 6, 1 U. S. (L. ed.) 485, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen* [154] *Genet*, captured as a prize on the high seas the sloop *Betsey* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty,

whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheat. 283, 5 U. S. (L. ed.) 454. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

"If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction, could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, [155] the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required, before cognizance of the wrong could be taken by our courts. But the practice from the beginning, in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy." (p. 349.)

" . . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws." (p. 354.)

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258, 4 U. S. (L. ed.) 80; *The Estrella*, 4 Wheat. 298, 308-311, 4 U. S. (L. ed.) 574; *La Amistad De Rues*, 5 Wheat. 385, 390, 5 U. S. (L. ed.) 115.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the [156] character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the Appam as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad*, supra, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

Affirmed.

NOTE.

Right to Bring Prize into Neutral Port.

The right to bring a prize of war into a neutral port is of necessity strictly limited. As was said by Attorney General Wirt (2 Op. Atty.-Gen. U. S. 87): "It would be a breach

of neutrality too, to permit a port to be made a cruising station for a belligerent or a place of depot for his spoils and prisoners." The right has been asserted (1) for the purpose of condemnation, (2) for the purpose of sequestration and (3) under the stress of a temporary emergency. The accepted conventions of international usage and the few adjudications on the subject seem to deny wholly the two first mentioned contentions while admitting the third.

It was agreed at the Hague Convention of 1907 (art. 4) that "a prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters." That article was declaratory of the general rule of international law as theretofore recognized in the United States and England, resting, it has been said (2 Westlake Int. Law 215), on the reason that the exercise of jurisdiction being a right attached to sovereignty an attempt to exercise it elsewhere without the permission of the territorial sovereign would be a usurpation while for that sovereign to grant the permission would be an unneutral loan of its sovereignty to a belligerent. The rule in the United States was settled in *The Betsey*, 3 Dall. 6, 1 U. S. (L. ed.) 485, that case and the subsequent decisions of the same court touching on the point being set out in the reported case.

In *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345, it was said by Chief Justice Kent: "It also appears, that, at the time of the bringing of the vessel into St. Jago as a prize, and at the time of the sale, Spain was a neutral power, and that there had not been any judicial condemnation of the cargo; but only an order of this agency for a provisional sale. I need not question a provisional sale in cases of necessity, under the orders of a competent court; but I deny the legality of the power exercised at St. Jago. The object of such tribunals in neutral ports, is probably to facilitate the sale, and increase the profits of prizes; but the object is not to be attained by such means. *Ausis talibus istis non jura subserviunt*. Neutral ports are not intended to be auxiliary to the operations of the parties at war, and the law of nations has very wisely ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. All such assumed authorities are unlawful, and their acts void."

So in *Donaldson v. Thompson*, 1 Campb. (Eng.) 429, Lord Ellenborough said: "The sentence was pronounced by a belligerent on neutral territory, and is therefore void. I am by no means disposed to extend the comity which has been shown to these sentences of foreign admiralty courts. I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine

in their favor rests upon an authority in Shower (*Hughes v. Cornelius* 2 Show. K. B. 232) which does not fully support it; and the practice of receiving them often leads in its consequences to the greatest injustice."

In the case of *The Flad Oyen*, 1 C. Rob. (Eng.) 135, it was said: "Mark the consequences which must follow from such a pretended concession; observe in the present case how it would affect the neutral character of the ports in the north! If France can station a judge of the admiralty at Bergen, and can station there its cruisers to carry in prizes for that judge to condemn; who can deny that to every purpose of hostile mischief against the commerce of England, Bergen will differ from Dunkirk, in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of Norway the seats of the French tribunals of war, is to make the adjacent sea the theatre of French hostility. It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity. Wisely, therefore, did the American government defeat a similar attempt made on them, at an earlier period of the war: they knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility." See to the same effect *Havelock v. Rockwood*, 8 T. R. (Eng.) 268.

The sequestration of a prize in a neutral port pending the action of a prize court sitting within the sovereignty of the captor was at one time sanctioned in the United States. *The Arabella*, 2 Gall. 368, 1 Fed. Cas. No. 501. See also *Cheriot v. Foussat*, 3 Bin. (Pa.) 220. The subsequent abandonment of that policy is apparent from the refusal of the United States government to adhere to article 23 of the Hague Convention of 1907 which sanctioned such a procedure, and in the reported case it is authoritatively declared that the attempted sequestration of a prize in a port of the United States is a violation of its neutrality. See also *The Appam*, 234 Fed. 389 (*affirmed* by the reported case), wherein the right of a prize court to act without having the prize before it was discussed.

The right to bring a prize into a neutral port exists therefore only as limited by art. 21 of the Hague Convention, viz.: "on account of unseaworthiness, stress of weather or want of fuel or provision" and the right to remain terminates as soon as the circumstances which justified the entry are at an end. *Ann. Cas.* 1917D—29.

In the reported case it is said that even in a case where that provision is not binding because of the failure of one of the belligerents to ratify it, it correctly represents the attitude of the American government on the question of international law involved.

BOARD OF TRUSTEES OF PHILADELPHIA MUSEUMS

v.

TRUSTEES OF UNIVERSITY OF PENNSYLVANIA ET AL.

Pennsylvania Supreme Court—October 28, 1915.

251 Pa. St. 125; 96 Atl. 126.

Municipal Corporations — Property — Powers of Administrative Board.

A board of trustees created by a city as its administrative agent to manage a museum and the premises on which the museum buildings were located cannot, in the absence of a clear intent, shown by ordinance, to create a distinct entity as depository of the legal title or of any legal transfer to the board, question the city's right to convey the property.

Same.

Where an ordinance enacted by a city under Act April 25, 1903 (P. L. 314), authorizing cities to establish certain institutions with power to acquire property, authorized a board of trustees created by the city to manage certain property, to hold property for the purposes comprised in the object of the board's creation, with the powers and subject to the restrictions prescribed by such statute, but made no other change in the board's status and did not provide for a transfer of the property to it, the board remains merely the city's administrative agent with respect to the property.

Conveyance by Municipal Corporation — Right to Object — Federal Government.

That the federal government had appropriated money to construct buildings for a commercial exposition, held on property belonging to a city, did not entitle it to object to the conveyance of the property by the city for private purposes to a private corporation, though a few of the buildings yet remained on the premises and were occupied by a museum.

Dedication — By Municipality — Necessity of Acceptance.

A "dedication" is the joint effect of the offer by the owner to dedicate and acceptance by the public, and there can be no dedica-

tion without the participation of both, though the dedicator is a municipality; and hence the passage of a city ordinance, setting apart land for public uses, being a mere offer to dedicate, becomes binding only by acceptance and use by the public for the purposes stated.

[See note at end of this case.]

What Constitutes Acceptance.

Where a city ordinance purported to dedicate to the public certain property for use as a park, and thereafter museums were erected on a part thereof and used by the public, and other portions were either leased to tenants or used as a public dumping ground, and were not opened for park purposes, there is no acceptance of the dedication of these other portions.

Appeal from Court of Common Pleas, No. 1, Philadelphia county.

Action by Board of Trustees of Philadelphia Museums, plaintiff, against Trustees of University of Pennsylvania et al., defendants. From decree dismissing exceptions to report of master, plaintiff and United States of America appeal. The facts are stated in the opinion. **AFFIRMED.**

Thomas O. Peirce, William A. Glasgow, Jr., John H. Hall and Francis Fisher Kane for appellants.

John C. Bell, John G. Johnson, Henry S. Drinker, Jr., J. Levering Jones and Samuel Dickson for appellees.

[129] **FRAZER, J.**—These appeals are by the Trustees of the Philadelphia Museums and the United States of America from the decree of the lower court holding the former was not an entity separate from the government of the City of Philadelphia, and the latter had no such interest in the controversy as would entitle it to question the action of the municipality in disposing of the property in question. The facts are fully stated in the preceding case.

Under the ordinance of June 15, 1894, and subsequent ordinances, the Board of Trustees of the Philadelphia Museums is a mere administrative agent of the city and has no standing to question the right of the city to deal with the property placed under its direction and control. There is no clear intent manifested by either of the ordinances to create a separate and distinct entity nor is such intent shown by the subsequent acts of the city in dealing with the property. No deed or other transfer was executed by the proper city authorities and delivered to the board. On the contrary, however, a part of the property in question was for a time leased to a third person by the city, at a yearly rental, which was paid to the city and not to the board and which lease was assigned to

the University of Pennsylvania following the deed of the property to that institution. The city also, by deed of December 29, 1906, conveyed to the Pennsylvania Railroad Company a right of way over a portion of the tract for the consideration of \$80,000, which sum was paid to the city and not to the Board of Trustees of the Museums. The ordinance of June 15, 1894, also indicated an intent on the part of the city to retain control of the property by the fact that the museums board was composed principally of city officials with the provision that vacancies occurring among those not officials should be filled by the mayor, subject to confirmation by select council. While it is true the subsequent ordinances were somewhat inartistically drawn and purport "to convey" the property to the board of trustees, a consideration [130] of the ordinances as a whole and the acts done pursuant thereto, and of the fact that no actual conveyance was ever made, convince us that there was no intention to actually establish a separate and independent body in which the ownership of the property might vest.

The status of the board is similar to that of the Carnegie Free Library Board in *Laird v. Pittsburg*, 205 Pa. St. 1, 54 Atl. 324, 61 L.R.A. 332, which was composed of the mayor of the city, presidents of select and common councils, president of the central board of education and five other members, appointed by councils to act in conjunction with certain others appointed by the donor. This board had charge of the expenditure of all funds donated by individuals or the city for library purposes and permission of the city was asked for the use of a portion of a public park for the erection of a proposed new library building. In connection with this location it was necessary to condemn certain property belonging to plaintiff, who contended the city could not exercise the power of eminent domain in taking land for the purpose intended, for the reason, inter alia, that the institution was not under the control of the city. In overruling this contention, this court, by Mr. Justice Mitchell, said (p. 7), "The further objection that the city cannot take this land because the Carnegie Free Library is not under the control of the city, and its property is distinct from that of a public park, is also untenable. The city takes and keeps the title and control of the land, though it commits the ordinary management, what may be called the police administration, to a board of directors in which it has, by election and ex officio, a representation of one-half. This is not a taking of the property for a private institution." The court below was right in holding that the present board of trustees is merely an administrative board of the city government.

The status of the board of trustees, with relation to the title of the property, was not changed by the ordinance of March 24, 1904, passed pursuant to the Act of [131] April 25, 1903, P. L. 314, authorizing cities to establish institutions for the purposes therein stated, with power to purchase or accept by gift, real or personal property, etc. The ordinance referred to merely conferred upon this board authority to take and hold real or personal property for the purposes comprised in the object of its creation with the powers and subject to the restrictions prescribed by the Act of 1903, but made no other change in the status of the board, nor did it provide that a transfer of the property in question should be made to it. So far as this act and this ordinance are concerned the status of the board, with respect to the property in question, remained unchanged.

The United States government is equally without standing to contest the action of the city in conveying this property. The appropriation of \$300,000 was made to the Philadelphia Exposition Association to aid in providing buildings necessary for the purposes of the exposition, with a further provision, that, after the close of the exposition, the buildings should be available for the purposes of the Philadelphia Museums. A number of the buildings, for the construction of which this fund was used, were taken down and removed from this property immediately after the close of the exposition, leaving standing only the chief buildings, which are now occupied by the museums. The main purpose of the appropriation by the federal government, was to assist in financing the exposition and encourage and stimulate export trade. Indirectly the fund was to benefit the Philadelphia museums, after it had discharged its primary purposes. There has been no attempt to divert the museum buildings to any other purpose than that for which they were constructed, and, therefore, the United States government has not been injured, nor is it threatened with injury. Presumably if a new location were obtained the museum would be removed to such place and in that way the purpose of the gift carried out.

The only other question involved in this appeal is the [132] action of the court below in holding that, as various other tracts of land which were not included in what is referred to as the museums tract ("A" and "B" or "University of Pennsylvania Tract No. 3") had never been improved or used for the purposes intended, the dedication was never accepted, and the city was not estopped from repealing the ordinance and otherwise disposing of the property. It appears from the report of the special master, that one of these tracts had been opened for a public

dumping ground and no effort was made by either the city or the trustees of the museums toward the creation of a botanical and economic garden. A part of another tract was leased in 1902 by the city to John A. Barry for a term of ten years as a stipulated rental. This lease was subsequently assigned to the University of Pennsylvania, which institution thereafter collected the installments of rent payable thereunder as they became due. Part of the property was also used as a storage yard and the Pennsylvania Railroad Company was granted a right of way over a part. At no time was money expended by the city or the trustees or by the public in improving this portion of the land or any part of it, for the purposes stated in the ordinance of dedication. A dedication to public uses does not become binding upon the dedicator until there has been an acceptance on the part of the public. Dedication is the joint effort of the offer of the owner to dedicate land and acceptance of such land by the public. Two parties are necessary, the owner on one side and the public on the other; there can be no dedication without the participation of both: *Los Angeles v. Kysor*, 125 Cal. 463, 58 Pac. 90. This is the general rule applicable to a dedication by a private individual, and there seems to be no good reason why the rule is not applicable to a dedication made by a municipality. Where the individual has made the dedication and no one has acted upon the offer, in such manner that he may be injured by its revocation, the former may revoke even though there has been an actual dedication and not a mere offer. The question [133] then becomes one of estoppel: *Schmitt v. San Francisco*, 100 Cal. 302, 34 Pac. 961. The city stands in the same position as an individual. Where the city is the owner of ground, the passage of an ordinance, setting it apart for public uses, either as a park or otherwise, is a mere offer to dedicate which becomes binding only by acceptance and use by the public for the purposes stated: *San Francisco v. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542; *San Francisco v. Canavan*, 42 Cal. 541; *People v. Williams*, 64 Cal. 498, 2 Pac. 393. In the case last cited it was said: "The passage of an ordinance, setting apart and dedicating a portion of the water front in a harbor for public use as a free public dock for ships is, said the late Supreme Court, a mere offer to dedicate, and the dedication is not complete, nor does the public acquire any right to the easement, until it has been accepted and used by the public in the manner intended."

In the case of *Atty.-Gen. v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L.R.A. 87, relied upon by appellants, as supporting a contrary rule, there was sufficient evidence of actual usage by the public to constitute an acceptance of

the dedication and the decision was based upon this ground. The language of the court to the effect that when a dedication was made by the town its acceptance was necessarily implied from the act of dedication is dictum. To hold that the passage of an ordinance of dedication forever precludes the municipality from using property for other purposes regardless of circumstances which might render it useless or undesirable for the purposes stated in the ordinance of dedication, would impose an unnecessary burden on the public without any corresponding advantage to any one.

What we have said is not intended in any way to conflict with the opinion of the lower court in *Pittsburg v. Epping-Carpenter Co.* 194 Pa. St. 318, 45 Atl. 129, which was affirmed by this court. Acceptance of an offer to dedicate need not be made at once, nor of the whole tract. Acceptance of a part of a tract may be of such nature as to indicate an intention to ultimately use the whole for [134] public purposes. This must necessarily be a question of fact to be determined in view of the circumstances of each case—such as the nature of the use made of part and the condition and location of other parts. In the present case, the remaining tracts do not adjoin the museum tract, and were as matter of fact dedicated for other purposes, to wit, the establishment of a botanical garden and park. No attempt has ever been made to use the land for these purposes, and the dedication was not for museum purposes, there seems to be no ground for holding that the use of the museum tract constituted an acceptance of the other tracts.

Both appeals are dismissed.

NOTE.

Necessity for Acceptance Where Land Is Dedicated to Public Use by Municipality.

It is well settled that a dedication of property to public use must be accepted by the public to become binding on the dedicator; (8 R. C. L. tit. *Dedication* p. 898) and the rule is as applicable where the dedicator is a municipality, as where he is a private individual. Unless there is an acceptance of the offer of dedication, either by an express act or by implication on the part of the public, the dedication is not complete and the dedicator may revoke his offer. *San Francisco v. Calderwood*, 31 Cal. 588, 91 Am. Dec. 542; *San Francisco v. Canavan*, 42 Cal. 541; *People v. Beaudry*, 91 Cal. 213, 27 Pac. 610; *Springfield v. Hampden County*, 10 Pick. (Mass.) 67; *Atty.-Gen. v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L.R.A. 87; *Oswego v. Oswego Canal Co.* 6 N. Y. 257; *Story v. New*

York El. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; *Knox v. Roehl*, 153 Wis. 239, 140 N. W. 1121. And see the reported case and the decision at the same time in *Philadelphia Museums v. University of Pennsylvania*, 251 Pa. St. 115, 96 Atl. 123. See also *Davenport v. Buffington*, 97 Fed. 234, 38 C. C. A. 453; 46 L.R.A. 377; *State v. Taff*, 37 Conn. 401.

It was held in *Atty.-Gen. v. Tarr*, *supra*, that an acceptance of a dedication by a municipality of a tract of land for the benefit of the public generally may be evidenced by the use thereof by the public, or by any particular class thereof; and that the acceptance of the whole tract dedicated is good if but a part of the land is used either for purposes of labor or of recreation. The court discussing the necessity for an acceptance said: "We are not prepared to hold that any acceptance was necessary on the part of the inhabitants of Gloucester, for whose benefit the reservation for landing places was principally designed, other than that which is inferred from the reservation itself. The landing was certainly valuable and beneficial to the inhabitants, and the act by which it was appropriated to themselves and the public was done by themselves, through the votes of the town, recorded in the book of possessions kept by its authority, for the purpose of showing the grants made by the town as the proprietary of the lands within its limits, and termed Commoners' Records. *Boston v. Richardson*, 13 Allen 146. A town might accept a dedication made by others for the benefit of its inhabitants, as of a town way, previous to the St. of 1846, c. 203, by its acceptance or acquiescence, or that of its agents acting within the scope of their authority. *Hayden v. Stone*, 112 Mass. 346, 350. When the dedication is made by itself, such acceptance is necessarily implied from the act of dedication. . . . The acceptance is to be construed in connection with the grant or dedication. Where that clearly includes the premises, less evidence must certainly be required to show that any particular part had been accepted, than where it is uncertain whether there has been more than a partial and limited dedication."

In *San Francisco v. Calderwood*, 31 Cal. 588, 91 Am. Dec. 542, wherein it appeared that a city by an ordinance dedicated a certain water front lot to be used as a free public dock for ships and vessels, the court said: "The ordinance was not a dedication, but an offer to dedicate, by which the city could lose nothing and the public could acquire nothing until the offer should have been accepted. The doctrine upon this point is so well settled as to leave neither encouragement or chance for discussion. (*Washb. on Eas.* 132, and case there cited.) It was

considered in *Harding v. Jasper*, 14 Cal. 647, that "if the soil be accepted and used by the public in the manner intended by the owner, the dedication is complete—precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use."

In *Knox v. Roehl*, 153 Wis. 239, 140 N. W. 1121, it appeared that a city for the purpose of widening one of its streets condemned a strip of land, paying the owner therefor, and thereafter the strip was noted as a part of the street on the official street atlas kept in the city engineer's office. In an action to foreclose tax certificates on the defendant's property for unpaid assessments for sewer and water mains laid in the street, he claimed that the city had no right to tax him for the improvements since the strip was no part of the street. The court decided in favor of the assessment and in commenting on the necessity for an acceptance of the dedication said: "Has the city dedicated this 10-foot strip for street purposes? Since the city, by a dedication of its own land, must not only dedicate but also accept the dedication, the questions of intent and acceptance merge more or less into each other. If, therefore, a clear intent to dedicate can be gathered, only slight proof of acceptance need be shown, for it will be presumed that the city intends to accept, in behalf of the public, its own dedication."

It seems that where a town with the aid of its inhabitants erects a bridge on a highway for public use, the building of the bridge and the proceedings of the town are of themselves sufficient to show a dedication and an implied acceptance thereof. *Springfield v. Hampden County*, 10 Pick. (Mass.) 67.

STATE

v.

COOPER.

West Virginia Supreme Court of Appeals—
June 16, 1914.

74 W. Va. 472; 82 S. E. 358.

Jury — Qualification — Member of Grand Jury Indicting Defendant.

One who served on the grand jury which returned an indictment is disqualified for service as a petit juror on the trial of a person thereby accused.

[See note at end of this case.]

Same.

Though by the court deemed qualified upon voir dire and sworn as such juror, he not

then recalling such former service, it is not error to excuse him from the panel of twelve, and in his stead to substitute another who upon examination was ascertained to be free from disqualification.

[See note at end of this case.]

Challenge for Cause — What Constitutes.

A mere objection to the withdrawal of a disqualified juror and the substitution of another upon due examination adjudged free from objection is not a challenge for cause.

Waiver of Disqualification of Juror — Failure to Object.

One accused of a felony waives his right of challenge, and will not, after verdict, be heard to complain, if, with knowledge of the disqualification, he remains silent or refuses, when afforded an opportunity, to exercise his right thereto.

Argument of Counsel — Prejudice — Instruction to Disregard.

Remarks of counsel in argument, which, when objected to, the court instructs the jury to disregard, are not cause for reversal of a judgment on a verdict otherwise free from error.

Instructions Approved.

Rulings on instructions are held not to be erroneous.

Witnesses — Cross-examination on Immaterial Matter — Harmless Error.

Permitting defendant in a homicide case to be asked on cross-examination whether he had previously carried a revolver, which question was immaterial to the issues involved, if error, is harmless, where he answered in the negative, especially where he had offered in evidence proof tending to show his previous good character as a quiet and peaceable citizen.

Error to Circuit Court, Fayette county.

Criminal action. John Cooper convicted of homicide and brings error. The facts are stated in the opinion. **AFFIRMED.**

Osenton & Horan for plaintiff in error.

A. A. Lilly, John B. Morrison and J. E. Brown for defendant in error.

[473] *LYNCH, J.*—John Cooper was convicted upon an indictment in the form prescribed by statute, charging him with the killing of Rufus Clendenin on September 4, 1912. The specific assignments of error on which he relies for reversal are the rulings of the trial court upon his demurrer to the indictment, the empaneling of the jury, the admission and rejection of evidence, the giving of instructions 1 and 4 for the state, and the refusal of his instruction number 5. Having heretofore held sufficient indictments charging murder in the statutory form, the citation of authority alone suffices. *State v. Schnelle*, 24 W. Va. 767; *State v. Flanagan*, 26 W. Va.

118; *State v. Baker*, 33 W. Va. 330, 10 S. E. 639; *State v. Sheppard*, 49 W. Va. 592, 39 S. E. 676.

[474] Upon the panel first selected, in the manner required by § 3, Ch. 159, Code 1913, and sworn to try the case, were two jurors, Meadows and Harrah, who had served as members of the grand jury which returned the indictment. This previous service they did not recall when examined upon their *voir dire*; but did so recall, and advised the court thereof, before any evidence was introduced by the state. The presence of the witnesses, when convened at the clerk's desk to be sworn, reminded them that they had been members of the grand jury. Thereupon the court, over defendant's objection, excused the two jurors, and defendant excepted. That those who served as grand jurors on the finding of an indictment are incompetent as petit jurors on the trial of the offense charged, appears from *State v. McDonald*, 9 W. Va. 456; *Dilworth v. Com.* 12 Grat. (Va.) 689, 65 Am. Dec. 264; *Bristow v. Com.* 15 Grat. (Va.) 634. To Hoffer, one of the jurors called and examined as substitutes for the two excused, the state objected, because he was one of the original panel of twenty from which the first twelve were selected; but the court sustained defendant's objection to excusing Hoffer, and substituted him in lieu of one of the two thus excused. However, neither the state nor the accused objected to Bragg, the other substituted juror, when, as thus completed, the panel of twelve was again sworn to try the case. To the court's inquiry, through the prosecuting attorney, whether defendant objected to the jurors Bragg and Hoffer, he, at the instance of his counsel, remained silent, and did not challenge or object to either of them; though, without assigning any cause therefor, he did later enter an objection to the discharge of Meadows and Harrah and to the substitution of Bragg and Hoffer, and excepted to both rulings of the court thereon.

Was the court's action in thus excusing two disqualified, and substituting therefor two apparently qualified jurors, erroneous, in view of defendant's refusal to exercise his right of challenge when thus in effect tendered to him? That he had the right to challenge for cause either one or both of the jurors Bragg and Hoffer is conceded—a right he could exercise or decline, as advised by counsel. But when he failed to act, when afforded an opportunity, he cannot thereafter be heard to complain. By failing to challenge when requested [475] he waived the right thereto. A mere general objection to the action of the court does not constitute a challenge for cause. Should one accused of felony decline to participate in the selection of a jury to try his case, the prosecuting attorney is authorized to strike eight from the panel of twenty jurors whom

the court may adjudge to be qualified, and of this action defendant cannot complain. § 3, Ch. 159, Code 1913. Besides, there is always a presumption of regularity in all judicial proceedings. Error must be shown by him who asserts irregularity. *Scott v. Newell*, 69 W. Va. 118, 70 S. E. 1092; *State v. Lavin*, 64 W. Va. 26, 60 S. E. 888; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; 24 Cyc. 299, 255; 2 Bish. Crim. Proc. § 749. Here, defendant made no attempt to show in what respect, if any, he was prejudiced in the selection of the jury; and we see no error therein. § 7, Ch. 159, Code 1913; *State v. Davis*, 31 W. Va. 390, 7 S. E. 24; *State v. Williams*, 49 W. Va. 220, 38 S. E. 495. See also *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

The evidence admitted over defendant's objection was not prejudicial or improper; and, if it was competent where refused, he failed to indicate, except as to one question, the answer anticipated. In that instance, however, the fact sought to be elicited was sufficiently disclosed by answers to preceding inquiries. Cooper and Clendenin had quarreled about a trifling matter some time between one and three o'clock in the afternoon of the day of the homicide, which occurred about six o'clock in the evening. Immediately after the quarrel, each of them secured a revolver, Clendenin walking to his home, half a mile distant, for the purpose, saying when separating from Cooper, he was too drunk to fight but would get his gun and "settle" with him. Cooper, when asked when he got his pistol said just after Clendenin went home; and, to a question why he got it, replied, "to protect my own self." Then followed the further question, objection to which the court sustained: "Did you in good faith believe Clendenin was going home to get the pistol and come back and settle with you?" The answer anticipated, as appears from the record, was that "owing to his knowledge of the general reputation of Clendenin for being a bad and dangerous man, together with his threat that he was going home to get a gun and come back and kill him or do him great bodily harm, [476] Cooper got his gun to protect himself in case he came back." But, as noted, defendant had testified to his purpose in obtaining possession of a revolver, and repetition thereof was therefore unnecessary. The charge against Cooper was not that of carrying a revolver, but that he later used it in an assault upon Clendenin, resulting in the instant killing of the latter.

Before determination of the propriety of the instructions of which defendant complains, a further review of the testimony is deemed essential. As stated, defendant and Clendenin had quarreled at least three hours before the homicide, and each of them immediately thereafter secured a revolver. After-

wards and until Clendenin was killed, both he and Cooper remained in close proximity to each other, perhaps neither of them seeing the other in the meantime. Soon after Clendenin's return from his home, he quarreled with William Parker about an equally trifling matter, in a saloon from which both were ejected; and, until Clendenin was shot, he and others, including Parker, remained in front of the saloon, engaged in a conversation, the subject of which those present were unable to state. At least none of them except McIntyre could or did repeat anything said by Clendenin indicative of a hostile attitude on his part against Cooper or any other person then present. But, while thus engaged, Cooper, with a revolver in his right hand, according to the testimony of all of the several witnesses introduced by the state, hurriedly approached Clendenin, unobserved by the latter until within a few feet of him, when Cooper shot, killing Clendenin almost instantly. It is true that, while these witnesses say Cooper walked out of the front door of the saloon and thus in haste approached and shot Clendenin, Cooper and Acquino testified he did not come out of the saloon, but out of a butcher shop the door of which was within a few feet of the front door of the saloon. Cooper and McIntyre say when Clendenin saw Cooper approaching, Clendenin remarked that he was too drunk to fight but that if he "had to kill a damn son of a bitch he guessed he could do it," and "just started out of his pocket with his gun, and turned toward me (Cooper) that way (illustrating)." However, excepting defendant and McIntyre, all the witnesses say that none of them, including Clendenin, saw Cooper approaching until he was within a few [477] feet of Clendenin; that then Cooper was in the attitude of one about to shoot, and did immediately shoot, before Clendenin succeeded in drawing his revolver, which dropped either from his hand as he was in the act of drawing it from his pocket, or from his pocket as he fell to the ground.

The two instructions complained of informed the jury that if they believed the evidence on the part of the state thus detailed they should find defendant guilty of murder in the first degree. Instruction number 1 was based upon the theory that Cooper, armed with a deadly weapon, found the deceased, and feloniously and intentionally shot and killed him, "as charged in the indictment," and the fourth, that, if, being thus armed, he walked up to or sought out Clendenin with the intention of having an affray with him or for the purpose of killing him, and a difficulty ensued, he could not, without some proof of a voluntary change of conduct or action on his part, excuse the killing of Clendenin upon the ground of self defense, "upon the principle that one cannot knowing-

ly and wrongfully bring upon himself the very necessity which he sets up for his own defense." In view of the evidence, we cannot say either of these instructions was erroneous.

Instruction number 5, refused, seems to us to be clearly covered by other instructions given at defendant's request. Number 4 told the jury that if they believed from "a preponderance of all the evidence and circumstances in this case that the deceased attacked the defendant, in such a manner and under such circumstances as to furnish him reasonable grounds to believe and he did believe he was in danger of death or great bodily harm at the hands of the deceased, and that under the influences of such belief he fired the shot that killed the deceased in order to protect himself from death or great bodily harm, such killing would be excusable under the laws of this state and the defendant guilty of no crime." This instruction clearly placed before the jury the theory relied on by defendant to excuse the homicide. Instruction number 5 was substantially on the same theory, though in a somewhat amplified form. But it is not erroneous to refuse an instruction which merely repeats other instructions given at the instance of the same party. It seems to us clear that [478] the instructions given for the state and for defendant properly placed before the jury all the theories relied on by each of them, and that defendant was not prejudiced by the action of the court thereon. *State v. May*, 62 W. Va. 129, 57 S. E. 366; *Snedeker v. Rulong*, 69 W. Va. 223, 71 S. E. 180.

The court did not err in refusing to grant a new trial. The testimony fully warranted the verdict. The jury could reasonably and properly conclude that Cooper was the aggressor, and that Clendenin did not see him as he approached, and not until Cooper was in the attitude of one intending to make a murderous assault.

Some complaint is also made of certain remarks by counsel in argument on behalf of the state. The record shows an objection on behalf of defendant made at the time of the utterance, but that thereupon the court promptly directed the jury to disregard the argument of counsel except in so far as it was based upon the evidence. Of course, some latitude must necessarily be allowed counsel in the discussion of any case; and this court will interfere only where the party complaining promptly objected; and requested the court to instruct the jury to disregard the argument, and not then unless such remarks reasonably appear to be prejudicial to the complaining party. *State v. Shores*, 31 W. Va. 491 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Shawn*, 40 W. Va. 1, 20 S. E. 873; *State v. Allen*, 45 W. Va. 65, 30 S. E. 209; *State v. Clifford*, 58 W. Va. 681, 52 S. E. 864.

Nor can we say the question propounded to defendant on cross-examination, whether he had not previously carried a revolver, was prejudicial to him. Whether he did or did not was immaterial on the trial of the issues involved. But, he having answered in the negative, we are unable to say in what respect he was injured thereby; especially as he had offered in evidence proof tending to show his previous good character as a quiet and peaceable citizen in the community wherein he was known. In rebuttal thereof, the state could, by proper evidence, attempt to show the contrary. *State v. Lane*, 44 W. Va. 730, 29 S. E. 1020; *Price v. Com.* 21 Grat. (Va.) 868. Under the circumstances, this objection seems untenable.

We are of opinion, therefore, to affirm the judgment.

Affirmed.

[479] *POFFENBARGER, J. (dissenting).*—The prisoner's legal right of peremptory challenge having been curtailed and restricted in the selection of the jury, by the elimination of two of the twelve first selected and the substitution of two others, I am unable to concur in the decision. These two were not among the twenty, when he exercised his right to strike off six. If they had been, his striking might have been entirely different. In my opinion, when the two disqualified jurors were removed, the panel should have been filled again to twenty, and the prisoner permitted to strike over again. It is said he was accorded his privilege of peremptory challenge and declined to exercise it as to the two new jurors. He certainly did not have it accorded to him in the manner contemplated and required by the statute. What was offered him may have been just as good, and it may be possible to devise even a better scheme than the statutory one, but I do not think the courts have any power to substitute schemes and devices of their own for those ordained by the legislature.

Whether the prisoner was injured in a practical sense by this denial of legal right, it is impossible to say. It is equally impossible to see that he was not, and a presumption of injury arises from error in a trial.

Judge Robinson concurs in this note and also dissents from the decision.

NOTE.

Qualification as Juror of Member of Grand Jury Indicting Defendant.

Introductory, 456.

Criminal Action:

Generally, 456.

Time for Objecting to Juror, 457.

Diligence in Discovering Disqualification of Juror, 461.

Civil Action, 462.

Introductory.

This note reviews the cases involving the qualification of a member of a grand jury to sit on the petit jury to try the case involved in the indictment. It does not discuss the general subject of the competency of a juror who has served in a cause involving the same or similar facts. For a discussion of that question, see the note to *People v. Mol*, 4 Ann. Cas. 960.

Criminal Action.

GENERALLY.

The first direct reference to the right of a member of a grand jury to sit as a petit juror on the trial of an indictment found by that grand jury appeared in a statute enacted by Parliament in the reign of Edward III which read as follows: "No indictor shall be put in inquests upon the deliverance of the indictors of felonies and trespasses, if he be challenged for that same cause by him which is so indicted." 25 Edw. III. stat. 5, c. 3. This clause of the statute not only applied to a juror who had found the indictment in the same cause but also on the trial of another indictment or action wherein the same matter was involved or happened to be material. See *Year Book of 40 An. 10, Ab. B. Chall.*, where an indictor, being returned on a petit jury and giving a verdict, was fined because he did not challenge himself. So in *Coke on Littleton 157b* citing a number of cases in the year books and other early reports supporting the rule, it was said: "So likewise one may be challenged that he was an indictor of the plaintiff or defendant either of treason, felony, misprision, trespass or the like in the same cause." The question does not seem to have attracted further attention until the reign of Elizabeth when Parliament enacted a second statute finding that "No indictor shall be put upon inquests upon deliverance of the indictors of felony and trespass, if he be challenged for the same cause by him who is indicted." 25 Eliz. c. 3. In *Rex v. Oates*, 10 How. St. Tr. 1079, it appeared that one of the panel called to try *Titus Oates* for perjury was excused because he had served on the grand jury bringing the indictment. In *Young v. Slaughterford*, 11 Mod. (Eng.) 228, Chief Holt on an appeal for murder ruled that it was a good cause for challenge that one of the petit jury had also sat on the grand jury indicting the prisoner. In *Reg. v. Sullivan*, 1 Per. & Dav. 96, 8 Ad. & El. 831, 35 E. C. L. 539, it was discovered, after the petit jury were sworn, that one of the jurors had sat on the grand jury bringing in the indictment in the case. After the verdict, the defendant asked for a new trial on this ground, but it was held by the court that an objection to the juror should have been made as a challenge

before the jury were sworn, and the defendants had waived their privilege by delaying. Chief Justice Denman said: "The subject is certainly of great importance, and ought to be considered. At present my opinion is, that the objection should have been made the subject of challenge to the juror. If he had disclosed the objection before he was sworn he might have left the box."

The general rule in the United States is that a member of a grand jury bringing in an indictment cannot serve on a petit jury trying a criminal action arising under the indictment, provided the defendant makes an objection. But as to the time of making this objection there is a considerable conflict of opinion. See the cases cited in the following subdivision of this note. Thus is *Com. v. Hussey*, 13 Mass. 221, a new trial was granted on the ground that two of the petit jurors had also served on the grand jury bringing in the indictment. The court observed that if those jurors had performed their duty while on the grand jury they could not have been impartial on the trial. So in *Beason v. State*, 34 Miss. 602, it was held that where two of the jurors had also sat on the grand jury bringing in the indictment, a new trial must be granted. The court said: "It has always been considered good cause of challenge that a juror was under any bias, and upon that principle it is laid down as good ground of objection to a juror that he was formerly a juror in the same cause. 3 Bl. Com. 393. By reason of the bias which must be presumed to exist in his mind under such circumstances, he cannot be altogether free and impartial to try the issue. And the reason of this rule is applicable in all its force to grand jurors who had participated in finding the indictment, and were afterwards called to sit as jurors upon the trial; for such a juror would naturally take his seat upon the jury to try the issue, with the impression, if not with the decided bias of mind, that the indictment was just and true, and should be sustained; and accordingly, it has been considered a good cause of challenge of a juror, that he was a member of the grand jury who found the indictment."

The rule adopted in the federal courts, which forms the one exception to the general rule in the United States, is that a member of a grand jury bringing in an indictment may serve on a petit jury trying a criminal action arising under the indictment. This is based on an Act of Congress (Act June 30, 1879, c. 52, par. 2; 4 Fed. St. Ann. 749) providing that prior service is no disqualification for a juror, unless the service was in the capacity of a petit juror. That act expressly excludes an objection that a juror has served on a grand jury bringing in the indictment. *National Bank v. Schufelt*, 145 Fed. 509, 76 C. C. A. 187.

TIME FOR OBJECTING TO JUROR.

The rule obtaining in some jurisdictions is that an objection to a member of the grand jury which found the indictment serving as a petit juror on the trial thereof must be made before the juror is sworn. *Birdsong v. State*, 47 Ala. 68; *Finch v. State*, 81 Ala. 41, 1 So. 565; *Williams v. State*, 109 Ala. 64, 19 So. 530; *Harrison v. State*, 144 Ala. 20, 40 So. 568; *Harris v. State*, 177 Ala. 17, 59 So. 205; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L.R.A. 269; *Gavin v. State*, 42 Fla. 553, 29 So. 405; *Denmark v. State*, 43 Fla. 182, 31 So. 269; *Ferrel v. State*, 45 Fla. 26, 34 So. 222; *State v. Turner*, 6 La. Ann. 308; *State v. Thomas*, 35 La. Ann. 24; *State v. Jackson*, 37 La. Ann. 897; *State v. Smith*, 41 La. Ann. 688, 6 So. 546; *State v. McCarthy*, 44 La. Ann. 323, 10 So. 673; *State v. Drakeford*, 162 N. C. 667, 78 S. E. 308; *Ryan v. State*, 30 Ohio Cir. Ct. Rep. 306; *Beck v. State*, 20 Ohio St. 228; *State v. O'Driscoll*, 2 Bay (S. C.) 153; *State v. Cooler*, 30 S. C. 105, 8 S. E. 692, 3 L.R.A. 181; *Gillespie v. State*, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137.

Thus in *Gavin v. State*, 42 Fla. 553, 29 So. 405, it was held that the defendant was not entitled to a new trial on the ground that a member of the petit jury had served on the grand jury bringing in the indictment, as his objection should have been made in the form of a challenge at the time the jury were drawn and before they were sworn in. The court said: "Section 2851, Revised Statutes, provides as follows: 'No member of a grand jury which finds a bill of indictment shall be put upon a jury for the trial of that indictment, if challenged for that cause by the defendant.' The inhibition here placed upon the serving of a grand juror as a member of the trial jury to try an indictment found by him as such grand juror is clearly and expressly made conditional upon a challenge being interposed by the defendant for that cause. The effect of the statute is not absolutely to disqualify a grand juror from service on a trial jury to try indictments found by such grand juror, but makes it only a ground of challenge for cause, which challenge the defendant may waive or not as he sees proper. By accepting the juror without exercising this right of challenge given him by the statute the defendant waived such right, and it was too late after verdict to claim the benefit of it."

In *Ferrell v. State*, 45 Fla. 26, 34 So. 222, it was held that the defendant could not interrogate the petit jurors as to whether they had been on the grand jury bringing in the indictment after the jury had been sworn, since he should have exercised that privilege on the voir dire. The court said: "It was not suggested to the court that any member

of the jury had in fact been a member of the grand jury, nor that there was any reason to suppose that he had been. It was the duty of the defendant to put the desired question upon the voir dire, and as no reason was given for the failure to do so except that the question 'was overlooked,' and it was not even suggested that there was any reason to suppose that any member of the jury had in fact been a member of the grand jury, the trial court cannot be held in error in refusing to permit the question when tendered for the first time after the jurors were sworn in chief."

In *State v. Turner*, 6 La. Ann. 309, it was held that a motion in arrest of judgment could not be granted on the ground that one of the grand jurors bringing in the indictment had also served on the petit jury trying the case, as the objection should have been made in the form of a challenge before the jury were sworn.

In *State v. Thomas*, 35 La. Ann. 24, the court said: "It is settled that a motion for a new trial, or one in arrest of judgment, will not be sustained on the ground that one of the grand jurors who found the indictment was one of the jurors who tried the case. Persons thus officiating cannot be said to have no good commission to proceed against the accused. The objection would have constituted a good ground of challenge, but cannot avail on a motion in arrest of judgment."

In *State v. Jackson*, 37 La. Ann. 897, it was held that where the defendant was told in open court that a petit juror had sat on the grand jury indicting him, and he waived his right of challenge by accepting the juror, he could not on that ground obtain a new trial, since the disqualification of the juror was one which could have been waived. The court said: "An accused cannot accept a jurymen when he has good cause of challenge, take the chances of a verdict in his favor, and when disappointed take shelter under the objection that he has refused to avail himself of."

In *State v. Smith*, 41 La. Ann. 688, 6 So. 546, it was held that the fact that a member of the petit jury trying the case had also served on the grand jury bringing in the indictment, while good as a ground of challenge to the juror, could not avail on a motion for a new trial. The court said: "There is no suggestion of fraud or injury. The juror, when examined on his voir dire, had stated that he knew nothing of the case and had neither formed nor expressed an opinion. There is no contradiction of this statement. For aught that appears, he might not have been present at the finding of the bill. Twelve out of the sixteen composing

the grand jury may validly act in absence of the other members. At all events, this, like alienage and other grounds of disqualification, was open to discovery by the proper questions to the juror on his voir dire; and ignorance of the existence of such disqualifying cause on the part of the accused and his counsel cannot avail in one case more than in others. The very object of the examination on the voir dire is to elicit information as to such facts as affect the competency of the juror."

In *Ryan v. State*, 30 Ohio Cir. Ct. Rep. 306, the court said: "It is urged that since he was a member of the grand jury which returned the indictment he must have at that time formed an opinion as to the guilt or innocence of the prisoner. This is not necessarily so. A grand jury consists of fifteen men, and it is provided by Rev. Stat. 7206 (Lan. 10960) that 'At least twelve of the grand jurors must concur in the finding of an indictment,'—so that there may have been at the time this indictment was found, three of the grand jurors who had formed no opinion either way, as to whether there was evidence sufficient to warrant the indictment. For aught that appears Colson may have served upon the grand jury and have been one of three who never made up his mind or formed any judgment as to the guilt or innocence of the party indicted. The statute makes the fact that one was a member of the grand jury which found the indictment, a ground of challenge of such person as a juror upon the trial, but where no challenge is made and no question on this subject is put upon the examination of the juror touching his qualifications, it is too late to raise this objection, after the trial and verdict."

In *State v. Cooler*, 30 S. C. 105, 8 S. E. 692, 3 L.R.A. 181, the court said: "There can be no doubt that the fact that a juror has served on the grand jury which found the bill furnishes a good ground for challenge; but if the objection is not taken at the proper time, the accused may lose the benefit of it, as such an objection is not usually available on a motion for a new trial (1 Bish. Crim. Proc. 1st ed. § 773), the general rule being universally recognized that that which was a cause of challenge to a juror shall not be made the ground for a new trial."

In *Gillespie v. State*, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137, it was held that where the defendant did not challenge a member of the petit jury until the jury had been sworn, the objection was waived. The court said: "If the juror be not challenged, he is competent to try the issue; nor can it be permitted to let the defendant annul the verdict against him, on his affidavit of want of knowledge;

affidavits always to be had in cases of convicted felons, and which are not subject to be disproved. But in this case the record evidence in the cause shows who the grand jurors that found the indictment were, and the defendants cannot be heard to say they neglected to inform themselves personally or by counsel of the fact; the law fixes them with knowledge. To hold otherwise than as above would sap the foundations of the trial by jury; a party in a civil or criminal cause (the rule being the same in each), could elect one or more jurors whom he had the right to challenge, because, for instance, the juror had formed and expressed an opinion against him, and make an experiment; on the failure of which make an affidavit showing the fact of incompetency, and stating the want of knowledge until it was too late to challenge the juror, when a new trial will be granted of course. Such a contrivance could be practiced in most criminal trials of the higher grades, where the triers generally of the county having jurisdiction had formed and expressed opinions on the merits of the cause, and when so many jurors are presented who are not householders, or open to challenge for other reasons."

In other jurisdictions the objection to a member of a grand jury bringing in an indictment serving on the petit jury trying the case arising under the indictment may be taken advantage of after the jury have been sworn and even when the verdict has been rendered, provided the defendant was not guilty of negligence in not taking advantage of his right to challenge. *Jackson v. State*, 51 Ga. 402; *Watkins v. State*, 60 Ga. 601; *Betts v. State*, 66 Ga. 508; *McLain v. State*, 71 Ga. 279; *Sapp v. State*, 116 Ga. 182, 42 S. E. 410; *Rice v. State*, 16 Ind. 298; *Barlow v. State*, 2 Blackf. (Ind.) 114; *Coleman v. Com.* 8 Ky. L. Rep. 607; *Com. v. Hussey*, 13 Mass. 221; *Beason v. State*, 34 Miss. 602; *Jefferson v. State*, 52 Miss. 767; *Roberts v. State*, 72 Miss. 728, 18 So. 481; *House v. State*, 96 Miss. 653, 51 So. 274; *State v. Brown*, 119 Mo. 536, 24 S. W. 1027, 25 S. W. 200; *U. S. v. Christensen*, 7 Utah 26, 24 Pac. 618; *Dilworth v. Com.* 12 Grat. (Va.) 689, 65 Am. Dec. 264; *Bristow v. Com.* 15 Grat. (Va.) 634; *State v. McDonald*, 9 W. Va. 456; *Bennet v. State*, 24 Wis. 57. And see the reported case. In *Jackson v. State*, 51 Ga. 402, it was held that where a member of a petit jury had served on the grand jury bringing in the indictment, and the state discovered the fact after the jury had been sworn in, but before evidence had been submitted, the court could discharge the jury and continue the case. The court said: "At a former term of the court a jury had been impanelled to try the case; but before any evidence was submitted, it was discovered

that one of the panel had been one of the grand jury that found the bill. All the other jurors had been discharged for the term. The solicitor general moved for and obtained an order to withdraw the case from the jury, and to continue it. The defendant neither waived the objection to the juror nor objected to the order. He now pleads that action of the court in bar of any further trial. The juror who had been of the grand jury who returned the bill was incompetent to try the defendant. *Rafe v. State*, 20 Ga. 65; *Cobb v. State*, 45 Ga. 11. It is not, in all cases, that the impaneling the jury prevents the state from exercising the rights it has before a full jury is made. Section 4681, Code, provides that 'if the fact (the incompetency of the juror) is unknown to either party, or the counsel, at the time the juror is under investigation, and it is subsequently discovered, such objection may be made and the proof heard at any time before the prosecuting counsel submits to the jury any of his evidence in the case.' This means that if the juror is incompetent he may then be discharged. If he be discharged, there is not a full jury left, and why could not a nolle prosequi be then entered, or a continuance had, if there be ground for it? Here there was no other jurors from whom to complete the traverse jury. Besides, the defendant did not object to the continuance. Had he waived any objection to the juror, and the court then had withdrawn him, had withdrawn the case from the jury, a different question would have been presented. Under the principle contained in the Code, the court had the power to discharge an incompetent juror at the time it did this one, unless objection to him was waived; and the state was thereby remitted to all the rights it had up to and before the case was submitted to the jury, by impaneling the whole twelve." But in *Sapp v. State*, 116 Ga. 182, 42 S. E. 410, it was held that where the defendant was given a list of those serving on the grand jury indicting him, his failure to discover that one of the petit jury had served on the grand jury was due to negligence, and his failure to challenge was a waiver of his right. The court said: "When the accused or his counsel was given the list and the indictment and told to look for any identity of names in the two papers, we think that he, in the absence of any fraud or deception, became chargeable with notice of whatever a proper examination of those papers would have revealed. He was thus chargeable with notice that this juror had served on the grand jury, and his failure or omission to challenge the juror or to suggest his disqualification must be held to amount to a waiver."

In *Jefferson v. State*, 52 Miss. 767, it was held that where, after the jury had been

sworn, one of the jurors arose and stated that he remembered having served on the grand jury bringing in the indictment, the court could direct the juror to stand aside, substitute another in his place and have the jury resworn. The court said: "The Code, § 2761, which requires that 'all peremptory challenges by the state shall be made before the juror is presented to the prisoner,' is inapplicable to the case at bar. Did the court err in directing the juror to stand aside, and in substituting another in his stead? The objection taken is general. The accused did not claim at the time a continuance of the trial, the privilege of rechallenging the other eleven jurors, or any other benefit, as the result of such change in the jury, nor did he then, nor does he now, insist or intimate that he was thus prejudiced in any way. The question is, therefore, as to the abstract right of the court to change the jury as in this particular instance. No injury or prejudice is shown or complained of. On the contrary, the presumption would be, naturally, that a grand juror who united in finding the bill would be prejudiced against the prisoner. The substitution of another in his stead may be supposed fairly to be an act favorable to the accused. However, aside from the particular facts of this case, it is well settled by the authorities that the practice involved rests in the discretion of the court."

In *Roberts v. State*, 72 Miss. 728, 18 So. 481, it was held that where, after the jury had been sworn and while the first witness for the state was being cross-examined, one of the jurors stated he had suddenly remembered having been on the grand jury bringing in the indictment, the court on the motion of the district attorney could discharge this juror as incompetent, substitute a new juror and proceed with the trial.

In *U. S. v. Christensen*, 7 Utah 26, 24 Pac. 618, it was held that where a juror had been asked on his voir dire whether he knew anything about the case and had answered "No," and it was found after a verdict of guilty that he had served on the grand jury which had found the indictment, it was proper to grant a new trial where the defendant had no knowledge of his disqualification. The court said: "An objection to a juror such as is raised in this case is not like merely technical disqualifications, such as alienage, nonresidence, and the like, which do not tend to impeach the fairness and impartiality of the jury. It is possibly true that the juror in this case had no opinion at the time of his examination as to the guilt or innocence of the accused. He may have forgotten that he was on the grand jury that found the indictment. He may have voted against finding the indictment, or may have been absent

when it was found, as twelve of the fifteen jurors constitute a quorum, and may transact business; but the presumptions of the law are all to the contrary, and, in the absence of any showing to that effect, he must be presumed to have participated in the finding of the indictment, and to have formed an opinion as to the guilt or innocence of the defendant. It might be possible also, even if the juror had formed an unqualified belief of the defendant's guilt from the evidence submitted to the grand jury, to change the opinion by evidence at the trial, if he were a man of candor and intelligence. But the defendant has a right to be tried by an impartial jury. A juror who, acting on his own oath as a grand juror, and upon the sworn testimony of witnesses, has already formed an opinion as to the defendant's guilt, and has solemnly accused him of a crime, should not be deemed an impartial or proper juror to try him. Having served on the grand jury which found the indictment, and having formed or expressed an unqualified opinion or belief that the prisoner is guilty of the offense charged, are each a ground of challenge to a juror for implied bias."

In *Dilworth v. Com.* 12 Grat. (Va.) 689, 65 Am. Dec. 264, it was held that a member of a grand jury bringing in the indictment against the prisoner was not competent to sit on the petit jury trying the same matter, and if the defendant could not discover this fact by using due diligence before the jury were impaneled and sworn, he could make the objection after the jury were sworn and before evidence was submitted. The court said: "The doctrine to be gathered from those decisions and others of the same class preceding them, I think substantially is, that when the prisoner excepts to a juror for cause before he is sworn, it is a matter of right to be adjudged by the court; when he excepts after trial for cause existing before the juror was elected and sworn, it is a matter addressed to the discretion of the court; and that in the exercise of this discretion the court ought to consider the whole case, and be satisfied that justice has been done; and that where there is conflict of testimony as to the language and conduct of the jurors, on which the exception to the jurors is founded, it properly belongs to the judge who presided at the trial to weigh and to decide upon the credibility of the opposing statements of the witnesses and jurors, and to decide, upon all the circumstances of the case, whether there is such proof of perjury and corruption on the part of the jurors as to make it proper to grant a new trial."

In *State v. McDonald*, 9 W. Va. 456, it was held that the fact that a member of the grand jury bringing in the indictment was

also called on the petit jury was a sufficient principal cause of challenge, but the objection could not be made afterwards unless the accused had really suffered injustice, although in such a case it might be made even after verdict. The court said: "When the prisoner excepts after trial, for cause existing before the juror was elected and sworn, it is matter addressed to the discretion of the court; in the exercise of this discretion, the court ought to consider the whole case, and be satisfied that justice has been done, and it is said, that in applying this rule the court regards, with extreme jealousy, all attempts to set aside verdicts on the ground of objections to jurors, existing before they were sworn; and that a verdict will not be disturbed for any such cause, unless it appears to have operated so as to inflict injustice upon the prisoners."

In *Bennet v. State*, 24 Wis. 57, it was held that where the names of the grand jury did not appear in the indictment, the fact that one of them served on the petit jury trying the case, such fact not being actually known to the defendant or to his counsel, was a ground for a new trial.

In the reported case it is held that when the court discovers that two members of a petit jury have also served on the grand jury bringing in the particular indictment which is about to be tried, it may dismiss the disqualified jurors and substitute two others who are qualified, even though the defendant has not taken advantage of his right to challenge. See also *Hawkins v. Andrews*, 39 Ga. 118; *Cobb v. State*, 45 Ga. 11; *Watkins v. State*, 60 Ga. 601.

DILIGENCE IN DISCOVERING DISQUALIFICATION OF JUROR.

Throughout the cases involving the question whether a new trial shall be granted on the ground that a juror was disqualified because of having served on the grand jury bringing in the indictment, emphasis is laid on the question whether the defendant was negligent in discovering this disqualification at the time of impanelling the jury. The defendant must use ordinary diligence in examining the grand jury list and comparing it with the names of the talesmen and in making such necessary inquiries as a man of reasonable diligence would use. Thus in *Jones v. State*, 95 Ga. 497, 20 S. E. 211, a new trial was refused on the ground that it was lack of diligence in the defendant not to have discovered that a juror who appeared in the petit jury as "T. G. Howell" was the same man who served on the grand jury bringing in the indictment as "Thomas G. Howell."

In *Massey v. State*, 124 Ga. 24, 52 S. E. 78, it was held that where a name appeared

on the jury list furnished to the defendant as "N. J. White," and the name of "Neal J. White" was on the list of the grand jury bringing in the indictment, it was not sufficient ground for a new trial that the two persons were identical, because the slightest diligence would have discovered that fact at the time when a challenge could have been made. The court said: "With the indictment and the list both before the counsel for the accused, the fact that a juror appeared in each whose initials were the same was sufficient to put him upon inquiry as to whether it was the same person in each list. By the exercise of the very slightest diligence this fact could have been ascertained before the juror was accepted. That the prisoner and his counsel did not know the fact until after the verdict is no sufficient reason for granting a new trial unless it appears they could not have discovered the existence of the fact by the exercise of ordinary diligence."

In *Cargill v. State*, 12 Ga. App. 574, 77 S. E. 832, it was held that before a new trial could be granted after evidence had been submitted on the ground that two of the jurors were members of the grand jury bringing in the indictment, it must appear that the accused and his counsel could not have discovered the fact by the exercise of ordinary diligence, and as it was not shown that the fact that two members of the grand jury bringing in the indictment were serving on the present jury could not have been discovered by examining the list of the members of the grand jury appearing thereon, and no reason being shown why this had not been done, a new trial was refused. See also *Britt v. State*, 112 Ga. 583, 37 S. E. 886.

In *Rice v. State*, 16 Ind. 298, it was held that where the defendant discovered after the verdict had been rendered that one of the petit jury trying him had also sat on the grand jury bringing in the indictment, and the failure to challenge at the proper time was through no fault of his own, the juror was incompetent, and a new trial should be granted; but if the fact of the incompetency of the juror had been known to the defendant at the time that the jury was accepted and sworn, he could not have raised any objections afterwards. The court said: "We think it clear that the juror was incompetent, and that the defendant was guilty of no negligence in not sooner discovering the fact. Had the incompetency of the juror been known to the accused at the time the jury was accepted and sworn, he could not afterwards have been heard to make the objection."

In *Barlow v. State*, 2 Blackf. (Ind.) 114, it was held that where two members of the grand jury indicting the defendant were also called on the petit jury trying the same of-

fense, the defendant could challenge; but it was further held that since this fact had been known to the defendant at the time the jury were impaneled he had been guilty of negligence in not taking advantage of it at the proper time, and a new trial was refused. The court said: "This part of the case, then, presents the question, whether the objection, known to the defendant at the time of impaneling the jury, but not made until after the verdict, was good on a motion for a new trial. We think it was not. It was a good cause of challenge, but being known to the party, and not mentioned at the proper time, the right was waived."

In *Coleman v. Com.* 8 Ky. L. Rep. 607, the state asked members of a jury generally whether they had any bias, and no answer was returned and the defendant did not ask any questions. The jury were sworn, the trial proceeded and a verdict of guilty was brought in. The defendant then made a motion for a new trial on the ground that one of the petit jury trying him had also sat on the grand jury bringing in the indictment. The court refused to grant a new trial on the ground that the defendant by his failure to inquire at the time the jury were impaneled, had waived his right to object.

In *Franklin v. State*, 2 Tex. App. 8, it was held that to neglect to challenge a petit juror who had also sat on the grand jury bringing in the indictment when it was possible to discover the fact by due diligence constituted a waiver by the defendant of his right to object to the juror.

Civil Action.

As to whether a member of a petit jury may serve in a civil proceeding where the issues have arisen from criminal proceedings involving an indictment rendered by a grand jury on which he served, the cases are few and at variance. In *Medlock v. De Kalb County*, 115 Ga. 337, 41 S. E. 579, a civil case arose from the issuance of an execution by county commissioners against a defaulting county treasurer and the sureties on his bond. One of the sureties interposed an affidavit questioning the legality of certain acts of the commissioners and denying his obligation. One of the jurors who was called on the petit jury had also served on the grand jury which prior to the civil action had indicted the treasurer for embezzlement of the county funds. It was held that this was not a legal disqualification since the issues were not the same, nor did the return of the bill of indictment involve on the part of the grand jurors any expression of opinion as to the issues in the civil action.

In *Mounce v. Crowson*, 59 Tex. Civ. App. 533, 126 S. W. 915, it was held that a mem-

ber of a grand jury indicting one of the defendants for fraud was not disqualified from serving on a petit jury in a civil action against the defendants for deceit and fraud based on the same charge, there being no attempt made to show an injury resulting from the juror's past service on the grand jury. The court said: "Having been a member of the grand jury under the circumstances alleged, was not in itself a legal disqualification to sit as a juror in this case. The situation in which that position placed the juror was not such as would require the court to presume as a matter of law that he was biased thereby to the extent of total disqualification to pass upon the property rights involved in the civil action. It will be observed that the appellant does not claim in his motion that the juror was biased or prejudiced one way or the other. The grounds urged merely rest on the statement of an abstract proposition, in itself unsound, without any attempt to show injury resulting from the juror's past service on the grand jury. This is not sufficient."

In *Rogers v. Lamb*, 3 Blackf. (Ind.) 155, it was held in an action for malicious prosecution for causing the plaintiff to be indicted that there was a right of challenge to a petit juror who had been on the grand jury bringing in the indictment. See also *Hawkins v. Andrews*, 39 Ga. 118.

NORMAN

v.

MEEKER.

Washington Supreme Court—June 16, 1916.

91 Wash. 534; 158 Pac. 78.

Payment — Note as Payment — Question of Law or Fact.

Whether defendant's note in suit was given by him and accepted by plaintiff in lieu of cash as payment and satisfaction pro tanto of part of the purchase price under a conditional sale of chattels is a mixed question of law and fact.

Conditional Sales — Election by Seller between Remedies.

Upon default by the vendee in a conditional sale contract the vendor may either disaffirm and retake the property, or affirm, declare subsequent payments due, and sue for the purchase price; the election of one remedy barring any right under the other. [See note at end of this case.]

Bills and Notes — Failure of Consideration — Recaption of Property Conditionally Sold.

Where a note is not included within the conditional terms of a contract of sale of a business, but is given as the equivalent of cash for a preliminary payment, its consideration does not fail by reason of the recaption of the property by the vendor upon the vendee's default, and the vendor may still enforce it.

[See note at end of this case.]

Appeal from Superior Court, Pierce county: CARD, Judge.

Action by Martin A. Norman, plaintiff, against Jerry Meeker, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

H. N. Eisenhower and Bates, Peer & Peterson for appellant.

Boyle, Brockway & Boyle and John W. Horejs for respondent.

[534] HOLCOMB, J.—The one question here to determine is whether the note of appellant sued on was given by him and accepted by respondent in lieu of cash, as payment and satisfaction *pro tanto* of part of the purchase price under a conditional sale of chattels. It is here a mixed question of law and fact.

On March 24, 1915, respondent sold to one Gregg, for a consideration of \$1,000, a confectionery and pool-room business. A conditional sale contract was entered into which stipulated that of the agreed purchase price, "second party [535] (vendee) has paid a note for five hundred (\$500) dollars for 60 days, the receipt whereof is hereby acknowledged." The further conditions of the contract which are material are these:

"And the said party of the second part, in consideration of the personal property, hereby agrees to pay the said party of the first part, at Tacoma, Washington, the remaining principal, with interest at the rate of seven per cent per annum, at the times and in the manner following:

"Twenty-five dollars or more on or before the 24th day of April, 1915, and twenty-five dollars or more before the 24th of each and every month thereafter until the entire principal shall have been paid. . . . In case the said party of the second part, his legal representatives or assigns, shall pay the several sums of money aforesaid, punctually and at the several times above specified, and shall strictly and literally perform, all and singular, the agreements and stipulations aforesaid, according to the intent and tenor thereof, then the said party of the first part will make unto the said party of the second part, his heirs or assigns, upon request at Tacoma, Washington, a bill of sale," etc.

The note referred to, which second party "has paid," was a note signed by appellant, a third party and stranger to the sale transaction, and by Gregg.

The argument of appellant is based upon the numerous decisions of this court, and of other courts similar thereto, that, upon a default by the vendee of a conditional sales contract, the vendor has one of two remedies. He may either disaffirm the contract and retake the property, or he may affirm the contract, declare the subsequent payments due, and sue for the purchase price thereof. But the two being inconsistent, the election of the one bars any right under the other; citing *Winton Motor Carriage Co. v. Broadway Automobile Co.* 65 Wash. 650, 118 Pac. 817, 37 L.R.A.(N.S.) 71; *Stewart, etc. Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Edward Thompson Co. v. Murphine*, 79 Wash. 672, 140 Pac. 1073; *Croup v. Humboldt Quartz, etc. Min. Co.* 87 Wash. 248, 151 Pac. 493; *Rose v. Rundall*, 86 Wash. 422, [536] 150 Pac. 614; *Alden v. Dyer*, 92 Minn. 134, 99 N. W. 784; *Green v. Sinker*, 135 Ind. 434, 35 N. E. 262; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028.

The conditional sales contract, providing for payment of \$25 or more on or before April 24, 1915, and \$25 or more on or before the 24th day of each and every month thereafter, having been broken by the vendee, the installment falling due on May 24, 1913, the same day as the maturity of the note in question, being unpaid, respondent retook the business. It appears that, a few days before the note fell due, the respondent went to Gregg, the purchaser, and told him that if the note was not paid when it fell due, respondent would take the store back. On that day respondent went to the store and found Mr. Gregg there. He asked Gregg what he was going to do. Gregg said: "I am going to throw the whole thing up. I don't want anything more to do with it. I will fix it up with you to-night or to-morrow morning." Respondent said he would take it over then if it suited Gregg, and Gregg replied that suited him.

These facts, appellant contends, place the transaction on all fours with the case of *Croup v. Humboldt Quartz, etc. Min. Co.* 87 Wash. 248, 151 Pac. 493. In that case, there had been forfeiture declared by the vendor, who also declared the contract invalid. Simultaneously, or immediately afterwards, the vendor sought to suspend the operation of the forfeiture and to stand upon the contract. He allowed the vendee to remain in possession of the property sold while attempting to renew a contract which he had previously declared was not good on account of some defect and which he had also declared forfeited. Upon the failure to renew the con-

tract, the vendee gave up possession and notified the vendor that it assented to his repudiation or rescission of the contract, and it was there held that the vendor could not thereafter bring an action under the contract for the remainder of the purchase price.

[537] Nor is this case analogous to that of *Winton Motor Carriage Co. v. Broadway Automobile Co.* supra, and the other cases of like nature, for the reason that in this case the contract must be construed as a contract reciting a present payment of \$500. While it is true that a note was given for that present payment, it was given as cash. The evidence tends to show that the respondent had attempted to deal with the purchaser, Gregg, upon the basis of a cash payment down of \$500. Gregg was unable to raise that sum and respondent agreed to take, and did take, the note in suit signed by appellant, who was not a party to the sale, in lieu of and as the equivalent of cash. Thereupon he delivered possession of the store to Gregg, and Gregg entered under his conditional sale contract. That contract bound Gregg to pay respondent the remaining principal, that is, the other \$500 over and above the first payment, with interest at the rate of seven per cent per annum, at the times therein stated, which we have heretofore set forth. Should the payments not be made punctually and as specified, then the respondent was authorized to retake the property; and should they be made as specified, then respondent was required, upon the completion thereof, to give to Gregg a bill of sale, etc.

It is contended by appellant that, where a promissory note is given to evidence a payment under such conditional sale contract and the contract is rescinded and the property retaken by the vendor, the consideration for which the note was given has absolutely failed, and such note is no longer a binding obligation upon the party giving the same. To this effect are cited the following cases: *Earle v. Robinson*, 12 Misc. 536, 33 N. Y. S. 606; *White v. Gray*, 96 App. Div. 154, 89 N. Y. S. 481; *Manson v. Dayton*, 153 Fed. 258, 82 C. C. A. 588; *Perkins v. Grobben*, 116 Mich. 172, 74 N. W. 469, 72 Am. St. Rep. 512, 39 L.R.A. 815; *McBryan v. Universal Elevator Co.* 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453, and *Minneapolis Harvester Works v. Hally*, 27 Minn. 495, 8 N. W. 597. But all these were cases where the [538] promissory note given to evidence the payment under a conditional sale contract was the note of the vendee and was included as part of the purchase price conditioned under the contract. In all those cases it was held that, where the consideration for the note has absolutely failed by

reason of the retaking of the property by the vendor, the note is no longer a binding obligation. But it was also recognized in most of those cases, as stated in *Manson v. Dayton*, supra, that it is an ordinary provision in contracts of conditional sales, where the vendee shall have made some preliminary payment and shall fail to meet the balance as required, to declare that what has been paid shall be forfeited to the vendor as liquidated damages, and is not inconsistent with the additional right of reclamation. Preliminary cash payments under conditional sales are usually considered as payments for the use and wear of the property while the vendee is in possession. Where, as in this case, the note in question was not included within the conditional terms of the contract but was given as a preliminary payment, the equivalent of cash, we cannot hold that the consideration has failed by reason of the recaption of the property.

The finding of the trial court was that "said note was given as payment and in lieu of cash." We cannot find that the evidence preponderates against that finding, and, in fact, are of the opinion that it preponderates in its favor. Such being the case, the judgment must be affirmed.

Morris, C. J., Parker, Bausman, and Main, JJ., concur.

NOTE.

Election of Remedies on Breach of Conditional Sale.

Introductory, 464.
General Rule, 464.
Application of Rule, 465.

Introductory.

It is the purpose of the present note to review the recent cases passing on the election of remedies on the breach of a conditional sale. For the earlier cases dealing with this subject see the notes to *Sanders v. Newton*, 1 Ann. Cas. 267; *American Process Co. v. Florida White Pressed Brick Co.* 16 Ann. Cas. 1054; and *Madison River Live Stock Co. v. Osler*, 133 Am. St. Rep. 558.

General Rule.

It is generally held that a vendor of property conditionally sold, reserving title to himself until the purchase price is paid, may in case of default by the vendee either sue to recover the specific property, or affirm the sale and sue for the price.

Canada.—*Levitt v. Lacasse*, 49 Quebec Super. Ct. 329; *American Abell Engine*, etc.

Co. v. Weidenwilt, 4 Sask. L. Rep. 388, 19 West. L. Rep. 730, 1 West. W. Rep. 321.

United States.—In re Norton, 181 Fed. 901; In re Levin, 220 Fed. 451, 136 C. C. A. 279.

Arkansas.—Hollenberg Music Co. v. Barron, 100 Ark. 403, Ann. Cas. 1913C 659, 140 S. W. 582, 36 L.R.A.(N.S.) 594; Hollenberg Music Co. v. Bankston, 107 Ark. 337, 154 S. W. 1139; Bowser Furniture Co. v. Johnson, 117 Ark. 496, 175 S. W. 516.

California.—Muncy v. Brain, 158 Cal. 300, 110 Pac. 945; Waltz v. Silveria, 25 Cal. App. 717, 145 Pac. 169; Pacific Carbonator Co. v. Haydes, 26 Cal. App. 607, 147 Pac. 988.

Delaware.—In re Frederica Water, etc. Co. 93 Atl. 376.

Florida.—Evans v. Kloeppel, 73 So. 180.

Georgia.—Venable v. Young, 137 Ga. 375, 73 S. E. 633; Purdy v. Dunn Machinery Co. 142 Ga. 308, 82 S. E. 887; Scott v. Glover, 7 Ga. App. 182, 66 S. E. 380; Spiers v. Hubbard, 12 Ga. App. 676, 78 S. E. 136; Wilson v. Owen, 91 S. E. 233.

Idaho.—Pease v. Teller Corp. 22 Idaho 807, 128 Pac. 981.

Illinois.—Edward Thompson Co. v. Collins, 151 Ill. App. 545.

Indiana.—Quality Clothes Shop v. Keeney, 57 Ind. App. 500, 106 N. E. 541; Reeves v. Miller, 91 N. E. 812.

Michigan.—Atkinson v. Japink, 186 Mich. 335, 152 N. W. 1079.

Minnesota.—Skoog v. Mayer Bros. Co. 122 Minn. 209, 142 N. W. 193; C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164, 51 L.R.A.(N.S.) 251; Chase v. Kelly, 125 Minn. 317, 146 N. W. 1113, L.R.A.1916A 912.

Mississippi.—Kerl v. Smith, 96 Miss. 827, 51 So. 3.

Nebraska.—Mathews Piano Co. v. Markle, 86 Neb. 123, 124 N. W. 1129.

New York.—Moneyweight Scale Co. v. Mehling, 69 Misc. 331, 125 N. Y. S. 532; Nelson v. Gibson, 143 App. Div. 894, 129 N. Y. S. 702; Shipley Constr. etc. Co. v. Mager, 165 App. Div. 866, 150 N. Y. S. 969; York Mfg. Co. v. Mager, 165 App. Div. 872, 150 N. Y. S. 973; Avery v. Chapman, 127 N. Y. S. 721; Pels v. David M. Oltarsh Iron Works, 129 N. Y. S. 371.

North Carolina.—Standard Dry Kiln Co. v. Ellington, 90 S. E. 564.

Oregon.—Thienes v. Francis, 69 Ore. 171, 134 Pac. 1195, 138 Pac. 845; Francis v. Bohart, 76 Ore. 1, 143 Pac. 920, 147 Pac. 755, L.R.A.1916A 922.

Pennsylvania.—McMillan v. Davis, 54 Pa. Super. Ct. 154.

South Carolina.—Rice v. Hampton, 106 S. C. 237, 91 S. E. 5.

South Dakota.—Sioux Falls Adjustment Co. v. Aikens, 32 S. D. 154, 142 N. W. 651. Ann. Cas. 1917D—30.

Utah.—I. X. L. Stores v. Moon, 162 Pac. 622.

Washington.—Ramey v. Smith, 56 Wash. 604, 106 Pac. 160; Winton Carriage Co. v. Broadway Automobile Co. 65 Wash. 650, 118 Pac. 817, 37 L.R.A.(N.S.) 71; Stewart, etc. Drug Co. v. Ross, 74 Wash. 401, 133 Pac. 577; Edward Thompson Co. v. Murphine, 79 Wash. 672, 140 Pac. 1073; Carabin v. Wilhelm, 87 Wash. 52, 151 Pac. 87; Eilers Music House v. Douglass, 90 Wash. 683, 156 Pac. 937, L.R.A.1916E 613. And see the reported case.

In *Eilers Music House v. Douglass*, 90 Wash. 683, 156 Pac. 937, L.R.A.1916F 613, wherein it appeared that the seller under a conditional sale contract brought suit to recover part of the purchase price, the court stated the general rule as follows: "In this state it is well settled that under a conditional sale contract the title to the article sold remains in the vendor, and on breach of the contract by the purchaser the seller has a choice of remedies. He may disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale and sue on the contract. He cannot do both; these remedies are inconsistent. To proceed by one remedy constitutes an election which is final and irrevocable. . . . 'It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting, inconsistent remedy in a court having jurisdiction, which constitutes the decisive act and makes the election binding.'"

The rule seems to be the same, even though there is no stipulation in the contract declaring the whole debt due in case of default. *Spiers v. Hubbard*, 12 Ga. App. 676, 78 S. E. 136.

Application of Rule.

The vendor having an election on the breach of a conditional sale contract to retake the goods or to sue for the price cannot pursue both courses, and the election to assert either right operates as an abandonment of the other. In re Norton, 181 Fed. 901; In re Levin, 220 Fed. 451, 136 C. C. A. 279; Muncy v. Brain, 158 Cal. 300, 110 Pac. 945; Waltz v. Silveria, 25 Cal. App. 717, 145 Pac. 169; Venable v. Young, 137 Ga. 375, 73 S. E. 633; Purdy v. Dunn Machinery Co. 142 Ga. 308, 82 S. E. 887; Pease v. Teller Corp. 22 Idaho 807, 128 Pac. 981; Reeves v. Miller (Ind.) 91 N. E. 812; Skoog v. Mayer Bros. Co. 122 Minn. 209, 142 N. W. 193; C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164, 51 L.R.A.(N.S.) 251; Mathews Piano Co. v. Markle, 86 Neb. 123, 124 N. W. 1129; Francis v. Bohart, 76 Ore. 1, 143 Pac.

920, 147 Pac. 755, L.R.A.1916A 922; Rice v. Hampton, 106 S. C. 237, 91 S. E. 5; I. X. L. Stores v. Moon (Utah) 162 Pac. 622; Ramey v. Smith, 56 Wash. 604, 106 Pac. 160; Winton Motor Carriage Co. v. Broadway Automobile Co. 65 Wash. 650, 118 Pac. 817, 37 L.R.A.(N.S.) 71; Stewart, etc. Drug Co. v. Reed, 74 Wash. 401, 133 Pac. 577; Eilers Music House v. Douglass, 90 Wash. 683, 156 Pac. 937, L.R.A.1916E 613. Thus after the seller has repossessed himself of the property he cannot prove his debt against the estate of the buyer in bankruptcy for the remaining unpaid notes. In re Norton, 181 Fed. 901 (rule in Pennsylvania). So where a seller filed a mechanic's lien against the premises containing his property which he sold conditionally, and thereafter an involuntary petition in bankruptcy was filed against the vendee, it was held, in reclamation proceedings by the seller, that he had lost his right to retake the property, as his claim of title was inconsistent with his claim of a lien. In re Levin, 220 Fed. 451, 136 C. C. A. 279. Compare Arctic Ice Mach. Co. v. Armstrong County Trust Co. 192 Fed. 114, 112 C. C. A. 458.

However, where the vendor of goods conditionally sold brought a suit for the purchase price, but did not prosecute it to judgment, it was held in a subsequent action in conversion instituted by the vendor that the plaintiff by his former action did not waive the right to sue for the property. Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water, etc. Co. (Mo.) 171 S. W. 944, wherein the court said: "This rule may be accepted with the qualification that the mere prosecution of a suit against the conditional vendee for the purchase price is not such an election of remedies as will amount to a waiver of title. The reservation in a contract of sale, of title in the vendor until payment of the price is in the nature of a security for the payment, and it requires more than a mere attempt to enforce the collection of the price after condition broken to constitute a waiver of the security. The rule in cases of this character is that the prosecution of one remedial right to judgment or decree, whether the judgment is for or against the plaintiff, is a decisive act which constitutes a conclusive election, and bars the subsequent prosecution of inconsistent remedial rights; but the mere assertion in court of one of such rights, abandoned before the action has proceeded to judgment, is not such an election as will deprive the plaintiff of the right to invoke the opposite remedy, where it appears, as in the instant case, that the defendant suffered no impairment of any right by reason of the abandoned proceeding." See also Utterson Lum-

ber Co. v. Petrie, 17 Ont. L. Rep. 570, 13 Ont. W. Rep. 104; Canadian Westinghouse Co. v. Murray Shoe Co. 31 Ont. L. Rep. 11, 20 Dominion L. Rep. 672.

It was held in Moon v. Wright, 12 Ga. App. 659, 78 S. E. 141, that where the purchase price was payable in instalments, which were evidenced by the buyer's notes, the bringing of the notes to judgment on the default of the buyer did not operate as a bar to a subsequent action by the vendor to recover the property.

In Merle, etc. Mfg. Co. v. Hicks, 178 Ill. App. 406, a previous action in assumpsit was held not to be a bar to a subsequent action of replevin.

Where the vendee of property conditionally sold expressly agrees that on his default the vendor may resell and apply the proceeds of the sale on the purchase price and that he will pay the balance of the purchase price then remaining, it has been held that the court will give effect to such an agreement. International Harvester Co. v. Bauer, 82 Ore. 686, 162 Pac. 856.

Similarly it has been held that the vendor may foreclose his contract in equity as a lien and hold the vendee liable for the deficiency if the amount realized at the sale is inadequate. Ballinger v. West Pub. Co. 239 U. S. 646, 36 S. Ct. 167, 60 U. S. (L. ed.) 484, 44 App. Cas. (D. C.) 49. To the same effect see Fred W. Wolf Co. v. Hermann Sav. Bank, 168 Mo. App. 549, 153 S. W. 1094; Thienes v. Francis, 69 Ore. 171, 134 Pac. 1195, 138 Pac. 845. And the existence of a statutory right to retake does not impair the remedy in equity. Southern Ice, etc. Co. v. Alley, 127 Tenn. 173, 154 S. W. 536.

In the absence of a forfeiture clause either express or implied by virtue of which all prior payments are to be retained by the vendor as liquidated damages, on retaking the property he must account to the vendee for the payments made to him. Quality Clothes Shop v. Keeney, 57 Ind. App. 500, 106 N. E. 541.

Where a conditional sale agreement contained a provision allowing the seller in case of default to resell the property and hold the purchaser liable for the balance remaining due after the resale, it was held that the fact that the vendor first hired the property out to another before selling it entitled the vendee to treat the contract as rescinded, since he was entitled to have it sold in as good condition as when it was taken out of his possession. North-West Thresher Co. v. Bates, 13 West. L. Rep. (Alberta) 657.

It has been held that where a conditional sale is entered into, the buyer may simulta-

neously therewith and in the same instrument mortgage other personal property as additional security for the purchase price, and on the default of the buyer to pay in accordance with the terms of the contract, the vendor may replevy the property conditionally sold. *Mizell Live Stock Co. v. J. J. McCaskill Co.* 59 Fla. 322, 51 So. 547. And under similar circumstances it has been held that the vendor may at the same time bring trover for his own property and foreclose the mortgage on the property of the vendee covered by the mortgage. *Boseman v. Carter*, 18 Ga. App. 578, 90 S. E. 101. But the seller cannot foreclose this instrument as a mortgage on the entire property. The parties cannot stipulate to make the instrument both retain title and not retain title to the same property. *Wynn v. Tyner*, 139 Ga. 765, 78 S. E. 185; *Bacon v. Hanesley (Ga.)* 90 S. E. 1033. See also *Rice v. Hampton*, 106 S. C. 237, 91 S. E. 5. Where the seller of property conditionally sold, holds a note of the vendee together with a mortgage on the vendee's property he may sue out an attachment for the purchase money on the default of the buyer, instead of pursuing the other remedies available to him; but to perfect the attachment, he must file and record a reconveyance to the conditional vendee. *Owens v. Parker*, 8 Ga. App. 221, 68 S. E. 1009; *Wilson v. Owen (Ga.)* 91 S. E. 233.

Where on the default of the vendee under a conditional sale the parties arrange for terms of payment different from those originally entered into, that does not operate as a waiver of the reservation of title. *Hollenberg Music Co. v. Bankston*, 107 Ark. 337, 154 S. W. 1139. The taking of additional security by the seller on the buyer's default does not operate as an election to divest the seller of his retained title. *McDonald Automobile Co. v. Bicknell*, 129 Tenn. 493, Ann. Cas. 1916A 265, 167 S. W. 108.

A refusal by the vendee to accept the goods conditionally sold to him does not affect the right of the seller to sue for the purchase price. *Port Huron Machinery Co. v. Hurto*, 154 Ia. 435, 135 N. W. 31.

In *Maine* it has been held that under a statute (Rev. St. § 113) which makes property sold conditionally subject to redemption and permits foreclosure of conditional sale contracts as chattel mortgages, the vendor on the default of the buyer may sue for the debt, and also enforce his lien at the same time. *Arthur E. Guth Piano Co. v. Adams*, 114 Me. 390, 96 Atl. 722; *Westinghouse*

Electric, etc. Co. v. Auburn, etc. R. Co. 106 Me. 349, 76 Atl. 897.

In *Connecticut* under the provisions of the sales Act (Public Acts 1907, ch. 212) an unpaid seller in possession of the goods may maintain an action for the price, if the property cannot readily be resold at a reasonable price. *United Machinery Co. v. Etzel*, 89 Conn. 336, 94 Atl. 356.

In *New York* the general rule obtains that by electing to declare the entire price due on a failure to pay an instalment and suing therefor the seller loses the right to retake the goods. *Shipley Constr. etc. Co. v. Mager*, 165 App. Div. 866, 150 N. Y. S. 969. But an action on one instalment note is not an election. *Ratchford v. Cayuga County Cold Storage, etc. Co.* 159 App. Div. 525, 145 N. Y. S. 83. In that jurisdiction a statute (Personal Property Law, § 65) regulates the taking of possession by a vendor on condition. It provides that the property when retaken shall be held for thirty days subject to a right of the buyer to redeem it, and within thirty days after the expiration of that period shall be sold at public auction. If the property is not sold within the time limited the buyer may recover the amount, if any, paid by him under the contract. A waiver in the contract of the statutory conditions is invalid. *Adler v. Weis, etc. Co.* 218 N. Y. 295, 112 N. E. 1049; *Hurley v. Allman Gas Engine, etc. Co.* 144 App. Div. 300, 129 N. Y. S. 14. See also *Plumiera v. Bricka*, 79 Misc. 468, 140 N. Y. S. 171. Under another statute (Municipal Court Act, Laws of 1902, ch. 580) a vendor of property conditionally sold may, after he recovers judgment, seize the same and sell it under an execution. Such a sale does not constitute a retaking so as to rescind the contract, but is in the nature of a new remedy by way of foreclosure of a lien, and does not conflict with the foregoing provision of Personal Property Law. *Crump v. Wissner*, 163 App. Div. 47, 148 N. Y. S. 401; *Quattrone v. Simon*, 85 Misc. 357, 147 N. Y. S. 448; *Mathushek, etc. Piano Co. v. Weld*, 94 Misc. 282, 158 N. Y. S. 169. And under such a seizure and sale, the buyer is not entitled to recover any payments that he may have made. *West Pub. Co. v. Gluck*, 92 Misc. 198, 155 N. Y. S. 514. An attempted seizure under a void writ of replevin does not preclude the vendor from retaking the goods under the Personal Property Law. *Mendelson v. Irving*, 155 App. Div. 114, 139 N. Y. S. 1065.

THE KING

v.

CASEMENT.

England—King's Bench Division and Court of Criminal Appeal—July 18, 1916.

[1917] 1 K. B. 98.

Treason — Adherence to Enemies.

For a citizen to visit a country with which his nation is at war and there endeavor to persuade prisoners of war to join the enemy's forces, and to obtain from the enemy arms and ammunition and endeavor to land the same in a political division of his own country in aid of a revolt there constitutes adhering to the enemy and giving him aid and comfort within the meaning of the Treason Act.

[See note at end of this case.]

Same.

It is immaterial to liability for treason in adhering to the enemy that the acts of adherence were committed outside the realm of the sovereign of the accused.

[See note at end of this case.]

[98] TRIAL at bar for high treason.

The indictment charged Sir Roger Casement with "high treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the Empire of Germany, contrary to the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2)."¹ It proceeded to allege that [99] "Sir Roger David Casement, Knight, on December 1, 1914, and on divers other days thereafter and between that day and April 21, 1916, being then, to wit, on the said several days, a British subject, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Emperor and his subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects, did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without

this realm of England, to wit, in the Empire of Germany."

Overt acts were alleged, namely, on December 31, 1914, and January 6 and February 19, 1915, of soliciting and inciting and endeavouring to persuade certain persons being British subjects [100] and members of the military forces of the King and being prisoners of war then imprisoned at Limburg Lahn Camp, in the Empire of Germany, to wit, Michael O'Connor, John Richardson, John Cronin, John Robinson, William Egan, Daniel O'Brien, James Wilson, and others whose names were unknown, to forsake their duty and allegiance to the King and to join the armed forces of his enemies and to fight against the King and his subjects in the said war. Also in or about the months of January and February, 1915, at Limburg Lahn in the Empire of Germany circulating and distributing and causing and procuring to be circulated and distributed to and amongst certain persons being British subjects and members of the military forces of the King and being prisoners of war imprisoned at Limburg Lahn Camp aforesaid, to wit, Michael O'Connor, John Robinson, John Cronin, William Egan, Daniel O'Brien, James Wilson, and divers others whose names were unknown, a certain leaflet to the tenor and effect following, that is to say:

"IRISHMEN! Here is a chance for you to fight for Ireland! You have fought for England, your country's hereditary enemy. You have fought for Belgium in England's interest, though it was no more to you than the Fiji Islands! Are you willing to fight FOR YOUR OWN COUNTRY with a view to securing the national freedom of Ireland?

"With the moral and material assistance of the German Government an IRISH BRIGADE is being formed. The object of the Irish Brigade shall be to fight solely for THE CAUSE OF IRELAND and under NO CIRCUMSTANCES shall it be directed to any GERMAN end. The Irish Brigade shall be formed and shall fight under the Irish flag alone. The men shall wear a special distinctively Irish uniform, and have Irish officers. The Irish Brigade shall be clothed, fed, and efficiently equipped with arms and ammunition by the German Govern-

¹ The Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2): "Auxint p'ceo q̄ diſſes opinions ont este einz ces heures qeu cas, q̄nt il avient doit estre dit treson, & en quel cas noun, le Roi a la requeste des Seignrs & de la Cōe, ad fait declarissement q̄ ensuit, cest assavoir; q̄nt hōme fait compasser ou ymaginer la mort n're Seignr le Roi, ma dame sa compaignie, ou de lour fitz primer & heir; . . . & si hōme leve de guerre contre n're dit Seignr le Roi en son Roialme, ou soit aherdant as enemys n're Seignr le Roi en le Roialme, donant a eux eid ou confort en son Roialme ou p̄ aillours, & de ceo q̄vablement

soit atteint de oſt faite p̄ gentz de lour condicion: . . . et fait a entendre qen les cases suisnommez doit estre ajugez treson q̄ sestent a n're Seignr le Roi & a sa roial majeste; & de tiele manere de treson la forfait e des eschetes apptient a n're Seignr le Roi, si bien des ſres & teñz tenuz des auts, come de lui meismes . . . "

TRANSLATION.

"Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the re-

ment. It will be stationed near Berlin and be treated as guests of the German Government. At the end of the war the German Government undertakes to send each member of the brigade who may so desire it to the United States of America with necessary means to land.

"The Irishmen in America are collecting money for the brigade.

"Those men who do not join the Irish Brigade will be removed [101] from Limburg and distributed among other camps. If interested, see your company commanders.

"Join the Irish Brigade and win Ireland's independence!

"Remember Bachelor's Walk!

"God save Ireland!"

with intent to solicit, incite, and persuade the said last-mentioned British subjects, being Irishmen, to forsake their duty and allegiance to the King and to aid and assist his enemies in the prosecution of the said war against the King and his subjects.

Other overt acts alleged were—

(i.) On or about December 31, 1914, and on divers days thereafter in the months of January and February, 1915, persuading and procuring certain persons, being members of the military forces of the King, to wit, Daniel Julian Bailey, one Quinless, one O'Callaghan, one Keogh, one Cavanagh, one Greer, and one Scanlan, and divers others, whose names were unknown, to the number of about fifty, the said persons being prisoners of war then imprisoned in Limburg Lahn Camp in the Empire of Germany, to forsake their allegiance to the King and to join the armed forces of his said enemies with a view to fight against the King and his subjects in the said war.

(ii.) On or about April 12, 1916, setting forth from the Empire of Germany as a member of a warlike and hostile expedition undertaken and equipped by the enemies of the King having for its object the introduction into and landing on the coast of Ireland of arms and ammunition intended for use in the prosecution of the war by the said enemies against the King and his subjects.

At the conclusion of the evidence for the prosecution, counsel for the prisoner moved to quash the indictment.

quest of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth, that is to say; When a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen or of their eldest son and heir; . . . or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere,

[121] LORD READING, C. J.—A submission has been made to the Court by the defence that this indictment should be quashed on the ground that it discloses no offence known to the English law. Another way of putting the same proposition is that the Court should rule, according to the contention of the defence, that the Crown has failed to prove an offence in law. The prisoner is charged with that species of treason which is known as adhering to the King's enemies. The charge in the indictment is the offence of "high treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the Empire of Germany, contrary to the Treason Act, 1351." The argument advanced and supported by careful, well-reasoned, and able arguments of Mr. Sullivan and those who supported his contention is to the effect that adherence to the King's enemies without the realm is not an offence against the statute of Edward III., that is to say, the statute of 1351. We have had [122] the advantage of elaborate arguments, by no means too elaborate, on behalf of the defence, and also on behalf of the Crown by the Attorney-General; and although this point has been discussed many times in the books and decided, according to our view, in the most recent case of treason, *Rex v. Lynch* [1903] 1 K. B. 444, yet it merits careful examination by this Court.

The argument is that this Court must construe the words of the statute of 1351 and must pay no regard to any commentary that may have been made by learned authors, however distinguished, when arriving at the meaning of the words. That we must interpret the words of the statute is beyond question. That we should not be entitled to do violence to the words of the statute may, I think, also be assumed. But if the words of the statute are not clear, and if it be possible to construe the statute in two different ways, then the comments of great lawyers, masters of the common law, during the last three or four centuries cannot be allowed by this Court to pass without the greatest regard and consideration.

The words in question in the statute 25 Edw. 3 are these, paraphrasing them: "It shall be treason if a man do levy war against our Lord the King in his realm or be adherent

and thereof be probably attainted of open deed by the people of their condition: . . . And it is to be understood, that in the cases above rehearsed, that ought to be adjudged treason which extends to our Lord the King, and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our Sovereign Lord, as well of the lands and tenements holden of other, as of himself. . . ."

to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere." The contention is that those words "or elsewhere" govern only the words "aid and comfort in the realm" and have no application to the words "be adherent to the King's enemies in his realm." As the offence is that of adhering to the King's enemies, if the words "or elsewhere" do not apply to the adhering, then the contention of the defence would be right. If, on the other hand, the Crown's contention is correct that those words "or elsewhere" do govern the adhering to the King's enemies, then it is plainly an offence to adhere to the King's enemies by an act committed without the realm. In order to avoid ambiguity I would add that to constitute the offence for this purpose it is not sufficient to show that the aid and comfort have been given to enemies without the realm. The act of adherence which constitutes the charge must also have been committed without the realm for this purpose, because the whole of this indictment is based upon the offence of adhering to the King's enemies without the realm.

[123] Now I repeat what I said during the argument, that we must construe these words of this statute, now some 560 years old, without reference to commas or brackets, but merely looking to the language. The history of the law of treason in this country is certainly of importance in considering the statute of 1351. It is unnecessary at this time, and having regard to the authorities to which I shall call attention in a moment, to refer in great detail to the early law. But I have no hesitation myself in stating that if a man adhere to the King's enemies without the realm he is committing the offence of treason; and that he is committing the offence of treason at common law, notwithstanding that the offence is committed without the realm. We have heard considerable argument to establish that the common law of England never knew a crime which was not committed within the territory of England, that is to say, in ancient times of course; and it is said the common law of England still obtains except in so far as it has been altered by statute. There is authority for the proposition which I have stated. Sir Matthew Hale in his *Pleas of the Crown* (Vol. 1, p. 169) says: "Touching the trial of foreign treason, viz., adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statutes [*sic*] of 35 Hen. 8, c. 2, hath sufficiently provided for it;" then follows a passage upon which I lay special stress: "But at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." In support of that reference is made to a case

in the fifth year of the reign of Richard II. which is to be found in Fitzherbert's *Abridgment*. (Fitzh. Abr. Trial, s. 54.) The substance of it—I am not quoting the exact words—is that the then King's Attorney stated to the Court, and apparently, so far as one can judge from the report, without any contradiction by the Court, and so far as I know without any contradiction to be found in any book up to this very day, that that was the law, and it was adopted as the law by Sir Matthew Hale in the passage which I have read. I am prepared to concede that if the statute were unambiguous in its terms we ought to construe its language without reference to the fact that it happens to be declaratory of the common law; but it is a matter not lightly to be [124] passed by that the common law before this statute was, in my opinion, as I have stated it. It has been said more than once (3 Inst. 1, note; *Sindercome's Case* (1657) 5 Cobb. St. Tr. 348; *Bellew's Case* (1672) 1 Vent. 254, note; *Reg. v. Smith O'Brien* (1849) 7 St. Tr. (N. S.) 349, per Blackburne, C. J., of Ireland). that this statute of 1351 was declaratory of the common law. There is no doubt that at that time there was great agitation amongst the subjects of the King because of the fear of the consequence of being charged with treason, which was a crime at that time so vague, or thought to be so vague, that those who might be charged with it were apprehensive of the consequences; and the result was that on petition to Parliament the statute then became law and received the assent of the King in the words to which I have referred.

Now from the year 1351 until the thirty-fifth year of the reign of Henry VIII. there is little to assist us; but in the reign of Henry VIII. a statute was passed which in my view is of importance in this connection. The statute is entitled "An Acte concerninge the triall of treasons cōmytted out of the Kinge Majesties domynions." It recites—again I am paraphrasing the language—that doubts and questions had arisen as to the trial of treasons and misprisions of treasons committed abroad. It is worth noting that the doubts had not arisen as to whether the act, if committed abroad, would amount to treason, but only as to the trial. Then the statute proceeds: "Be it enacted," &c., "that all manner of offences being alrebye made or declared, or hereafter to be made or declared by any the lawes and statute of this Realme, to be treasons . . . and done ppetrated or cōmytted or hereafter to be done ppetrate or cōmitted by anye pson or psons out of this Realme of Englande, shalbe from hensforth inquired of herd and determined before the Kinge Justice of his Benche for ples to be holden before himselfe," that is the King's Bench, and also as an alterna-

tive by commissioners where a commission is appointed. Now that statute assumes that the offence of treason can be committed without the realm; and it prescribes in respect of all such offences as have already been declared the mode of procedure, or rather the venue of the trial. The statute shows plainly that the offence existed. From that time the statute has regulated the trial of offences without the realm. It is by virtue of that statute and subsequent statutes, [125] which have really done nothing more than provide that the counties of London and Middlesex shall be one county for this purpose, that the jurisdiction of this Court is derived. It is because we are sitting as judges of the King's Bench that we become the judges to try this case, for the reason that, if it is a treason committed without the realm, the venue is prescribed by this statute of Henry VIII. as of the King's justices "where the saide Benche shall sytt and be kepte." That statute of Henry VIII. at least shows clearly what the law was at the time it was passed, and is, to my mind, authority for this proposition, that there was the offence of treason without the realm; and further, quite consistently with the reading which the Crown wishes to give to the statute of 1351, it would apply to the offence of adhering to the King's enemies without the realm. The doubts that have arisen from beginning to end, so far as we have been able to trace in looking through the various books to which we have had access and to which our attention has been called, are never as to the offence, but only as to the venue. This was the whole difficulty which arose, as was pointed out by learned authors, and more especially in Hawkins's Pleas of the Crown, (Hawk. P. C. bk. 2, ch. 25, s. 48, vol 4, p. 22 (Leach); vol. 2, p. 306 (Curwood)), where this matter is dealt with in passages that have been read and of which I will only read one short passage now. There the learned author says "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried." There is not the faintest suggestion that the offence did not exist, but only a doubt as to the manner and place of trial. "For some seem to have holden that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands; but surely it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the pur-

view of 25 Edw. 3, should be wholly dispensable, as it must have been, if it were no way triable." I am content to adopt every word of that language [125] of that great master of the law and also of Sir Matthew Hale, whom I have just quoted. The only observation I wish to make upon it is that the defence would say, as Mr. Sullivan pointed out, and, I think, rightly, that it does not follow that this meaning must be given to the words now under discussion because, it is said, there were other offences of treason without the realm. But equally it must be observed that the learned author suggests no exception to the general statement, and there is nothing which would support an exception being made save the interpretation of the statute contended for by the defence. I can find no justification for doubting that these learned authors meant their language to apply equally to a case of adhering to the King's enemies without the realm as to any other kind of offence of treason without the realm.

Now I will not read again the passages in Coke's Institutes, but they contain (3 Inst. 10, 11) a statement of the law which is plain in its terms and which Mr. Sullivan quite frankly stated was an authority against him, if the Court accepted it as an authority.

Then coming to later days there are passages in *Mulcahy v. Reg.* L. R. 3 H. L. 306, 318, in which Willes, J., in giving to the House of Lords not only his opinion but the opinion of all the judges on the law relating to treason, adopted the construction of the words of the statute of 1351 that the offence is committed if a person be adherent to the King's enemies in his realm or elsewhere. He leaves out the words which have given rise to this discussion, i. e., "giving them aid and comfort." These views were adopted by the House of Lords. It is right here again to say that Mr. Sullivan pointed out, and again I say in my judgment accurately, that these observations of Willes, J. were by the way; but nevertheless they were the considered opinion of the judges given to the House of Lords, and the House of Lords did not dissent from any one of the views expressed.

Then at last we come to the decision in *Rex v. Lynch* [1903] 1 K. B. 444. There the same argument was advanced by the defence that has been put forward before us, and it was persisted in and elaborately argued. The Court there came to the conclusion that the defendant's contention was wrong, and, although it gave no judgment, the then [127] Lord Chief Justice proceeded to sum up and directed the jury as if the offence had been committed. Lynch was convicted by the jury. If the argument of the defence in the present case is right, Lynch never should have been convicted, and the Court ought to have ruled that no offence had been

disclosed either by the evidence or in the indictment. The Court did not so rule, but on the contrary directed the jury upon the assumption that the offence was disclosed if the jury took a particular view of the facts.

That is a strong current of authority. I will not pass over the case in *Dyer* (*Dyer*, 131b) to which our attention was called and upon which Mr. Sullivan placed much reliance. His argument was that on examination that case shows that there was no such offence cognizable by the common law as treason out of the realm; indeed he went further and argued that no such offence was known to the law at all, because no means had been found of trying the offence until the statute 35 Hen. 8, c. 2. But a consideration of the case in *Dyer* (*Dyer*, 131b) shows that it is not a judgment at all; it is a memorandum of the judges and the King's serjeants, some doubt having arisen as to whether a statute of 1 & 2 Ph. & Mar. had repealed the statute of 35 Hen. 8, c. 2, in so far as that statute declared that treasons without the realm should be tried by the judges of the King's Bench. In the result they came to the conclusion that the statute of Henry VIII. was not repealed. Reliance was placed before us upon the words "because no offence of treason committed out of the realm was triable here by the course of common law." The obvious comment is that the words assumed that there was an offence of treason committed out of the realm. The difficulty was that it was not known how it was triable by the course of the common law. All that was done by the judges and the Master of the Rolls there assembled was to declare the effect of this statute 1 & 2 Ph. & Mar. The question which has been argued before us was not raised. On the contrary it was assumed that there was such an offence as treason without the realm. The difficulty, which one finds running through centuries of our law, is as to the procedure when there was treason without the realm—that is, as to the venue of the trial.

Our attention was called by the learned Attorney-General to [128] a series of cases of which I only propose to refer to three and to rely only upon one. First there was the case of Lord Wentworth, Grymston, and Chamberleyn (Unreported: *Baga de Secretis*, K. B. 1 Eliz. Pouch 38, in the Public Record Office.) The indictment there, we are told by the Attorney-General, was for an offence committed in Calais. Lord Wentworth apparently was sent to the House of Lords to be tried; Grymston was acquitted; Chamberleyn was convicted. I find it difficult to take that case as an authority. Indeed I do not think we can regard it as one because it was tried in the year 1558, and according to the indictment it seems clear that the offence was laid treating Calais as within the

King's dominions. Consequently in my judgment that case does not help us. The next case he cited was the Duke of Wharton's Case (Unreported: *Baga de Secretis*, Trin. 2 Geo. 2, K. B. 8/67, in the Public Record Office), which was tried in the year 1729. There, according to the statement made from investigation of the indictment and the record, the offence was of adhering to the King's enemies in Spain. The overt acts show the offence of adhering committed in Spain and the aid and comfort given in Spain; so that the complete offence of treason without the realm was there charged. The Duke of Wharton did not appear and was outlawed. That case assumes that by the law of England he had committed the offence. It is to be observed that the defendant did not appear and did not put his case before the Court, and therefore the case has not the full authority which would be given to a case in which the defence raised the point under discussion. The third case was that of William Cundell, tried in the year 1812, of which the record is extant, but of which there is no report except in the *Newgate Calendar*. (Vol. 4, p. 62.) It was a case of adhering without the realm to the King's enemies and giving them aid and comfort there. The case was tried. The persons were within the jurisdiction of this Court and sentence was pronounced. Therefore in the year 1812 there is distinct authority for saying that it is an offence to adhere without the realm to the King's enemies. It was the case of persons who were confined in the Isle of France and who had there forsaken their allegiance to the King and transferred it to the French. In [129] view of that judgment it cannot be said that there is no authority to be found in our books for the proposition advanced by the Crown until the authority of *Rex. v. Lynch*, [1903] 1 K. B. 444.

I do not propose to go further through the various authorities. I have called attention to the most important of them. I come to the conclusion that the offence, if proved in fact, has been committed in law. We are merely considering now the case upon the assumption that the facts prove it. The argument of the defence is put forward on the basis that no offence is made out in law. The result of the argument upon this motion is that in my judgment the words "giving to them aid and comfort" may be read as a parenthesis; yet I do not confine the application of the words "or elsewhere" to that parenthesis; I think they apply just as much to the parenthesis as to the words which precede it. My view is, although it is not necessary to state it for the purposes of this case, that the words "or elsewhere" govern both limbs of the sentence—both the adhering to the King's enemies and the aid and

comfort to the King's enemies—and that it is an offence to adhere within the realm or without the realm to the King's enemies, and it is equally an offence to adhere within the realm to the King's enemies by giving them aid and comfort without the realm.

For these reasons I am of opinion, notwithstanding the learned and able arguments that have been addressed to us, that the point fails and that the motion to quash the indictment must be refused.

AVORY, J.—I agree that this objection fails whether it be regarded as an objection to the indictment that it discloses no offence upon the face of it, or whether it be regarded as an objection that there is no evidence to go to the jury of an offence committed within the meaning of the statute of Edward III.

It would, in my opinion, be sufficient in this Court to say that the point which has been argued before us so strenuously and with so much learning has been already decided by this Court in *Rex v. Lynch*, but, having regard to the criticisms which have been passed upon that case, I think it right to add my own reasons for coming to the same conclusion as that which has been expressed by my Lord Chief Justice.

[130] First of all, it is not right to say that the point was not in fact decided in *Rex v. Lynch*, [1903] 1 K. B. 444. While it is true that no formal judgment was pronounced on the objection, it will be found by reference to the report of the case in *The Times Law Reports*, 19 *Times L. Rep.* 163, 173, that the Lord Chief Justice stopped the Attorney-General in his reply to the argument and said that the Court was satisfied upon the point and that unless he desired to cite any further authorities they did not wish to hear him further. That was in fact a decision that the point taken was a bad one. But further, and beyond the fact, to which allusion has been made, that the prisoner in that case could not have been convicted unless the point was decided against him, it will also be found in the same report, 19 *Times L. Rep.* 178, 179, that towards the close of his summing-up the learned Lord Chief Justice said "that the charge against the prisoner was that of aiding the King's enemies; and he had already told them that the facts which had been laid before them amounted to aiding the King's enemies, and that, wherever it was done, this was an offence in respect of which, if proved, the prisoner ought to be found guilty under the indictment." So that there was an express direction in terms in that case to the jury that wherever the acts were done of adherence to the King's enemies, that was an offence within the meaning of the statute.

It is also clear that the Court must interpret this statute of Edward III. in the light of the fact that it has been decided to be an Act declaratory of the common law. I cannot doubt that before the statute it was treason in a British subject to join the forces of an enemy abroad, and that if a British subject had joined the forces of an enemy abroad at war with this country, and he afterwards returned or was brought back to this country, he could be tried here for that offence. When one has regard to the nature of this offence of high treason I think it is obvious it must have been so. Foster in his *Crown Law* thus describes the offence of high treason, *Fost.* 183: "High treason being an offence committed against the duty of allegiance, it may be proper . . . to consider from whom, and to whom allegiance is due. With regard to natural born subjects there can be no doubt. They owe allegiance to the Crown at all times and in all places. [131] This is what we call natural allegiance, in contradistinction to that which is local. . . . Natural allegiance is founded in the relation every man standeth in to the Crown, considered as the head of that society whereof he is born a member; and on the peculiar privileges he deriveth from that relation, which are, with great propriety, called his birthright; this birthright nothing but his own demerit can deprive him of; it is indefeasible and perpetual; and consequently the duty of allegiance, which ariseth out of it, and is inseparably connected with it, is in consideration of law likewise unalienable and perpetual." In view of that definition of the offence of high treason I think it cannot be doubted, as I have said, that such an offence committed by a British subject abroad was triable, justiciable, in this country; and the only doubts which had arisen before the statute of Henry VIII. were, as expressed by Hawkins in his *Pleas of the Crown*, in the passage which my Lord has already read—not a doubt whether it was triable here, not a doubt whether it was an offence committed by a British subject, but a doubt only as to the proper place and the proper manner in which it should be tried. He points out that some have held that it should be tried in one county; others that it should be tried in another county; others that it should be tried upon an indictment laying the offence in any county where the King pleased. That, no doubt, had reference to a special commission issued by the King for the trial of a particular treason, which commission would, in my opinion, get rid of all difficulty about local venue.

That being so, if this was an offence triable in this country before the statute of Edward III.—that is to say, if the offence of treason committed abroad was triable in this country before the statute of Edward III. and that

statute is declaratory only of the common law—it would be a strange conclusion that the statute has limited the offence to treasons or to overt acts committed within the realm. As the Attorney-General has pointed out, the offence of adhering to the King's enemies, giving aid and comfort to them, is an offence which is more likely, *prima facie* at all events, to be committed out of the realm than within it, and it would be a strange enactment to provide, if the common law was as I have said, that after this date the offence could only be committed by a person who was within the realm at the time when he committed it.

[132] With reference to the construction of the actual words, again it would be sufficient, as my Lord has pointed out, to say that the great authorities have uniformly put upon these words the construction which the Crown invite us to give them, namely, that the statute does not limit this kind of treason to treason committed by a subject within the realm. But there appear to be two constructions of it which have been adopted, either of which will satisfy and answer this objection. It may be that the words "or elsewhere" are to be read as applying to the words "be adherent to the King's enemies"—that is to say, if he be adherent to the King's enemies in his realm or elsewhere; or it may be, as Serjeant Hawkins seemed to think when he said (Hawk. P. C. bk. 1, ch. 17, s. 28, vol. 1, p. 91 (Leach); ch. 2, s. 28, vol. 1, p. 12 (Curwood)), "As to the second point, viz., what shall be said to be an adherence to the King's enemies, &c., this is explained by the words subsequent, 'giving aid and comfort to them,'" that the proper construction of this section is that the words "giving aid and comfort to them in the realm or elsewhere" are an explanation or an exposition of the kind of adherence to the King's enemies which is aimed at by the statute. Nobody questions that the words "or elsewhere" apply to the giving of aid and comfort to the enemy, and it may be, therefore, that the proper construction is that if a person gives aid and comfort to the King's enemies either in the realm or elsewhere he is committing the offence of adhering to the King's enemies within the meaning of this statute. Whichever view be taken, it is sufficient to say that all the authorities agree that it is not limited in the manner in which the learned counsel for the prisoner have invited us to confine it.

It only remains to consider in one word the statute of Henry VIII. which provides for the trial in this country of treasons committed abroad. In my view there is nothing in that statute which assists the argument for the prisoner. The recital of it is "Forasmuche as some doubttes and questions have

bene moved that 2ten kinde of treasons, mysprisons and concealment of treasons, done perpetrated or comytted out of the King's Majesties realme of Englande and other his Graces Dominions cannot ne maye by the comon lawes of this realme be enquired of" In my opinion that recital or [133] preamble of the statute rather assumes that there are already certain kinds of treason committed out of the realm which may be tried within the realm, and the probability is that the statute was only for removing doubts as to the other kinds of treason many of which had been enacted either in the reign of Henry VIII. or shortly before. At all events it makes it clear that after that date any treason committed out of the realm may be tried, as this one is being tried, by His Majesty's judges in the King's Bench.

For these reasons I agree that this objection must be overruled.

HORRIDGE, J.—After the very careful consideration by the Lord Chief Justice of the law before the statute of Edward III., of that statute itself, of the cases in which the decision involved the construction of the statute, and of the writings of learned authors, I do not think I should usefully occupy the time of the Court by again reviewing those matters. All I wish to say is this: My view is that the true construction of the statute is to be found in the opinion of the judges in the case of *Mulcahy v. Reg. L. R. 3 H. L. 306, 318*, in the words of Willes, J., "if a man . . . be adherent to the King's enemies, in his realm or elsewhere," and that there ought only to be added to that the direction as to the use of the words "or elsewhere" contained in the judgment of the Lord Chief Justice. I agree with every word of that judgment, and I also agree that this objection fails.

Counsel for the prisoner and for the Crown respectively having addressed the jury upon the evidence, the Lord Chief Justice summed up the case. As to the meaning of the words "giving to them aid or comfort" he directed the jury as follows:—"If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort to the King's enemies. Again, if a British subject commits an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort to the King's enemies."

[134] The prisoner was found guilty. The Lord Chief Justice pronounced sentence of death.

The prisoner appealed.

COURT OF CRIMINAL APPEAL.

A. M. Sullivan, Artemus Jones and J. H. Morgan for appellant.

Sir Frederick Smith, A.-G., Sir George Cave, B.-G., Bodkin, Travers Humphreys and Branson for Crown.

G. Gavan Duffy, solicitor for appellant.

The Director of Public Prosecutions, solicitor for Crown.

DARLING, J.—In this case the appellant was indicted for high treason in adhering to the King's enemies elsewhere than in the King's realm, that is to say, within the Empire of Germany, and his act was said to be contrary to the Treason Act, 1351, the statute of 25 Edw. 3, stat. 5, c. 2. That statute says: "Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth,"—which is the statute of Edward III., and various treasons are defined; and after the treason of levying war against the King in his kingdom there is defined (because it is only, as has often been said, declaring the common law) this particular treason. I will read it first in the words in which it is written in the Parliament Roll and in the Statute Roll, now in the Record Office, in Norman French, and then I will read it in the translation which has been published long ago under the authority of the King's printers. The words are these: may commit treason by levying war against the King, and so on, "*Ou soit aherdant as enemys nre Seignr le Roi en le Roialme donant a eux eid ou confort en son Roialme ou par aillours*," and that has been translated "or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere." The construction of those few words has given rise to all the argument which has been addressed to the Court before whom the appellant was tried and to this Court.

Now we desire to say—every member of this Court desires to say—that we are greatly indebted to Serjeant Sullivan, who has appeared [135] for the appellant in this case. We desire to say that in our judgment his argument was in every way worthy of the greatest traditions of the King's Courts, in one of which it was delivered. Having said that, it is from no want of respect to his argument that we did not call upon the Attorney-General, but the Court, having considered fully and attentively every argument used by Serjeant Sullivan and the authorities he advanced for it, have come to the conclusion that there was no need to call for any refutation of it from the Attorney-General. The authorities have been fully cited;

there is no consideration which is not before the Court, because the answer, so far as it was an answer, to Serjeant Sullivan's argument had been made by the Crown at the trial, and Serjeant Sullivan himself was thoroughly aware of what might be the answer to any proposition which he put before us. We have considered, therefore, with the advantage of having known to us all that passed at the trial, the argument which he has so well—so excellently, I may say—addressed to us.

Now the main point raised in the argument of Serjeant Sullivan was that this statute had neither created nor declared that it was an offence to be adherent to the King's enemies beyond the realm of the King, and that the words meant that the giving of aid and comfort *par aillours*—that is outside the realm—did not constitute a treason which could be tried in this country unless the person who gave the aid and comfort outside the realm—in this case within the Empire of Germany—was himself within the realm at the time he gave the aid and comfort. This argument was founded upon the difficulties which must arise owing to the doctrine of venue, that people were only triable within certain districts where the venue could be laid; that if a man committed a crime in a county he must be indicted and tried for it in that county; that if he committed a crime against the King he must be tried within the realm; and that if the aid and comfort were given outside the realm by a person then being outside the realm he could not be tried there—that follows, because it was not within the King's realm; and that as he could not be tried by the King's Courts in the Empire of Germany he could not be tried here; he could not be tried in the King's Courts at all for what he had done in Germany, unless when he gave the aid and comfort in Germany he was himself actually resident [136] within the realm of the King. It was said this must be so or one could find a case where a man had altogether outside the realm given aid and comfort to the King's enemies and had been indicted within the realm and tried for it. Such a case would be difficult to find in the course of years, because it cannot be a very common offence. First of all, if a man did those things pure and simple it is highly improbable that he would then put himself in peril by coming within the realm, where what he had done might be investigated and where he might be punished for it. One would expect that very few people would put themselves in a position where they could possibly be charged; but if any of them did, it is so highly probable that, besides the giving of aid and comfort outside the realm, they would have done something inside the realm; and that if they

came back they would have done so with some evil intention, such as levying war, compassing the King's death, or doing something of that sort, that they would very probably be arrested on their arrival in this country and not charged with being adherent to the King's enemies outside the realm, but charged with some such offence as anybody being within the King's realm could commit there; it would be much more easily proved; and, if the two offences had been committed, as would be extremely probable, in the one case, anyone having the direction of a criminal prosecution would be certain to charge him for the offence which could be the more easily proved. Therefore we are not very much impressed by the fact that there is very little precedent for such a prosecution as this.

But there is a large amount of authority for the proposition that what the jury have found was done by this appellant, and what it is not contested was done, because there is here no appeal upon the facts, is an offence triable, as this offence was tried, in the King's Bench. Taking the words of the statute themselves, it appears to us that the construction for which Serjeant Sullivan contends is not the true one. He would have it that "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," means that the adherence, because it is the adherence which is the offence, must be by a person who, being in this country, gives the aid and comfort, it may be in this country, it may be outside of it. We agree that if a person being within [137] this country gives aid and comfort to the King's enemies in this country he is adherent to the King's enemies; we agree (and Serjeant Sullivan admits this) that if he is in this country and he gives aid and comfort to the King's enemies outside this country he is adherent to the King's enemies. But we think there is another offence, and that these words must mean something more than that. We think that the meaning of these words is this: "giving aid and comfort to the King's enemies" are words in apposition; they are words to explain what is meant by being adherent to, and we think that if a man be adherent to the King's enemies in his realm by giving to them aid or comfort in his realm, or if he be adherent to the King's enemies elsewhere, that is by giving them aid or comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies, then he commits the treason which the statute of Edward III. defines. Reasons may be given for that, but we think a very good reason is to be found in this, that the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be, and he may violate his allegiance in

a foreign country just as well as he may violate it in this country. If authority were wanted for that it is to be found in *Rex v. Cundell*, 4 Newgate Calendar 62. I put out of the question Serjeant Sullivan's argument as to where the person could be tried, whether he could be tried by commissioners, or by commission of oyer and terminer, or in the King's Bench; but a really shocking example of what allegiance may mean is to be found in *Cundell's Case*, where prisoners of war, being then in the Isle of France, which we now call by its older name Mauritius, were seduced from their allegiance; they had adhered to the King's enemies; being recaptured, they were actually tried here in England, and one of them, Cundell, was executed for high treason; the others were pardoned. That was because he had violated his allegiance which followed him, which remained with him wherever he might be outside the King's dominions, and by which he was bound even when he was a prisoner of war. Of course I do not cite that case to commend it for its humanity, but merely to say that as a matter of strict law it is perfectly good law, and the only reason why it is not decisive of this case is that it does not dispose of the question as [138] to where the person who has committed the particular treason can be tried or how he can be tried.

Now I have said that it is the opinion of the Court that there is a great deal of authority for this proposition, that adherence to the King's enemies outside the King's dominions by a person who is himself outside them constitutes the commission of this treason by the person who is elsewhere than within the King's realm. It is worth while to notice that this question must have been discussed; people may have doubted how a person could be tried, but it must have been discussed among lawyers as to how he could be tried. There is a long and ancient opinion, as I will show when I read the cases presently, for the proposition that it is treason to do what the appellant has been convicted of doing in this case.

A statute was passed which has been often cited here, a statute of 35 Hen. 8, and what it says is this: "An Acte concerninge the triall of treasons cōmytted out of the King's Majesties domynions." There is a distinct statement that you can commit treason out of the King's dominions; it is only a question of how the person is to be tried; and it says: [The learned judge read the section of the statute set out above to the words "to be holden before himselfe," and proceeded.] Therefore this trial was rightly had in the King's Bench provided what was done by the appellant amounted to treason by virtue of the statute of Edward III. If it was such a treason it was rightly tried. Whether it was

or not depends upon the construction which we ourselves, reading this statute, put upon it. Serjeant Sullivan has asked us simply to take the statute and read it as though we had seen it for the first time, and he says that is the best way to construe any statute. Well, it is a little difficult for anybody who is a judge of the King's Bench to say that he reads for the first time the statute of Edward III. concerning treasons. We must all have read it before. But I do not know that the rule which Serjeant Sullivan lays down is altogether an acceptable one. In Maxwell on the Interpretation of Statutes (5th ed. (1912) ch. xi. p. 489) there is this passage: "It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. *Optima est legum interpres consuetudo*"—and then another maxim is stated. "Where this has [139] been given by enactment or judicial decision, it is of course to be accepted as conclusive. But further, the meaning publicly given by contemporary, or long professional, usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed; and those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions; moreover, the long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice, may, perhaps, be regarded as some sanction and approval of it."

Now this statute has been understood long before to-day, has been understood by lawyers of great learning and lawyers of very exceptional erudition who have been members of the King's Bench, and understood in the sense in which we have to-day said we understand it. Serjeant Sullivan has attacked their authority; he has, quite properly, assailed the authority of Lord Coke; he has questioned the reasons, if there be any, for the statements which Lord Coke has made concerning the law; and if we were to accede to the argument of Serjeant Sullivan we should have absolutely to disregard the opinion of Lord Coke, the opinion of Mr. Serjeant Hawkins, and the opinion of Sir Matthew Hale, all great names in the law, and persons whose opinions have long been followed in many questions of extreme difficulty which have puzzled lawyers for many generations. Let us see what Hale says. Sir Matthew Hale in his Pleas of the Crown says this (1 Hale, P. C. ch. 15, p. 160): "Touching the trial of foreign treason, viz. adhering

to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statute of 35 Hen. 8, c. 2, hath sufficiently provided for it;" he cites Story's Case, 3 Dyer, 298b, 300b, and continues: "but at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." That is a very definite statement, and if we were to allow this appeal we should be bound to say that it did not state the law. Are we entitled to throw over the opinion of Sir Matthew Hale as cavalierly as we [140] are invited to do? Looking at this book, *The History of the Pleas of the Crown*, how comes it to be in our hands? I read at the very beginning of it: "Extract from the Journal of the House of Commons Lunæ 20^o die Novemb. 1680. Ordered, that the executors of Sir Matthew Hale, late Lord Chief Justice of the Court of King's Bench, be desired to print the MSS. relating to the Crown law; and that a committee be appointed to take care in printing thereof, and it is referred to Sir William Jones, Serj. Maynard,"—a name to be revered in legal history—"Sir Fra. Winnington, Mr. Sacheverel, Mr. Geo. Pelham and Mr. Paul Foley;" and it is because of their care and by order of Parliament that we have this book in our hands at all.

Then there is Mr. Serjeant Hawkins, who says (Hawk. P. C. bk. 2, ch. 25, s. 48; vol. 4. p. 22 (Leach) vol. 2, p. 306 (Curwood)) this: "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried. For some seem to have holden, that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands: but surely it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3, should be wholly punishable, as it must have been, if it were no way triable." Serjeant Sullivan's argument is that it was punishable because you could not try it, if the kind of treason alleged were what is alleged in this case.

I mentioned yesterday—and I think it is worth mentioning again, because we are confessedly relying upon the authority of Sir Matthew Hale and of Serjeant Hawkins in the judgment that we are giving, and also upon the opinion expressed by Lord Coke to which I will come presently—that there is a passage in the case of *Butt v. Conant*

(1820) 1 Brod. & B. 548, 570, 5 E. C. L. 186. Dallas, C. J., himself no mean authority, says this: "We are told that we must look to the authorities, and find what we can in the books upon the subject. Now if the authority of Lord [141] Hale, and that of Mr. Serjeant Hawkins, are to be treated lightly, we may be without any authority whatever." (Here we are asked to treat them more than lightly, we are asked to reject them altogether.) "With respect to Lord Hale, it is needless to remind those whom I am now addressing"—this was in 1820—"of the general character for learning and legal knowledge of that person, of whom it was said, that what was not known by him, was not known by any other person who preceded or followed him; and, that what he knew, he knew better than any other person who preceded or followed him. With respect to Mr. Serjeant Hawkins, we know his authority. These are books which are in the hand and head of every lawyer, and constantly referred to on every occasion of this sort. I must, therefore, look to these books; and I shall proceed to examine the exposition given by text writers of the words of those statutes, and the commission of the peace."

Now with regard to Lord Coke, his opinion is precisely the same as that which is given by Sir Matthew Hale and Mr. Serjeant Hawkins, and it has been said to us that we should not follow Lord Coke because Stephen in his Commentaries and other writers elsewhere have spoken lightly of the authority and learning of Lord Coke. It may be they have done so. Of course they have all the advantage. They are his successors. If Lord Coke were in a position to answer them, it may be they would regret that they had entered into argument with him; but, although Stephen and others have perhaps flouted the opinion of Lord Coke, he has been recognized as a great authority in these Courts for centuries, and nowhere more than perhaps in the passage I am now about to read, which I owe to my brother Atkin, in the case of *Garland v. Jekyll* (1824) 2 Bing. 296, 9 E. C. L. 412: "I know it has been said, that Lord Coke in this case must be mistaken, for in the margin is a reference to Lord Coke's Reports, and upon referring to the page you find nothing to warrant his opinion. I have looked into the report, and the observation is correct, but it will be found that the same observation will apply to cases that are relied on on the other side; it appears to me that [142] the reference was not made by Lord Coke, but that it has been introduced by some ignorant editor who fancied something confirmatory of the opinion in 4 Coke. The fact is, Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of

what is considered law in Westminster Hall, if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any Court of Justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense." Those are the words of Best, C.J.

If one wanted an opinion of a person who was not a lawyer, it is where this same Lord Coke is alluded to by John Milton as one who—

"On the royal Bench

Of British Themis, with no mean applause,
Pronounced, and in his volumes taught our laws,

Which others at their Bar too often wrench."

(Sonnet to Cyriack Skinner).

There are other authorities who understood this matter in precisely the same way, not authorities as great as Lord Coke, but it is worth while, I think, to show what was the volume of opinion during ages when lawyers were considering this particular matter. There is a treatise perhaps not very commonly known—I referred to it yesterday—by Mr. Ferdinando Pulton, a barrister of Lincoln's Inn, and the particular copy I am reading from was published in 1609. He says that his views are "collected out of the reports of the common lawes of this realme, and of the statutes in force, and out of the painfull workes of the reverend judges," mentioning them; and there is this passage (*De Pace Regis*, fol. 110a, pl. 4): "And because by the said statute of 25 Edw. 3 it is declared to be high treason to levie warre against the King in his realme, or to be adherent to his enemies, aiding them in his realme or elsewhere; therefore if a subject borne of this realme being beyond the seas, doth practice with a prince or governor of another countrey to invade this realme with great power, and doe declare, where, how, and by what meanes the invasion may best be made, it is high treason; for an invasion with great power cannot be, but of likelihood it will tend to the destruction or great perill of the K. and hurt to the realme; and moreover the said offender [143] hath manifested himselfe to be adherent to the K. enemy and to aid him with his counsel, though not in the realme, yet elsewhere. And this offence shall be tried in the K. Bench, or elsewhere, before such commissioners, and in such countie, as the King by commission shal appoint, according to the stat. of 35 Hen. 8, 2."

A much more modern writer was of the same opinion, Sir James Fitzjames Stephen. In his *Digest of the Criminal Law* he says (5th ed. (1894), art. 55, p. 44): "Every one commits high treason who, either in the

realm or without it, actively assists a public enemy at war with the Queen."

A valuable opinion to the same effect was given in the year 1775, and it is referred to and can be found in Archbold's Criminal Pleading, where this is said (24th ed. (1910), p. 1033, note (a)): "In 1775 the law officers (Thurlow, A.-G., and Wedderburn, S.-G.) had been informed—(1.) that in 13 Ann. an Act against high treason had been passed in the province of New Hampshire;—which was in the King's dominions in America—"(2.) that the said Act was disallowed by Order in Council in 1718; (3.) that it was conceived that there was no law of that province at present existing for the trial and punishment of that offence. They were asked in what manner it was proper to proceed against persons for high treason committed in New Hampshire. They replied: 'We are humbly of opinion that it requires no Act of a provincial Legislature to constitute the offence of high treason in any of His Majesty's plantations. The crime may be prosecuted in the Superior Court of New Hampshire (which by 11 Wm. 3 hath the full criminal jurisdiction within that government which His Majesty's Court of King's Bench exercises here), or in this country under the statutes of 35 Hen. 8, as the occasion may require.'" That was exactly this case. The treason was not committed within the King's realm; it was committed elsewhere. There is no pretence that the person who committed it by being adherent, or whatever form the treason took, was within the King's realm. That is a distinct statement which covers this case exactly, and that is the opinion of two such law officers as Lord Thurlow and Lord Loughborough, absolutely consonant with the opinion which this Court is expressing to-day.

I do not know that it is worth while to allude to the paragraph [144] to which Serjeant Sullivan called our attention in Platt's Case, 1 Leach 168, but it is to be noticed that no stress whatever is laid by the Court there upon the words which Serjeant Sullivan insists govern the whole of this particular definition of treason, that is the words "in his realm," because what is said is: "It was the ancient opinion, that the species of treason, which consists, by 25 Edw. 3, c. 2, in adhering to the King's enemies, might be tried, before the statute 35 Hen. 8, c. 2, within the kingdom, by the rules of the common law, though the aid and comfort was afforded without the realm."

We do not think it necessary to give further reasons for the conclusion to which we have come. We purposely do not rely upon a recent case which has been questioned by Serjeant Sullivan, simply for the reason that we are of opinion that the conclusion to which the Court indubitably came in that

case is supported by ample authority to be found in the decisions and in the opinions of great lawyers to which I have referred in giving the judgment of this Court.

It only remains to say that the appeal is dismissed.

Appeal dismissed.

NOTE.

What Constitutes "Adherence to Enemies," etc., within Law of Treason.

General Rule.

In a broad sense, by "adherence to enemies, giving them aid and comfort," within the law of treason, is meant any act on the part of a citizen or subject indicating disloyalty to the government or sympathy for its enemies. Such an act may consist in taking an oath of allegiance to the enemy; joining their army or assisting others to do so; surrendering to them a fort or castle or cruising on one of their ships; collecting information for their use; or selling them arms, provisions or other supplies.

England.—Rex v. Lynch [1903] 1 K. B. 444; Rex v. Stone, 6 T. R. 527, 1 East P. C. 79, 99; Rex v. Evans, 1 East P. C. 80, 2 East P. C. 798; Rex v. Hensey, 2 Ken. K. B. 366, 1 Burr. 642; Rex v. Gregg, 14 How. St. Tr. 1376; Hawkins, P. C. 54; 1 Hale, P. C. 168.

Canada.—Rex v. Nerlich, 34 Ont. L. Rep. 298, 8 Ont. W. N. 592, 25 Dominion L. Rep. 138; Rex v. Snyder, 24 Can. Crim. Cas. 101, 25 Dominion L. Rep. 1, 34 Ont. L. Rep. 318, 8 Ont. W. N. 594; Rex v. Fehr, 26 Can. Crim. Cas. 245, 29 Dominion L. Rep. 111.

United States.—*Respublica v. Roberts*, 1 Dall. 39, 1 U. S. (L. ed.) 27; *Respublica v. McCarty*, 2 Dall. 86, 1 U. S. (L. ed.) 300; *Carlisle v. U. S.* 16 Wall. 147, 21 U. S. (L. ed.) 426; *U. S. v. Greathouse*, 2 Abb. 364, 4 Sawy. 457, 26 Fed. Cas. No. 15,254; *U. S. v. Hodges*, 2 Wheel. Crim. 477, Brun. Col. Cas. 465, 26 Fed. Cas. No. 15,374; *Charge to Grand Jury*, 4 Blatchf. 518, 23 Law. Rep. 597, 30 Fed. Cas. No. 18,270; *Charge to Grand Jury*, 5 Blatchf. 549, 30 Fed. Cas. No. 18,271; *Charge to Grand Jury*, 1 Bond 609, 30 Fed. Cas. No. 18,272. Compare *U. S. v. Pryor*, 3 Wash. C. C. 234, 27 Fed. Cas. No. 16,096; *Medway's Case*, 6 Ct. Cl. 421.

In the matter of *Charge to Grand Jury*, 4 Blatchf. 518, 23 Law. Rep. 597, 30 Fed. Cas. No. 18,270, the court said that adhering to and giving aid and comfort to the nation's enemies was somewhat difficult in all cases to define; but that certain it was, that furnishing them with arms or munitions of war, vessels or other means of transportation, or any materials which would aid them in carrying out their traitorous purposes, with a

knowledge that they were intended for such purposes, or inciting and encouraging others to engage in or aid them in any way, came within the provisions of the act. It was further said in that case that it was immaterial whether treasonable acts were induced by sympathy with the enemy, hostility to the government, or a desire for gain.

In the matter of Charge to Grand Jury, 5 Blatchf. 549, 30 Fed. Cas. No. 18,271, the court said: "There are some acts of the citizen, in his relations with the enemy, which leave no room for doubt—such as, giving intelligence, with intent to aid him in his acts of hostility—sending him provisions or money—furnishing arms, or troops, or munitions of war—surrendering a military post, etc., all with a like intent. These and kindred acts are overt acts of treason, by adhering to the enemy." Likewise in *Hawkins Pleas of the Crown* 55, adherence to the enemy is defined as follows: "Giving aid and comfort to them; from which it appears, that any assistance given to aliens in open hostility against the king, as by surrendering a castle of the king's to them for reward, or selling them arms, etc., or assisting the king's enemies against his allies, or cruising in a ship with enemies to the intent to destroy the king's subjects is clearly within this branch."

In 1 Hale P. C. 168, it is stated: "If a captain or other officer, that hath the custody of any of the king's castles or garrisons, shall treacherously by combination with the king's enemies, or by bribery or for reward, deliver them up, this is adherence to the king's enemies."

In the matter of Charge to Grand Jury, 1 Bond 609, 30 Fed. Cas. No. 18,272, Leavitt, District Judge, said: "The words in the definition, 'adhering to their enemies,' seem to have no special significance, as the substance is found in the words which follow—'giving them aid and comfort.' . . . In general, when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs, gives them aid and comfort."

Application of Rule.

In *Medway's Case*, 6 Ct. Cl. 421, it was held that the mere writing of a letter to the head of the Confederate States by a British subject, unaccompanied by the sending, uttering or publishing thereof, was not an act of aid or comfort to the rebellion.

In *Rex v. Lynch* [1903] 1 K. B. (Eng.) 444, a British subject born in Australia, was indicted for high treason. He was charged with adhering to, aiding and comforting the governments of the South African Republic

and the Orange Free State, without the realm of England. The charges were founded on the fact that the prisoner had made a declaration of willingness to take up arms for the South African Republic and took an oath of allegiance thereto; published an address to Irishmen inciting them to assist the enemy, and commanded an armed body of men called the Second Irish Brigade, with intent to co-operate with their forces. Before the prisoner pleaded to the indictment his counsel made a motion to quash it on the ground that each count charged an adhering to the enemy without the realm, and therein disclosed no offense under the Treason Act of 25 Edw. 3, stat. 5, c. 2, which provided, so far as material to the case at bar, that it should be adjudged to be treason "if a man do levy war against our Lord the King in his realm or be adherent to the King's enemies in his realm giving to them aid and comfort in the realm or elsewhere." The motion was denied, and the prisoner relying solely on the fact of his naturalization in the South African Republic, which was held by the court to be an act of treason as being in contravention of the statute prohibiting a British subject from becoming naturalized in an enemy state in time of war, was found guilty. The reported case authoritatively lays down the rule that an act done outside the realm is within the terms of the British statute.

In *Respublica v. Roberts*, 1 Dall. (Pa.) 39, 1 U. S. (L. ed.) 27, it was held that one who aided and assisted the enemy by joining their armies was guilty of treason. So in *Respublica v. McCarty*, 2 Dall. (Pa.) 86, 1 U. S. (L. ed.) 300, the court said: "Enlisting, or procuring any person to be enlisted, in the service of the enemy, is clearly an act of treason."

Likewise in *U. S. v. Hodges*, 2 Wheel. Crim. 477, Brun. Col. Cas. 465, 26 Fed. Cas. No. 15,374, the court said that the delivering of prisoners to the enemy was an overt act of adhering to the enemy, which nothing but a threat of death likely to be put into execution would justify. But in *Rex v. Snyder*, 24 Can. Crim. Cas. 101, 25 Dominion L. Rep. 1, 34 Ont. L. Rep. 318, 8 Ont. W. N. 594, it appeared that the military authorities at Welland suspected the defendant of assisting the enemy by conveying Austrian subjects across the Niagara river to the United States after the war broke out. About the 14th of November, 1914, they sent one Bugaraki, who was in their employment, to the defendant. Bugaraki represented to the defendant that he was a foreman on the Welland canal, and that sixty or seventy Austrian reservists under him, who were under suspicion in the country, were anxious to get to Buffalo for the purpose of reporting to

the Austrian consul there, and in saving their property in Austria from confiscation. The defendant, after several interviews, finally agreed with Bugarski that he would take these men across for \$10 each, and arranged with Bugarski, that he would bring some of the men to his house on the Niagara river on an appointed night, when he, the defendant, would row them across to the United States. Bugarski, at the appointed time, appeared at the defendant's house with four Austrian reservists, and met the defendant as arranged. The defendant stated that the weather was too bad, and that he would have to defer taking the men across the river until the wind abated, and he conducted the men to an old house on the property, where he agreed to keep them until that time. He was paid \$10 by Bugarski for each of the men in payment of his charge for taking them across the river. In quashing the conviction for an attempt to commit treason by assisting a public enemy, the court said: "It appears from the evidence that the men whom the prisoner is charged with having incited and assisted had no intention of leaving Canada for the purposes mentioned in the indictment or for any other purpose, and that they had no knowledge that the purpose of their being brought to the prisoner's premises was that he might take them across the river for any such purpose or at all. The whole affair was a sham, arranged by the military authorities for the purpose of confirming the suspicions they had that the prisoner was engaged in the work of assisting Austrians to cross the river with the view of their going to Europe to assist the enemy, and, as they thought, enabling them to arrest him *flagrante delicto*. The prisoner, no doubt, thought that the thing was real, especially when he received \$10 in cash for each of the men that were brought to him. There was no evidence that the prisoner incited the men or any of them to leave Canada, and I am unable to understand how it can be said that the prisoner assisted them to leave or attempted to do so. Surely to assist another involves the idea of a desire, or at least a willingness, to be assisted on the part of the person who is said to have been assisted; and there was neither, according to the uncontradicted testimony, and that, too, elicited from the witnesses called on the part of the prosecution."

In *Rex v. Nerlich*, 34 Ont. L. Rep. 398, 8 Ont. W. N. 592, 25 Dominion L. Rep. 138, it appeared that one Nerlich and his wife were indicted for that they did "maliciously and traitorously conspire, confederate, and agree with each other, and with others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy now at war with His
Ann. Cas. 1917D—31.

Majesty the King, to leave the Dominion of Canada and join the enemy forces," etc. At the close of the case for the Crown, the trial judge directed the jury that there was no evidence on which Mrs. Nerlich could be convicted of conspiracy, and the jury accordingly rendered a verdict of "not guilty" as to her. The jury thereafter found Nerlich guilty. Holding that he should have been acquitted the court said: "The Nerlichs and the 'others' referred to in the indictment are charged with conspiring to aid the enemy by inciting and assisting Zirzow to leave Canada and join the enemy's forces. The same persons are accused of 'inciting' and 'assisting' him. The idea of a man conspiring with others to incite himself seems to be an absurdity. To attempt to put such a meaning upon the language of this indictment is surely something at variance with the plain language of the instrument, and could not possibly have been in the mind of the draftsman."

In *Rex v. Stone*, 6 T. R. (Eng.) 527, 1 East P. C. 79, 99, the indictment charged as an overt act of adhering to the King's enemies and compassing his death that the prisoner conspired with others to collect intelligence within England and Ireland of the disposition of the King's subjects in case of an invasion of either country, and to communicate such intelligence to the enemy, for their assistance and direction in their conduct and prosecution of the war. It was contended by the prisoner's counsel that such information was gathered for the purpose of averting the danger of so great a calamity. The court said that the jury were to judge whether the intelligence had been sent with that view, for however beneficial the effect of such intelligence might be, yet, if it were sent in order to assist the enemy in their counsels, and to enable them the better to shape their defense or attacks, it was undoubtedly high treason under both the clause of adhering and of compassing. See to the same effect *Rex v. Hensey*, 2 Ken. K. B. (Eng.) 366, 1 Burr. 642; *Rex v. Gregg*, 14 How. St. Tr. (Eng.) 1376; *Charge to Grand Jury*, 5 Blatchf. 549, 30 Fed. Cas. No. 18,271.

In *Carlisle v. U. S.* 16 Wall. 147, 21 U. S. (L. ed.) 426, wherein it appeared that aliens domiciled in the United States manufactured saltpetre which they sold to the Confederacy, it was held that they were guilty of treason. The court said: "By thus furnishing materials for the prosecution of the war whilst they were domiciled in the country, knowing the uses to which the materials were to be applied, the claimants became participators in the treason of the Confederates equally as if they had been original conspirators with them. The court of claims, therefore, did not err in its conclusion that the act of the claimants in selling the salt-

petre to the Confederates, under these circumstances, was an act of aid and comfort to the rebellion."

In *U. S. v. Pryor*, 3 Wash. C. C. 234, 27 Fed. Cas. No. 16,096, it appeared that the prisoner was charged in an indictment with adhering to the enemy, giving them aid and comfort by going from a British seventy-four, whilst lying in Delaware bay, to the shore of the state of Delaware, with the intention of procuring provisions for the blockading squadron. The judge charged the jury that the undertaking did not amount to an overt act of treason inasmuch as the prisoner engaged in no acts of hostility against the United States or its citizens and they returned a verdict of not guilty.

In *East's Pleas of Crown*, vol. I, p. 80, vol. II, p. 798, in commenting on the case of *Rex v. Evans*, it was stated that the court concurred in holding that it constituted an adherence to the enemy within the act of treason for a subject to go cruising hostilely in an armed vessel of the enemy with intent to seize and take the ships of the king and his subjects. See also *Hawkins Pleas of the Crown* 54. So in *U. S. v. Greathouse*, 2 Abb. 364, 4 Sawy. 457, 26 Fed. Cas. No. 15,254, it was held that procuring, fitting out and arming a vessel to cruise in the service of the rebellion on the high seas for the purpose of committing hostilities against the citizens' property and vessels of the United States was an adherence to the enemy within the law of treason.

In *Rex v. Fehr*, 26 Can. Crim. Cas. 245, 29 Dominion L. Rep. 111, the accused was charged with treason. The indictment read as follows: "The jurors of our Lord the King present that Gabor Fehr on or about the twenty-third day of July in the year of our Lord one thousand nine hundred and fifteen, at Sydney in the county of Cape Breton, did unlawfully commit treason by assisting a public enemy at war with His Majesty in such war, to wit, the Austria-Hungary war loan, to the amount of four hundred and seventy-two dollars and fifty cents (\$472.50) contrary to the form of the statute in such case made and provided." On motion of his counsel the indictment was quashed on the ground that the public enemy was not stated, and that it was left to the accused to guess which of the three or four of the public enemies at the time at war with His Majesty he was charged with assisting. The court said: "The indictment found against the accused is, in my opinion, defective, in that it does not set forth with precision the offense charged and does not in sufficient terms state any overt act of treason. . . . The only approach to a statement of an overt act is the mention of the Austria-Hungary war loan and of the sum of \$472.50. This can hardly be consid-

ered a statement of an overt act of treason. It gives the accused little or no idea of what he has to meet; it may apply, if it applies at all, to a great number of entirely distinct and different acts. I think the indictment should be so framed as to afford notice to the accused in terms which he cannot mistake of the acts with which he is charged and which the Crown intends to establish by evidence."

In *Vaughan's Case*, 1 East P. C. (Eng.) 79, it was stated that it was an adherence to the king's enemies for a subject of England to make war on the king's allies, engaged with him against the common enemy, though no act of hostility was committed against the king or his forces; for by the act committed the enemy would be strengthened and the king weakened.

In *Rex v. Delamotte*, 1 East P. C. (Eng.) 53, it was stated that in the case of a foreigner who goes abroad himself, leaving his family and effects within the realm, the duty of local allegiance continues for the protection thus enjoyed, and if he commits treason, aiding even his own countrymen in acts or purposes of hostility, he may be punished as a traitor. So in *Rex v. Porterfield*, 10 How. St. Tr. (Eng.) 1051, it was held that one who harbored, maintained, supplied, intercommunicated and conversed with his brother, a declared traitor, was himself guilty of treason.

In *Rex v. Ahlers*, [1915] 1 K. B. (Eng.) 616, 84 L. J. K. B. 901, 112 L. T. N. S. 558, 79 J. P. 255, 31 Times L. Rep. 141, it appeared that the prisoner was a German-born subject who had resided in England for thirty years. In 1905 he became naturalized. He acted as German consul at a place called Sunderland. During the first days of the month of August, 1914, in his capacity as consul he took various steps for the purpose of assisting German subjects to return to their own country. That was in pursuance of his duty. On the morning of August 5 he read a daily newspaper in which there was a statement that war had been declared between Great Britain and Germany at 7 P. M. on August 4. The statement was not accurate as to the time, as the fact was established by the official document that a state of war had commenced at 11 P. M. on August 4. On August 5, the prisoner, according to the evidence, which was on this point not substantially in dispute, did certain acts, such as assisting certain persons to return to Germany. He was charged in the words of the indictment with "contriving and with all his strength intending to aid and assist the enemies of our Lord the King against our said Lord the King and his subjects heretofore during the said war . . . and with force of arms unlawfully maliciously and traitorously was adhering to aiding and comforting the German Emperor against our Lord the King." The de-

fense put forward on his behalf at the trial was that, acting in his capacity of a consul, his object was to assist German subjects to return to their own country, and that his intention was not in any way to injure the interests of Great Britain, but merely to carry out his duty and help those German subjects to return to their own country. The court quashed the conviction for the reason stated as follows: "We cannot . . . find that the jury ever had it brought to their minds that it was possible, if they chose to adopt the view, that the prisoner was not actuated by the intention and had not the purpose of aiding and comforting the King's enemies. Neither can we say that the jury could not possibly have come to a conclusion favorable to the appellant if those two alternative views had been put before them. As this court has often ruled, it is not enough to support the conviction that the jury might have come to the same conclusion, had the proper direction been given. Before we can uphold a verdict of guilty after misdirection, we must be satisfied that, had the proper direction been given, the jury must have come to the same conclusion and convicted the prisoner. We cannot so hold in this case. We cannot say that it follows from the evidence that the actions of the appellant were necessarily hostile to this country in intention and purpose; although there was undoubtedly evidence upon which the jury might have so found."

STEWART

v.

HAGERTY.

Pennsylvania Supreme Court—January 3, 1916.

251 Pa. St. 603; 96 Atl. 1099.

Alienation of Affections — Evidence Insufficient.

In an action for alienation of the affections of plaintiff's husband, the evidence is held to be insufficient to show that defendant was the active cause of the alienation of plaintiff's husband's affections.

Admissibility of Evidence — Acts after Separation.

In an action by a wife against another woman for alienation of the affections of plaintiff's husband, where there is no evidence of improper relations between defendant and the husband before the separation of plaintiff from her husband, evidence of such improper relations thereafter is inadmissible.

[See note at end of this case.]

Burden of Proof.

In an action for alienation of the affections of plaintiff's husband, the burden is on plaintiff to show that defendant was the pursuer, not merely the pursued, and that she deliberately influenced plaintiff's husband to withdraw his care, protection, comfort and companionship.

Appeal from Court of Common Pleas: Allegheny county: EVANS, Judge.

Action by M. S. Stewart, plaintiff, against E. Daisy Hagerty, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

Joseph Stadtfeld and L. K. & S. G. Porter for appellant.

Thomas M. Marshall and Thomas M. Marshall, Jr., for appellee.

[604] POTTER, J.—The defendant in this case was charged with alienating the affections of plaintiff's husband. She denied the charge and alleged that plaintiff's loss in this respect was in no way due to any influence exerted by her. Her counsel contend that there was no evidence in the case tending to show that defendant was responsible for the estrangement between plaintiff and her husband, and they urge that the court below erred in submitting that question to the jury. In her statement of claim, plaintiff [605] averred a separation between herself and her husband, but gave no date for its occurrence. However, the undisputed testimony shows that they separated in 1907 or 1908. With a single exception, none of the witnesses called by plaintiff to substantiate her claim testified to anything which occurred prior to 1909. That exception was Miss Katheryn I. White, who testified that in 1905 or 1906 she saw Mr. Stewart and defendant one evening about nine o'clock standing together and talking on a street corner in front of a lighted drug store. She says she saw them upon another occasion about a year later, walking down the street. This was also in the evening. She states that she also saw them on the street once or twice in the day time, but was indefinite as to the dates of these occasions. Defendant, who was called by plaintiff for cross-examination, testified that she first met Mr. Stewart on November 26, 1909, and previous to that date had never seen nor heard of him. There was no evidence whatever of any wrongful intimacy between defendant and plaintiff's husband prior to the separation of the latter from plaintiff, which occurred in 1907 or 1908. The only evidence of the husband's association with defendant prior to that time was, as above stated, that on two or three occasions they were seen standing and con-

versing and walking together on a public street. This in itself was no evidence of improper relations, nor did it tend to prove the exercise of any allurements on the part of defendant for the purpose of enticing the husband away from his wife. Nor were the facts shown to be connected in any way with the separation that occurred two or three years later. But counsel for the plaintiff contend that evidence as to relations existing between defendant and plaintiff's husband some time after the separation may properly be considered in connection with testimony as to their prior relations, in order to interpret those relations. In support of this contention they cite *Sherwood v. Titman*, 55 Pa. 77. [606] That was an action by the husband to recover damages for criminal conversation, and it was held that in such an action, evidence of improper intimacy of defendant with plaintiff's wife before the husband and wife had separated may be supplemented by evidence of similar conduct after the separation. Counsel also cite *Keath v. Shiffer*, 37 Pa. Super. Ct. 573, 580, in which it was held that, where evidence was offered "as to the conduct of the parties prior to the separation, laying a reasonable ground to infer an improper relation then existing between them,—testimony as to their relations after the separation was admissible in order to render certain the inference to be drawn from their prior conduct." It will be noted that in both these cases, there was evidence of improper relations existing prior to the separation. But in the case at bar, the evidence went no farther than to show that plaintiff's husband, on two or three occasions during a period of two or three years, was seen talking and walking with defendant on a public street. This evidence did not in itself tend to show anything improper, nor did it lay any reasonable ground for any inference of the kind. Therefore, the present case does not fall within the rule invoked, and evidence of the relations existing some time subsequent to the separation was not admissible. Nor is there anything in the fact that the defendant and the husband were seen together on the street which tends to show that defendant was the active agent in bringing about the meeting. In order to sustain this action there must be some evidence from which the conclusion can be drawn that she was the pursuer, and not merely the pursued: *Buchanan v. Foster*, 23 App. Div. 542, 48 N. Y. S. 732. To the same effect is *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. S. 3. In view of the admitted fact of a separation between plaintiff and her husband, clear proof was necessary that defendant was the active inducing cause of that separation. The trial judge fully recognized this requirement, for he said to

the jury: [607] "The basis of the wife's claim, however, is that the cause of the separation was the evil influence exerted over her husband by this defendant. That is the basis of her claim, and in order to establish Mrs. Stewart's claim here, you must find from the evidence that this defendant was the cause of the separation; that she was not only the cause of it, but that she was wilfully the cause of it; that she acted deliberately and purposely in exerting the influence over George W. Stewart which caused him to withdraw his care, protection, comfort and companionship from Mrs. Stewart." A very careful examination of all the evidence in the case fails to disclose anything which would measure up to the degree of proof required in this instruction or that would justify an inference that defendant wilfully induced Mr. Stewart to separate from his wife, or that she was the active cause of the alienation of his affections from her. Many and various reasons might have caused the loss by plaintiff of her husband's affections. The burden was upon her to show that the defendant was the active inducing cause of that loss. Clearly she did not show this by any proof which she offered of conduct prior to the separation.

The first, second, fourth and sixth assignments of error are sustained. The judgment is reversed, and is here entered for the defendant.

NOTE.

Admissibility in Action for Alienation of Affections of Evidence of Acts Committed after Separation of Spouses.

The few decisions in which the question has been decided are in accord in declaring that in an action for alienation of affections evidence of acts committed after the separation of the spouses is admissible, to reflect light on the previous relations of the parties. *Hardwick v. Hardwick*, 130 Ia. 230, 106 N. W. 639; *Merrill v. Leisenring*, 166 Mich. 219, 131 N. W. 538; *Sweikhart v. Hanrahan*, 184 Mich. 201, 150 N. W. 833; *Phelps v. Bergers*, 92 Neb. 851, 139 N. W. 632; *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085; *Sherwood v. Titman*, 55 Pa. St. 77; *Keath v. Shiffer*, 37 Pa. Super. Ct. 573; *Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67; *Morris v. Warwick*, 42 Wash. 480, 7 Ann. Cas. 687, 85 Pac. 42. Thus in *Keath v. Shiffer*, *supra*, evidence as to the relations between the defendant and the wife of the plaintiff after the separation of the latter from her husband was held to be admissible for the purpose of interpreting their conduct previous to the separation, a foundation having been laid by the introduc-

tion of testimony as to improper relations existing prior to the separation. In the reported case it is held that in the absence of such a foundation the testimony should not be received.

In *Morris v. Warwick*, 42 Wash. 480, 7 Ann. Cas. 687, 85 Pac. 42, the court in stating the reason for admitting evidence of the conduct of the defendant and the plaintiff's wife after a separation of the spouses said: "It seemed to be the view of the trial court that the conduct of the defendant and the plaintiff's wife, at any time after the separation of plaintiff and his wife, was not pertinent nor material, on the theory, as indicated by the court, that there could be no alienation of affection where none existed. But it does not necessarily follow that affection does not survive a separation. No arbitrary standard of action can be erected by which conjugal affection can be tested or measured. It differs in intensity and constancy with the different temperaments and characters of the individuals. It may be so superficial that slight provocation would be sufficient to destroy it, or it may be so deeply rooted that it will survive neglect, disgrace, brutal treatment, and desertion. It sometimes even outlives legal separation, as is proven by many authenticated instances of men and women remarrying after divorce has been obtained. Husbands and wives, in the heat of passion engendered by wrongs, real or imaginary, may, and frequently do, separate from each other, and yet when time gives opportunity for reflection and self-examination, it is frequently discovered by both parties that the actual cause of dissension was really trifling, that affection was not annihilated, but simply for the time being forced into the background, and reconciliation is devoutly desired by both. And it is this right to a reconciliation that a stranger has no right to interfere with, or deprive a husband or wife of."

In *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085, in sustaining the admission of evidence tending to show that when the plaintiff was abandoned by her husband she lived with the defendant in adultery, the court said: "It is contended that this evidence had no tendency to throw light upon their prior relations in Minnesota and North Dakota, and was of a highly prejudicial character. It cannot be doubted that this evidence was damaging to the defendant. It was, in our opinion, however, entirely competent. The circumstance that defendant took King with

her to Wisconsin, and kept him at her hotel after the plaintiff had protested to her in Minneapolis against it, and against the defendant's relation with her husband, and the evidence of their adulterous relations in Wisconsin, were valuable aids in determining what their relations had been in this state and in Minnesota, and tended strongly to show that the defendant was the moving cause in King's abandonment of his wife."

However, it has been held that the defendant in an action for the alienation of the affections of plaintiff's wife could not show that the plaintiff had been attentive to another woman after his wife left him and after he had commenced the action. *Welker v. Hazen*, 147 Pa. St. 122, 93 Atl. 173.

It has been held that where it is shown that the husband abandoned his wife, and that during the abandonment she was maintaining improper relations with the defendant, it is a question for the jury to determine whether the acts of the defendant were an inducing cause to the husband's desertion of his wife. *Romaine v. Decker*, 11 App. Div. 20, 43 N. Y. S. 79.

Evidence that the defendant and the plaintiff's wife became engaged to be married shortly after the plaintiff's wife obtained a divorce on the ground of cruelty has been held to be admissible as illustrating the state of affection between them before the divorce was granted. *Bergman v. Solomon*, 143 Ky. 581, 136 S. W. 1010. And so, evidence that the plaintiff's husband instituted an action for divorce has been held to be admissible in connection with proof that the defendant participated in the bringing of the action. *Hardwick v. Hardwick*, 130 Ia. 230, 106 N. W. 639. See also *De Ford v. Johnson* (Mo.) 177 S. W. 577.

Testimony that the defendant after eloping with the plaintiff's wife foreclosed a chattel mortgage on the plaintiff's property has been held to be admissible on the ground that it tended to establish malice. *Warnock v. Moore*, 91 Kan. 262, 137 Pac. 959.

It has been held that in an action by a husband against his wife's parents for the alienation of her affections, evidence that after the separation the parents encouraged their daughter to associate with disreputable persons was admissible. *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. See also *Fuller v. Robinson*, 230 Mo. 22, Ann. Cas. 1912A 938, 130 S. W. 343.

**ST. LOUIS, IRON MOUNTAIN AND
SOUTHERN RAILWAY COMPANY**

v.

NEEDHAM.

Arkansas Supreme Court—March 13, 1916.

122 Ark. 584; 184 S. W. 47.

**Carriers of Passengers — Change of
Cars — Notice to Passenger.**

An adult passenger, apparently of ordinary intelligence, and in full possession of her senses, is bound to take notice of her route and make the necessary change of cars, and the carrier is not required to give her special notice of the necessity therefor, so that, if it announces the arrival at a junction where it is necessary to change for points on the line of the connecting carrier, it is not liable for carrying the passenger beyond the junction.

[See note at end of this case.]

Same.

In an action for damages from defendant's negligent failure to notify plaintiff of the necessity for changing cars at a junction, the evidence is held to make the defendant's announcement of the junction and the necessity for changing a question for the jury.

[See note at end of this case.]

Same.

In such action, where the issue is whether the carrier announced the junction and the necessity for changing cars as claimed by it, an instruction, leaving it to the jury to determine whether the trainman exercised ordinary care to apprise plaintiff of the place she was to leave the train to take a train on a connecting road, is erroneous, as ignoring the real issue.

[See note at end of this case.]

Appeal from Circuit Court, Pulaski county:
HENDRICKS, Judge.

Action by Mrs. S. E. Needham, plaintiff, against St. Louis, Iron Mountain and Southern Railway Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

E. B. Kinsworthy and *W. G. Riddick* for appellant.

Geo. F. Jones for appellee.

[585] McCULLOCH, C. J.—The plaintiff, Mrs. Needham, became a passenger on one of the defendant's trains enroute to Heber Springs, a station on the Missouri & North Arkansas Railway, and was carried beyond the junction where she should have changed cars. This is an action to recover damages alleged to have been sustained by reason of negligent failure on the part of defendant's

servants to notify plaintiff of the necessity for changing cars at Kensett, the junction of the two roads. The case was tried before a jury and the result was a verdict against the defendant, and from the judgment rendered thereon the defendant has prosecuted this appeal.

Plaintiff resided in Little Rock and bought a round-trip ticket to Heber Springs, the ticket reading over defendant's line from Little Rock to Kensett, and thence over the Missouri & North Arkansas Railroad to point of destination. Plaintiff boarded a train at the Union [586] Station, Little Rock, at 2:45 p. m. The conductor came through the train shortly after leaving Little Rock and detached the coupon covering the fare for passage to Kensett and returned the balance of the ticket to plaintiff. Plaintiff testified that she did not know where Heber Springs was, but supposed that it was on the line of defendant's road and that she would not have to change cars. The conductor says that when he took up the ticket he informed plaintiff of the necessity of changing cars at Kensett, but this the plaintiff denies in her testimony. The train stopped at Kensett a sufficient length of time for passengers to debark, and the name of the station was announced by one of the trainmen in the coach in which the plaintiff was riding, but there is a conflict in the testimony as to the extent of the announcement. Plaintiff said that the brakeman or other employee merely called the name of the station, but the flagman testified that he called the name of the station and gave the announcement to "change cars for Searcy and Eureka Springs." At any rate, plaintiff failed to debark at the station, and she says that she did not learn that a mistake had been made in not changing cars until she reached Crawfordsville, a station on the road seventeen miles west of Memphis. She states that the conductor then admitted that she had been carried by on account of his mistake, and stopped the train at Crawfordsville so that she could get off. She was furnished transportation from Crawfordsville back to Wynne, and thence back to Kensett, but in returning she was kept up all night, either at the station at Wynne or continuing the journey back to Kensett.

(1) It is contended by counsel for defendant that the judgment should be reversed and the cause remanded for the reason that according to the undisputed testimony the stop at Kensett was announced, and that that was all that the servants of the company were required to do, the plaintiff being guilty of negligence in failing to ascertain that that was the point for changing cars. It is clear that if there was an announcement made, as [587] claimed by the flagman, giving notice of the necessity for a change of cars to points

north on the Missouri & North Arkansas Railroad, the plaintiff was bound to take notice of her route and make the necessary change. She was an adult, apparently of ordinary intelligence, and in full possession of her senses, therefore the carrier was not required to give her special notice of the necessity for a change of cars. All that the law required was that a suitable regulation be made for the convenience of passengers, and that reasonable steps be taken to bring those regulations to the attention of the passenger, no further individual notice being required. *St. Louis, etc. R. Co. v. Atchison*, 47 Ark. 74, 14 S. W. 468; *Jewell v. St. Louis, etc. R. Co.* 82 Ark. 598, 102 S. W. 370; *Rock Island, etc. R. Co. v. Stevens*, 84 Ark. 436, 105 S. W. 1032, 108 S. W. 517, 16 L.R.A. (N.S.) 1132; *Lilly v. St. Louis, etc. R. Co.* 31 Okla. 521, 122 Pac. 502, 39 L.R.A. (N.S.) 663; *Central of Georgia R. Co. v. Ashley*, 150 Ala. 145, 48 So. 981.

In the Alabama case above cited, the rule is, we think correctly stated as follows: "A primary duty rests on the carrier of passengers to give publicity to its regulations, whether of schedule, including places whereat its train will stop for the discharge or reception of passengers, or of routing on its roadway, embracing points of change to another line of its roadway or that of another company, to the end that the ordinarily prudent and intelligent traveler may be informed of the facts essentially necessary for him to accomplish his journey. The reason for such duty inheres in the nature of the service afforded by such agencies, in connection with the power possessed by carriers to formulate and enforce such reasonable regulations as the conduct of the business requires. . . . Having this power, it would be wholly irrational to say that no duty, commensurate with the power, rests on the carrier to advise the traveling public, by reasonable means, of regulation so necessary to any journey by rail; for such a pronouncement would essentially, cast upon the passenger the obligation, not simply to exercise reasonable prudence and diligence to ascertain the regulations, with respect to where, when, [588] and how his journey may be made under regulations existing and published, but to seek out unpublished regulations the operation of which affect his journey. The result would be, naturally, that no carrier of passengers would make any effort to give publicity to its regulations touching matters associated with the employment of its transportative agencies."

(2) We think the above statement of the law is correct, as applicable to the facts of this case, and that while the defendant had the right to assume that the plaintiff had informed herself as to the route to her desti-

nation, yet the obligation rested upon the carrier to give some notice of the arrival at the junction point, and of the fact that it was the junction point applicable to the route plaintiff was traveling. The undisputed evidence shows that there was such a regulation, which consisted of an announcement of the fact that it was the junction, and that it was necessary to change for points to the north on the line of the connecting carrier. If that announcement, in accordance with the regulation, was in fact made, then there can be no recovery in this case, but there is a dispute on that point. It is argued that inasmuch as the plaintiff confesses that she did not know that Heber Springs was on another line of railway, the announcement, even if it had been made, would have been ineffectual so far as she is concerned, and would have meant nothing to her. It is true, the plaintiff says that she did not know that she had to change cars at all, but we cannot say that an announcement of the change at Kensett would not have attracted the plaintiff's attention to the extent that she would have pursued further inquiry to ascertain whether or not that change applied to her route. The jury might have drawn the inference from the circumstances that the announcement, if made, would have put the plaintiff upon an inquiry which she would have pursued by asking information of the conductor. We are of the opinion, therefore, that there was enough to go to the jury on that issue, about which there was a sharp conflict in the testimony.

[589] (3) That issue was not, however, correctly submitted to the jury, and for that reason the judgment must be reversed for a new trial. The court gave the following instruction, over the objection of the defendant: "X. You are instructed that it was the duty of the defendant to use ordinary care to apprise plaintiff of the place she was to leave its train and catch a train on another road to continue her journey under the ticket defendant had sold her. By ordinary care is meant that care an ordinarily prudent person would exercise under the circumstances. If you find that her having been carried by Kensett was the result of want of ordinary care on the part of the employees of the defendant, then you will find for the plaintiff; if you find she suffered any damages if such failure to exercise ordinary care was the proximate cause. By proximate cause is meant the natural and probable result of an act, and that that should have been foreseen under the circumstances."

The instruction is erroneous in leaving it to the jury to determine what would constitute ordinary care. The regulation of the company for the junction station to be announced, and the announcement of the neces-

sity for changing cars for points on the intersecting line, was reasonable and constituted the full measure of the carrier's duty to the passengers. It was not proper to leave it to the jury to say whether or not, if that regulation had been complied with, it constituted ordinary care. The flagman testified that he made the announcement of the necessity for change of cars, and the jury may have accepted his statement as true and yet found that ordinary care required a special notice to the plaintiff that she must change cars in order to go to Heber Springs. The instruction ignores the real point at issue in the case, as to whether or not the announcement was made as testified by the flagman, and erroneously leaves it to the jury to determine whether or not the trainmen had exercised ordinary care "to apprise plaintiff of the place [590] she was to leave its train and catch a train on another road."

For that error, the judgment is reversed and the cause remanded for a new trial.

NOTE.

Duty of Carrier to Give Passenger Notice of and Time to Make Change of Cars.

It is the duty of a carrier of passengers who sells a ticket requiring a change of cars to give to the passenger reasonable notice in some form of the necessity of changing cars and the station where the change must be made. *Central of Georgia R. Co. v. Ashley*, 159 Ala. 145, 48 So. 981; *Dye v. Virginia Midland R. Co.* 20 D. C. 63, *Barker v. New York Cent. R. Co.* 24 N. Y. 599. And see the reported case. And at least in the case of a passenger on a sleeping car it is the duty of the carrier to awaken the passenger in time to dress and alight. *McKeon v. Chicago, etc. R. Co.* 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L.R.A. 252, wherein it was said: "As the plaintiff held the defendant's sleeping-car ticket to New Lisbon, she was necessarily expected to use it by occupying her berth until awakened for the purpose of making such change of cars. To make such change, it became the duty of the defendant, whether stipulated in the contract of carriage or not, to either awaken her in time to make the necessary preparation for such change in a suitable and decent manner, upon reaching the station or, failing to so awaken her before reaching the station, to hold the train at that point for a sufficient length of time to enable her to make such preparation as was necessary to change cars." As to the general duty to awaken a passenger before arriving at his destination see the note to *Bass v. Cleveland, etc. R. Co.* 7 Ann. Cas. 718.

However, in *St. Louis, etc. R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W.

324, a duty of inquiry was imposed on the passenger, the court saying: "The court charged the jury, in effect, that it was plaintiff's duty to inform herself as to the route she was to travel and the station at which she was to make a change, but in this connection he informed the jury that the measure of her duty in this respect was the use of ordinary care. We are of the opinion that the charge requested was the proper one to have been given. This action is based on negligence of the defendant in failing to stop its train and give notice thereof so plaintiff could alight therefrom. If this was done, defendant would not be liable, unless a custom had been established requiring greater diligence in helping plaintiff off the train, and it was immaterial what care plaintiff exercised in informing herself as to the place of changing cars. It was her duty to so inform herself, and if she did not do so and was not misled by defendant's agents or servants, and if by reason of this she was carried beyond her station, she cannot recover."

In *Lilly v. St. Louis, etc. R. Co.* 31 Okla. 521, 122 Pac. 502, 39 L.R.A. (N.S.) 663, it was held to be the duty of the train employees to give information on request as to a change of cars, the court saying: "In the instant case, when the servants of the company in charge of the train were requested by plaintiff to furnish her with information as to where it would be necessary for her to change trains, it became their duty to inform her; and their failure to do so constitutes, in our opinion, such negligence as renders the company liable in damages for all injury proximately resulting therefrom."

General public notice in the schedules and timetables of a necessity of changing cars is apparently sufficient in connection with an announcement on the train. *Page v. New York Cent. R. Co.* 13 N. Y. Super. Ct. 523, wherein it was said: "If the defendant gave such published notice of the running of its trains, and such special notice in the cars, of the necessity of changing cars at any particular station, that every traveler of ordinary intelligence, by the use of reasonable care and caution, would obtain all the requisite information as to the route to be traveled, and the cars to be taken at any intermediate point of the voyage, it discharges its whole duty in this respect. If a passenger, merely by a failure of his own to use such care and caution, instead of changing cars at a particular station, and taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty, or of contract, on the part of the company. The fact of the publicity of such regulations, the

time, manner, and circumstances of publishing them, and whether sufficient to bring home actual notice to the passenger, provided he bestows reasonable care and attention, in order to inform himself, is one to be determined by a jury." And see the reported case.

A passenger is not entitled to rely on information derived from a station agent in the face of a contrary announcement by the conductor. *Dye v. Virginia Midland R. Co.* 20 D. C. 63; *Texas, etc. R. Co. v. Lathrop* (Tex.) 192 S. W. 1080. See also *Barker v. New York Cent. R. Co.*, 24 N. Y. 599; *Lilly v. St. Louis, etc. R. Co.* 31 Okla. 521, 122 Pac. 502, 39 L.R.A.(N.S.) 663. In *Dye v. Virginia Midland R. Co.* supra, it was said: "It is known to be the special function of conductors of railway trains to be informed, and to inform others, what they are going to do with the trains they conduct. While the authorities hold that 'a traveler may rely with more confidence upon a ticket agent's assurance concerning fares and tickets, and the contract obligations they import, than that of any conductor,' it is equally known to the courts that a conductor's announcement concerning what he is about to do with his own train is more to be relied upon than the statement of a ticket agent concerning the same matter. If the functions and relative authority of ticket agents are thus recognized by the courts as matter of law, it would seem to follow that a passenger cannot disregard, and without inquiry, the statement of the conductor concerning the running of his train." In *Lilly v. St. Louis, etc. R. Co.* 31 Okla. 521, 122 Pac. 502, 39 L.R.A.(N.S.) 663, the court said: "It is the duty of the passenger, upon learning en route that he must change cars to reach his destination, to ascertain where he should make such change; and if he fails to do so and is carried over a wrong line, the railway company is not liable, unless he was misled by its agents or servants. *St. Louis S. W. R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324. But how is a passenger to obtain this necessary information? Evidently from the servants of the railway in charge of the train upon which the passenger rides. The method by which public travel upon railways for long distances is effected renders it necessary that the railway companies shall, through their agents and servants upon passenger trains, instruct the passengers thereon upon inquiry how they may reach their destination. In the transfer to connecting carriers, in the change of trains upon the same line of railway, in the transfer of coaches from the main lines to branch lines, and vice versa, and in the discontinuance of trains at the end of divisions and in the addition of new sections, no one, often, other than the persons in charge of the train upon which a passenger rides, to whom

the passenger has access, is able to furnish the information required by the passenger to enable him to know where and when he must make change of trains in order to reach his destination. It would be practically impossible for the agent of any station of a railway company to know at all times all the details relative to transfer and change of trains that must take place in a single journey of long distance upon a single system of railway, much less of the many changes that may and do take place in journeys over many different systems or lines. It is a matter of common knowledge and experience that the traveling public do resort to the employees in charge of the respective trains upon which they ride for information relative to all necessary changes; and that such information is uniformly furnished by such employees."

If an employee of a carrier gives to a passenger incorrect information as to changing cars, which is not corrected by any subsequent notice, and the passenger relying thereon is carried to the wrong place, the carrier is liable. *Robertson v. Louisville, etc. R. Co.* 142 Ala. 216, 37 So. 831; *Chicago, etc. R. Co. v. Floyd*, 115 Ark. 607 mem. 171 S. W. 913; *Davis v. Houston, etc. R. Co.* 25 Tex. Civ. App. 8, 59 S. W. 844.

While the duty to afford a passenger a reasonable time to change cars does not seem to have been passed on directly, the relation of passenger and carrier continues during the change (see the note to *Killmeyer v. Wheeling Traction Co.* Ann. Cas. 1915C 1220) and the general rule that a reasonable time must be given to board a train or alight therefrom (see the notes to *Hall v. Northern Pac. R. Co.* 14 Ann. Cas. 960, and *Chicago, etc. R. Co. v. Lampman*, Ann. Cas. 1912C 788) would seem to be applicable.

HILL

v.

NORTON ET AL.

West Virginia Supreme Court of Appeals—
May 26, 1914.

74 W. Va. 428; 82 S. E. 363.

**Appeal and Error — Harmless Error —
Overruling Demurrer to Declaration.**

An erroneous ruling upon a demurrer to each of two counts in a declaration, one of which is insufficient, is not alone ground for reversal, if plaintiff's evidence was admissible under the good count and was sufficient to sustain the cause of action therein averred.

Streets and Highways — Construction of Coal Vault — Presumption of Municipal Permission.

Permission by the municipality to construct and maintain a coal vault under and an opening thereto in a city pavement will be presumed from acquiescence and use continued for several years.

Coal Hole — Personal Injuries — Liability of Abutting Owner.

A lot owner who maintains a coal hole in a city pavement as an appurtenance, whether constructed by him or not, must exercise reasonable care in keeping it in a reasonably safe condition for use by the public as part of the sidewalk. Whatever the public safety reasonably requires is the measure of diligence to be exercised by him.

[See note at end of this case.]

Same.

If he knows, or by the exercise of reasonable diligence would know, the grating over a coal hole in the sidewalk in front of his property is defective, and fails to repair it, he is liable for an injury resulting therefrom to a pedestrian lawfully using the sidewalk.

[See note at end of this case.]

Same.

He remains liable for injuries to a pedestrian resulting from a defective coal hole grating in a pavement, when appurtenant to the premises, whether occupied in whole or in part by tenants, if the defect therein existed at the date of the demise.

[See note at end of this case.]

Same.

A pedestrian is not guilty of contributory negligence solely because he steps on a coal hole grating in a public sidewalk.

[See note at end of this case.]

Deeds — Appurtenances — Coal Vault in Street.

A grant of a lot abutting on a city street vests title to a coal vault under and an opening in a pavement, though in terms not expressly including either of them. Such title is, however, subject to the easement of the public for street purposes.

Landlord and Tenant — Liability of Landlord — Injury to Third Person.

At the expiration of a tenancy, whether with or without actual change of possession, a landlord may lawfully enter and make necessary repairs; and his neglect so to do renders him liable for injuries resulting from defects then existing in the premises demised.

Appeal and Error — Questions Reviewed — Specific Objection.

Unless brought to its attention by special bills of exception, or upon a motion for a new trial, specifically stating, as grounds therefor, the admission or rejection of evidence, this court will not consider the rulings of the trial court thereon.

Instructions Approved.

It is held that the trial court properly ruled on the instructions requested by the parties hereto.

Evidence — Sufficiency — Preponderance.

To sustain a finding in his favor, it is not essential there should be a distinct preponderance of evidence on behalf of the plaintiff. To have this effect, it is only necessary that the evidence, when considered in its entirety, reasonably justifies such verdict.

Appeal and Error — Scope of Review — Sufficiency of Evidence.

This court will not grant a new trial, where the evidence is voluminous and conflicting, unless palpably insufficient to sustain the verdict, or the amount clearly evinces partiality, prejudice, or passion on the part of the jury, or that they were misled by some mistaken view of the merits of the case.

Words and Phrases — "Distinct."

As defined by lexicographers, "distinct" means "clear to the senses or mind;" "easily perceived or understood;" "plain;" "unmistakable."

Error to Circuit Court, Ohio county.

Action by Blanch Hill, plaintiff, against S. P. and G. W. Norton, defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. **AFFIRMED.**

James W. Ewing and Hubbard & Hubbard for plaintiffs in error.

John P. Arbenz for defendant in error.

[430] *LYNCH, J.*—The injuries for which plaintiff sued resulted from a fall into a coal hole in the pavement adjacent to the lot and building thereon owned by defendants, who are now plaintiffs in error. The cover slipped or tilted when plaintiff stepped on it, one of her legs suddenly dropping into the opening, her body falling heavily across the upper edge of the circular iron grating.

In support of their demurrer to each of the two counts, defendants argue the declaration is insufficient; because the averments of the first are in part stated in the disjunctive, and both charge defendants "as insurers" of the safety of pedestrians on the pavement in front of their property. From the discussion of other questions arising on this review, and the conclusion reached thereon, will fully appear our reasons for holding the second objection untenable. As to the first, even if deemed sufficient to invalidate the first count, because uncertain and therefore violative of the strict rules of pleading; yet, if the second count is sufficient, as we find it to be, and the evidence sustains the cause of action therein averred, such defect does not of itself warrant a reversal. *Merchants', etc. Bank v. Evans*, 9 W. Va. 373; *Stolle v. Aetna F. etc. Ins. Co.* [431] 10 W. Va. 546, 27 Am. Rep. 593; *Haigh v. U. S. Bldg. etc. Assoc.* 19 W. Va. 793; *Hood v. Bloch*, 29 W. Va. 224, 11 S. E.

910; *Virginia Cedar Works v. Dalea*, 109 Va. 333, 64 S. E. 41; *Johnson v. Com.* 102 Va. 927, 46 S. E. 789. That it was thus admissible and sufficient appears from the facts detailed and the conclusion reached on this review. As applicable here, the rule announced in the cases cited is that, notwithstanding the error, if indeed it be such, committed by the trial court in its ruling on the demurrer, still if the evidence certified was admissible under the second count, and sufficient to warrant the verdict complained of, this court will not, for that reason alone, reverse the judgment below.

When and by whom the coal vault and opening were first made, or whether made with or without municipal license, the record affords no means of ascertaining. But the record warrants the conclusion that they were constructed conjointly with the basement and superstructure, a brick building at least two and perhaps more stories in height, and have since been maintained as appurtenances to the building. It also warrants the further conclusion that the building is an old one. The legal, but rebuttable, presumption is that the coal vault and opening were first constructed by and with the consent of the municipality. *Hart v. McKenna*, 106 App. Div. 219, 94 N. Y. S. 216; *Korte v. St. Paul Trust Co.* 54 Minn. 530, 56 N. W. 246; 1 *McAdam in Landl. & Ten.* 1632. "Permission to construct the vault may be inferred from acquiescence in its maintenance for many years." 3 *Dillon on Mun. Corp.* § 1180.

The evidence justifies the conclusion that at no time was the grating over the coal hole securely fastened by rod or chain, as required by municipal ordinance passed in 1881, or that, if thus or otherwise fastened, the appliances provided had long since ceased to be effective for that purpose. That plaintiff stepped on the cover and was injured, no one denies. Nor is there any proof that she did not exercise reasonable care for her own safety. Defendants at the time of their purchase knew of the existence of the opening in the pavement and of the grating covering it, although George Norton says: "I knew in a general way there was a vault there; but we never used it, and it never occurred to me anything about it." But plaintiff's husband, who saw the grating after the accident, testifies: "I could lift it up. There [432] was no bolt and no rod, nothing holding it. It was just loose, and I lifted it out myself and put it back in. I tried it with a stick, like the rung of a chair. I had something like that with me, like the hook on the stock of an umbrella, and turned it over. I naturally lifted it up and turned it around." But the extent of plaintiff's injury, and whether temporary or permanent, are questions as to which the testimony is voluminous and conflicting.

Defendants deny liability, first, on the theory that title to the coal area, and the means of access thereto from the sidewalk, did not vest in them by virtue of their deed. That they did pass thereunder, as appurtenances to the building, subject to the easement for street purposes, whether in terms expressly granted or not, is abundantly sustained by the authorities. *Clifton v. Weston*, 54 W. Va. 250, 46 S. E. 360; *Stewart v. Ohio River R. Co.* 38 W. Va. 438, 18 S. E. 604; *Foley v. County Court*, 54 W. Va. 16, 46 S. E. 246; *Marbury v. Jones*, 112 Va. 389, 71 S. E. 1124, 3 *Dillon on Mun. Corp.* § 1180, 1183; *Parish v. Baird*, 160 N. Y. 302, 54 N. E. 724.

Defendants also deny liability in any event, and contend that, if any liability exists under the circumstances of this case, it devolved upon Helmbright, who as tenant occupied part of the premises at the time they acquired title thereto and thereafter without change of possession continued as their tenant at the date of the injury. These two grounds of defense may be considered conjointly.

It is true, when defendants purchased the property in January, 1907, Helmbright occupied the first floor and the basement. His tenancy, however, expired about one month thereafter, when he became their tenant of the same parts but not of the building in its entirety. He thus remained in possession at the date of the injury. In this connection, it may be observed, and the testimony shows, that the coal hole and opening had not been in use, at least for the purpose originally intended, for twenty years or more prior to the accident; and Helmbright did not use either of them at any time during his tenancy, which began in 1906. From that time at least, to the date of the accident in 1909, it is fair to conclude from the testimony, the grating was not securely fastened in the frame, although it does not appear any person except the plaintiff sustained injury thereby.

[433] The authorities seem fully in accord upon the proposition that if at the date of the lease, or a renewal thereof, whether by the same or subsequent owners, the premises are out of repair or in a defective condition, whereby injury occurs to a third person, the owner is liable, either alone or jointly with the tenant. As stated by 1 *McAdam on Landl. & Ten.* 1636: "Even though the landlord parts with possession of the entire premises, he remains liable where at the time of the lease the sidewalk is unsafe because of the defective or negligent condition of something placed by the abutting owner in, on or by the sidewalk as a convenience or easement to his premises." While they do not concur in holding the landlord liable under all the varying conditions involved, the "coal hole cases" in the main agree such liability

exists where the vault and opening are defective at the date of the lease. *Delay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; *Frischberg v. Hurter*, 173 Mass. 22, 52 N. E. 1086; *Anderson v. Dickie*, 1 Robt. (N. Y.) 238; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Whalen v. Gloucester*, 4 Hun (N. Y.) 24; *Finnigan v. Biehl*, 81 N. Y. S. 1116; *Matthews v. New York*, 78 App. Div. 422, 80 N. Y. S. 360; *Owings v. Jones*, 9 Md. 108; 1 Taylor on Landl. & Ten. § 175. In some instances, both landlord and tenant have been held jointly and severally liable. *Mancuso v. Kansas City*, 74 Mo. App. 138; *McLaughlin v. Kelley*, 230 Pa. St. 251, 79 Atl. 552, 50 L.R.A. (N.S.) 305; *Irvin v. Wood*, supra; *Calder v. Smalley*, 66 Ia. 219, 23 N. W. 638, 55 Am. Rep. 270; 1 *Shear. & Red. Neg.* §§ 708-10.

In *Gelof v. Morgenroth*, 130 App. Div. 17, 114 N. Y. S. 293, and *Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 66 Am. St. Rep. 575, 41 L.R.A. 554, the tenant occupied the ground floor only—other parts of the building, as in this case, being in possession of the landlord or other tenants. The tenant who occupied the first story covenanted to make repairs. The court, in the first case, said mere occupancy of the storeroom and cellar did not relieve the owner from the "duty of preventing the sidewalk from becoming dangerous to those using the street." And, in the second case, it was held that upon the landlord devolved an implied duty to use reasonable care in inspecting and repairing a grate in the sidewalk in front of his property. While not required to repair general defects, yet when he cut a hole in the sidewalk, the court said, the duty devolved on him properly to construct the opening and thereafter to use reasonable care to keep it in [434] repair as long as he remained in possession. "The duty sprang from the necessity of having safe sidewalks, and, as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with the public highway, be justified, even when permission is duly granted." Upon transfer of the entire interest and possession, as the duty runs with the land, the same duty and liability would devolve upon the grantee, whether in fee or for a term. So a lease of the entire premises and possession thereof by the tenant would doubtless throw the burden upon the latter. But, even though the tenant agrees to keep the premises in repair, the owner remains liable for injuries resulting from a defective or unsafe condition existing at the date of the demise. *Wells v. Ballou*, 201 Mass. 244, 87 N. E. 576; *Hill v. Hayes*, 199 Mass. 411, 85 N. E. 434, 18 L.R.A. (N.S.) 375; *Matthews v. DeGroff*, 13 App. Div. 356, 43 N. Y. S. 237; *Calder v. Smalley*, supra.

From these and other authorities, we find the general rule to be that, although the owner is authorized to maintain an opening in the sidewalk, he is liable to the exercise of reasonable care and diligence in making and keeping the same in a safe condition. *McGaffigan v. Boston*, 149 Mass. 289, 21 N. E. 371; *Leahan v. Cochran*, 178 Mass. 566, 60 N. E. 382, 86 Am. St. Rep. 506, 53 L.R.A. 89; *Hill v. Hayes*, 199 Mass. 411, 85 N. E. 434, 18 L.R.A. (N.S.) 375; *Wells v. Ballou*, supra; *Irvin v. Wood*, supra; *Canandaigua v. Foster*, supra; *Denver v. Dean*, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594; *Drake v. Kansas City*, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759; *McLaughlin v. Kelley*, supra; 1 *Elliott on Roads and Streets*, § 902; *Joyce on Nuisances*, §§ 231, 232; *Dickson v. Hollister*, 123 Pa. St. 421, 16 Atl. 484, 10 Am. St. Rep. 533. Nor is actual knowledge by him of an existing defect in the vault or its covering essential to liability. It is sufficient if by the exercise of reasonable diligence he could have known of the dangerous condition. *Gillis v. Cambridge Gas Light Co.* 202 Mass. 222, 88 N. E. 779; *Calder v. Smalley*, 66 Ia. 219, 23 N. W. 638, 55 Am. Rep. 270; *Anderson v. Dickie*, 1 Robt. (N. Y.) 238; *Latell v. Cunningham*, 122 Minn. 144, 142 N. W. 141; *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079; *Hayes v. Seattle*, 43 Wash. 500, 86 Pac. 852, 117 Am. St. Rep. 1062, 7 L.R.A. (N.S.) 424. See also *Keating v. Boston*, 206 Mass. 327, and valuable note 19 Ann. Cas. 464, 92 N. E. 431. As said in *Timlin v. Standard Oil Co.* 126 N. Y. 525, 27 N. E. 786, 22 Am. St. Rep. 845, even if the owner did not create the defective condition, yet "if to his knowledge it exist on his premises at the time of the demise, and is of a character dangerous to the public or an adjoining owner, or if he were in truth ignorant [435] and yet by the exercise of reasonable care and diligence he would have known of its existence, there is no principle which can exempt him from the responsibility any more than if he created the nuisance himself." Whether the grating was defective when the Nortons became owners of the property and at the time of their lease to Helmbright, and whether they negligently permitted the defective and unsafe condition to remain, and, if so, what constituted negligence on their part, were questions solely for the jury. *McGaffigan v. Boston*, supra; *Wells v. Ballou*, supra; *Hill v. Hayes*, supra; *Gillis v. Cambridge Gas Light Co.* supra; *Anderson v. Dickie*, supra; *Reinhard v. New York*, 2 Daly (N. Y.) 243; *Sterling v. Thomas*, 60 Ill. 264; *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079; *Dickson v. Hollister*, supra; *Calder v. Smalley*, 66 Ia. 219, 23 N. W. 638, 55 Am. Rep. 270; *Hayes v. Seattle*, supra; *Matthews v. New York*, 78 App. Div. 422, 80 N. Y. S. 360; *Latell v. Cunningham*, supra.

In *Calder v. Smalley*, the court said: "It was shown that the covering of the coal hole was without fastenings, and subject to be removed by any person. The jury, we think, could well have found that it was negligent to leave the covering in that condition; that the care required by the law, for the safety of those who frequented the street, demanded that such a trap should not be arranged for them in the sidewalk, which could be readily set by the mischievous and malicious, and would be set by the negligent, who would fail properly to replace the cover after using it."

Nor can defendants exonerate themselves from liability, on the ground that at the time of their purchase a tenant of their grantors was and remained in possession of part of the premises. If, when they purchased, the property had been vacant and subsequently leased by the Nortons, there could be no question of their duty to repair and fasten the grate if then dangerous; and if thereafter they leased to Helmbright, whether with or without a covenant on his part to repair, the defective condition continuing, they would still remain liable for any injury occasioned thereby. The owners then clearly had the right to enter and observe the condition of the premises, including the opening in the pavement, and make necessary repairs. And it was their duty to enter for this purpose—a duty devolving upon them in order to prevent injury to pedestrians on the highway. Any failure on [436] their part in the performance of that duty would render them liable to the person injured. The mere fact that part of the premises were occupied by Helmbright would not operate as an excuse. They had the same right and authority at the termination of the lease under which he first entered. And if when they again leased to him they knew, or by the exercise of reasonable diligence could have known, the granting was defective, and did not repair it, we are unable to perceive any difference in their duty or liability; both remained the same.

As was said in *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. S. 1051: "Although the defect in the structure developed during the period covered by the lease, if the owner thereafter made another lease to the same parties without inspecting the structure, he is liable, as at the expiration of the first lease he had a right to enter and make an examination. . . . If he leases the premises, knowing the public use is to continue, he must at least be reasonably assured they have not deteriorated, and are still safe for occupancy by the public. This obligation requires affirmative action on his part; and, in order that he may be exculpated to one injured by reason of the decay of the place he vouched for, it must appear he inspected the property or in some other adequate manner

fulfilled his obligation to the public before leasing the same. Any other rule might relieve a responsible owner from the duty he owes to the public, and shift the burden to an irresponsible tenant." See also *Matthews v. DeGroff*, 13 App. Div. 356, 43 N. Y. S. 237; *Whalen v. Gloucester*, supra; *Mancuso v. Kansas City*, supra. *Fleischner v. Citizens' Real Estate*, etc. Co. 25 Ore. 119, 35 Pac. 174, holds that a "landlord who renews a lease after the creation of a nuisance upon the premises thereby becomes chargeable for its continuance. . . . Upon the surrender of the old lease, the company was invested with the right of entry, and, as the nuisance was in existence upon the premises, it must be presumed to have been aware of the fact, and hence it is liable for its continuance under the exception to the general rule that it had demised premises with a nuisance then in existence thereon. The law is well settled that if the tenant creates a nuisance upon the premises during the term, by an unusual or extraordinary use thereof, although the landlord can not be made [437] chargeable for the consequences in the first instance, yet, if he subsequently renews the lease with the nuisance thereon, he becomes chargeable for its continuance." *Sandford v. Clarke*, 21 Q. B. D. (Eng.) 398, holds that, even on a weekly tenancy, the landlord could enter and make repairs at the end of any week; and that, failing to do so, he is liable for any injury resulting from the defective condition of a coal plate in the pavement, as his duty requires the exercise of ordinary care in anticipation of defects which are the legitimate result of use and climatic influences.

On the admission and rejection of certain evidence, oral and documentary, defendants complain. But, as no part of what was thus admitted or rejected became a part of the record by special bills of exception or as grounds of the motion for a new trial, we decline, under the authority of *Gregory v. Ohio River R. Co.* 37 W. Va. 606, 16 S. E. 819; *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953; *State v. Henaghan*, 73 W. Va. 706, 81 S. E. 539, and other cases decided at the present term, to devote the time necessary to search the voluminous record in order to discover the various rulings complained of by them.

It is apparent, without further discussion, that plaintiff's instruction C was eminently proper. It advised the jury that, if defendants maintained a coal hole in the sidewalk in front of their premises, it was their duty to equip and maintain it "in a reasonably safe and proper condition, so as to be reasonably safe to the persons walking upon and along said sidewalk, and for any injury arising from their failure so to do they are liable." Instruction D seems immune from

the criticism to which defendants attempt to subject it. More than once it has been approved by this court in identical or similar terms. *Riley v. West Virginia Cent. etc. R. Co.* 27 W. Va. 151, 161; *Carrico v. West Virginia Cent. etc. R. Co.* 39 W. Va. 102, 19 S. E. 571, 24 L.R.A. 50. The limitation as to the amount of damages ascertainable did not vitiate the instruction. It simply informed the jury not to exceed the sum claimed by the declaration. That it did not mislead appears from the amount found by the verdict.

Further complaint is made by defendants of the refusal by the court to give their instructions from 8 to 16 inclusive. The last seven were very properly rejected; because in conflict with the authorities we have cited, or misleading, or without [438] evidence in their support. We further think instruction 8 was wrong; for it told the jury "there is no rule of law necessarily requiring the defendants to fasten the lid of the coal hole with a rod or chain." The ordinance in evidence specifically requires the cover to be fastened in the manner stated in the instruction. But, even in the absence of such ordinance, the owner, as we have seen, was required by law to secure the covering in some manner to make the grating reasonably safe for pedestrians on the highway. The instruction was in direct contravention of the rule thus announced. It was also misleading; because, if given, the jury might have inferred that no duty devolved upon the owners to fasten the grating in any manner, or to keep it in a reasonably safe condition of repair. Instruction number 9, asked by defendants, if given, would have informed the jury they could not find for plaintiff unless they believed there was a *distinct* preponderance of the evidence in her favor. As defined by lexicographers, "distinct" means "clear to the senses or mind," "easily perceived or understood," "plain," "unmistakable." But it is not essential that the evidence on behalf of a party on whom rests the burden of proof must unmistakably preponderate in his favor in order to entitle him to a verdict, or that for this purpose the preponderance must be clear to the mind or senses, or easily understood or perceived. Evidence which when considered in its entirety satisfies the minds of the jury of the truth of the facts in issue is sufficient to show a preponderance in favor of such party; and to have this effect the preponderance need not be perfectly clear. "In such case an honest belief, a belief which results from a careful, diligent investigation of the proof, is all that is to be expected." *Simmons v. West Virginia Ins. Co.* 8 W. Va. 474.

Defendants likewise urge reversal because, as they insist, the verdict is excessive and

contrary to the evidence. The case was twice tried, each time resulting in a finding for plaintiff. Although the second verdict was much larger than the first, we cannot say it was so excessive as to warrant interference by this court. Plaintiff was seriously injured. While before the accident she could and did perform, unaided, all her household duties and obligations; since that time, [439] the proof tends to show, she was unable to perform such duties, became feeble, nervous and excitable, and required the constant assistance of a servant or employee. Many witnesses were examined by both parties, among whom were physicians and surgeons of eminent ability, at least two of whom made a physical examination and treated plaintiff for the injuries received by her, while others testified as experts. The jury and the trial judge saw the witnesses, including the plaintiff, and heard their testimony, which, as stated, was voluminous and conflicting.

Finding no error, we affirm the judgment.

Affirmed.

NOTE.

Legal Liability for Injuries Sustained by Pedestrian from Coal Hole in Sidewalk.

Liability of Municipality, 494.

Liability of Owner of Premises, 495.

Liability as between Owner and Occupant of Premises, 495.

Liability of Person Using Coal Hole, 496.

Contributory Negligence, 496.

Liability of Municipality.

The rule laid down in *Keating v. Boston*, 206 Mass. 327, 19 Ann. Cas. 464, that a municipality is liable for injuries caused by a defect known by it to exist in the cover of a coal hole in the street finds support in several recent cases. Thus the municipality is liable where an ordinance requires manhole covers placed in sidewalks to have a rough surface and a pedestrian is injured on account of the smooth and slippery surface of a coal hole cover. *Latell v. Cunningham*, 122 Minn. 144, 142 N. W. 141.

An action lies against a municipality for an injury to a pedestrian from a coal hole which has been left open and unguarded for such a length of time as to charge the municipality with notice thereof. *Irwin v. Kansas City*, 173 Mo. App. 711, 160 S. W. 30. A municipality is charged with notice of the defective condition of a coal hole or other opening in the sidewalk, if the defect has existed a sufficient length of time to be observed by its officers exercising reasonable

supervision, and is liable to a person for injuries occasioned as a result of the defect. *McLaughlin v. Kelly*, 230 Pa. St. 251, 79 Atl. 552, 50 L.R.A.(N.S.) 305. The city has notice from the beginning where the defect of a coal hole is a structural one. *Hebenheimer v. St. Louis (Mo.)* 189 S. W. 1180.

The liability of a municipality to a person injured by the defective condition of a coal hole or other opening in the sidewalk is not affected by the fact that the owner of the premises is ultimately responsible. *McLaughlin v. Kelly*, supra. But where the municipality pays a judgment rendered against it in favor of a pedestrian injured by a coal hole improperly constructed by a property owner in the sidewalk of the municipality, it may recover over against the property owner responsible for the injury the amount of the judgment and attendant costs unless the municipality is itself at fault. *Canton v. Torrance*, 151 Ill. App. 129.

Liability of Owner of Premises.

It has been held recently that a property owner maintaining a coal hole or other opening in a sidewalk is bound to know that persons will pass and repass and step on the cover without apprehending danger, and he is, therefore, held to care and diligence in keeping it secure. *McLaughlin v. Kelly*, 230 Pa. St. 251, 79 Atl. 552, 50 L.R.A.(N.S.) 305. And see the reported case. An abutting owner is liable for injuries received by a pedestrian where the coal hole or cap or cover is negligently constructed or out of repair. Where a pedestrian steps on and through the cover of a coal hole, because the cover is worn out or out of repair, he may as a rule recover from the owner of the premises. *Kuhn v. Chicago*, 178 Ill. App. 411; *Jawitz v. Hellinger*, 86 Misc. 34, 148 N. Y. S. 5; *Young Men's Christian Assoc. v. Jasse (Tex.)* 183 S. W. 867. But it is well settled that a property owner must have some length of time, reasonable under the circumstances, to ascertain the defective condition of a coal hole cover before liability can be imputed for injuries occasioned resulting from the defective condition of the sidewalk. *Maldosky v. Germania Bank*, 127 N. Y. S. 292; *Pool v. Paddell*, 160 N. Y. S. 1082.

The owner of the premises is liable where a pedestrian is injured on account of the smooth and slippery surface of a coal hole cover and an ordinance is in force requiring manhole covers placed in sidewalks to have a rough surface. *Latell v. Cunningham*, 122 Minn. 144, 142 N. W. 141.

The municipality may recover the amount of a judgment and attendant costs rendered against it in favor of a person injured by an improperly constructed coal hole in the side-

walk of the municipality, which it is compelled to pay, against the property owner responsible for the defect if the municipality itself was not negligent. *Canton v. Torrance*, 151 Ill. App. 129.

Liability as between Owner and Occupant of Premises.

The recent cases hold that the owner of the premises is not relieved from liability to a pedestrian for injuries sustained on account of the defective condition of a coal hole by the fact that the lessee of the owner is in possession of the premises at the time of the injury, if the injury is due to the faulty construction of the coal hole, and such condition existed and was known to the owner at the time of the demise of the premises to the lessee. *Jawitz v. Hellinger*, 86 Misc. 34, 148 N. Y. S. 5; *McLaughlin v. Kelly*, 230 Pa. St. 251, 79 Atl. 552, 50 L.R.A.(N.S.) 305. If the sidewalk becomes defective by reason of the condition of a coal hole while the property is in the occupancy and control of a tenant, resulting in injury to a pedestrian, the tenant is liable. *McLaughlin v. Kelly*, supra. And where the injury is attributable to the negligence of the tenant or of others not connected with the abutting owner, the landlord is not liable. *Clay v. El Dorado Hotel Co.* 121 Ark. 253, 180 S. W. 977. In *McLaughlin v. Kelly*, supra, the court said: "The landlord cannot relieve himself from liability by placing the tenant in possession of the property. It is his duty to remove the nuisance or defect before he delivers the premises to the tenant, and if injury results on account of his failure to perform this duty he is not relieved from liability by reason of the tenant's possession. To relieve a landlord from liability under such circumstances would be . . . contrary to public policy and substantial justice, for it would not infrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities of his proprietorship. . . . That the premises at the time of the accident were in possession of a tenant does not under the circumstances relieve the defendant from his duty to inspect and repair the pavement. The primary duty of keeping a sidewalk in repair rests upon the owner of the abutting premises. The municipality is liable to a party injured by reason of its defective condition but the owner is ultimately responsible. If the sidewalk becomes defective while in the occupancy and control of a tenant resulting in injury to a third person, the tenant is liable, and if the defect existed at the time of the demise, the landlord is responsible to the injured party."

Liability of Person Using Coal Hole.

A third person using a coal hole and leaving it uncovered is liable to a pedestrian injured thereby. Thus, if a coal hole is left open and unprotected by a brewing company delivering beer to the occupant of the premises, the brewing company may be held liable for injuries sustained by a person who without negligence falls into the coal hole. *Powell v. Wilhelm*, 49 Pa. Super. Ct. 268.

Contributory Negligence.

Several recent cases support the doctrine that the reasonable care which the law exacts of all persons, in whatever they do involving the risk of injury, requires travelers on the footways of public streets to look where they are going; but that this does not necessarily imply that the pedestrian must keep his eyes constantly and at every moment on the pavement to discover a possible defect in a coal hole therein. If there is a conflict of testimony, or for any cause there is reasonable doubt as to the facts, or as to the inferences to be drawn from the facts established by the evidence, the contributory negligence of the pedestrian is a question for the jury. *Powell v. Wilhelm*, 49 Pa. Super. Ct. 268. And see the reported case. In *Hebenheimer v. St. Louis (Mo.)* 189 S. W. 1180, the court said: "Respondent's duty was to exercise ordinary care for her own safety. She was not, however, 'bound to look for hidden dangers.' All that was required of her was that she walk with her eyes open, observing her 'general course, and in the usual manner.'" In *McLaughlin v. Kelly*, 230 Pa. St. 251, 79 Atl. 552, 50 L.R.A.(N.S.) 305, the court said: "The question of the contributory negligence of the plaintiff is not before us. When she stepped aside to avoid the crowd she was still on the pavement, and that act did not convict her of negligence. Under the evidence, she was on the sidewalk and where she had the right to be. She testifies that she was exercising care when she stepped toward the building. 'Q. Were you using the care that you usually use when you walk on the sidewalk? A. I certainly was, I tried to be as careful as possible.' The cover on the hole was apparently substantial and safe, and the plaintiff was not required to make a critical examination before stepping on it. In the absence of knowledge to the contrary, she had the right to assume that it would support her weight. The request for binding instructions, therefore, could not have been granted on the ground that the plaintiff, by her negligence, contributed to her injuries."

HOLMBERG

v.

JACOBS.

Oregon Supreme Court—July 20, 1915.

77 Oregon 246; 150 Pac. 284.

Master and Servant — Liability for Injury to Domestic Servant.

Where the complaint, in an action for injuries to a cook from the explosion of a gas stove, alleged that the explosion was due to defects in the stove, evidence that the burners had been lighted at least 20 minutes before the explosion did not authorize a recovery by plaintiff; it being incumbent on plaintiff, not only to establish the happening of the accident, but also that it happened on account of the negligence alleged in the complaint.

[See note at end of this case.]

Judicial Notice — Inflammable Nature of Gas.

In an employee's action for injuries from the explosion of a gas stove, the court will take judicial notice that gas used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an explosion, if present in any considerable volume.

[See 124 Am. St. Rep. 30.]

Expert Evidence — Irresponsive Answer to Hypothetical Question.

The answer elicited in response to a hypothetical question propounded to a witness on cross-examination was not available as evidence, where it was not based on evidence corresponding with the hypothesis advanced.

Dismissal and Nonsuit — Failure of Proof.

Where the testimony for plaintiff, in a personal injury case, leaves the cause of the accident to mere speculation, a nonsuit should be entered.

Appeal from Circuit Court, Multnomah county: CLEETON, Judge.

Action by Eva Holmberg, plaintiff, against Fred A. Jacobs, defendant. Judgment for plaintiff. Defendant appeals. **REVERSED.**

[247] This is an action by Eva Holmberg against Fred A. Jacobs.

The plaintiff was in the service of the defendant as a cook from July 11 to 13, 1913. She says he furnished a gas stove to be used in her employment. She then alleges:

"That this defendant carelessly and negligently allowed the said stove to become in a defective, dilapidated and dangerous condition, and the burners, flues and gas-pipes in the said stove to become so burned, rusted and corroded that gas would escape and ac-

cumulate in the said stove, making the same dangerous and unsafe when any person should attempt to light and operate the said stove; that the said stove was in a dangerous and unsafe condition as aforesaid on the 13th day of July, 1913, and this defendant knew, or by the exercise of reasonable care and prudence could have known, that the said stove was in a dangerous and unsafe condition; that this plaintiff did not know of the said danger on the 13th day of July, 1913; that, in pursuance of the duties of her employment as cook for this defendant, this plaintiff, on the 13th day of July, 1913, had lighted and was attempting to operate the said gas stove and to use the same for the purpose of cooking, but owing to the defective condition of the said stove, and an accumulation of gas resulting therefrom, [248] an explosion of gas ensued, causing great injury to plaintiff."

These quoted averments are traversed by the answer. The remainder of the complaint relates to the nature of her injuries and consequent damages. The court denied a motion for a nonsuit made by the defendant at the close of plaintiff's case, and the trial resulted in a verdict and judgment against him, from which he appeals.

W. B. Shively, Jr. for appellant.

Benson & Benson and Hamilton Johnstone for respondent.

BURNETT, J. (*after stating the facts*).—The sole question presented for our consideration is whether the court erred in refusing the motion for a nonsuit. The only evidence about how the accident happened is that of the plaintiff herself. She testifies that she began her work for the defendant on July 11th. She says:

"I got there in the morning and prepared one meal, luncheon, discovered the stove, what is in a bad condition, didn't do the work, didn't cook or bake. After the meal was over, goes to Mrs. Jacobs, tells her, 'There is something the matter with the stove; it do not work satisfactory;' and she says to me, 'I have sent for the man already to come and attend to it.' The man came later."

She states he came and examined the stove that day; returned the third day and put in new burners. Speaking [249] of the condition of the stove before the repairs were made, she said, in substance, that the pipes and burners of the stove were rusty, dirty and corroded; that the burners appeared to be clogged, as well as rusty and corroded. She says the repair man put in the new burners about 3 o'clock in the afternoon, but she gives no account whatever of their condition, whether good or bad. She did not use the stove after that until about 6 o'clock in the evening of the same day. Concerning the accident, she states:

"The dinner was prepared. I was going to bake the rolls. I went to make dessert at half-past 6, lit the oven for to get my oven hot.

"Q. At what time?

"A. At 6 o'clock; let it burn there for 10 minutes or 20 minutes, opened the door to see if the oven was warm enough to receive my biscuits. It wasn't. I closed the door, let it stay there for some minutes longer, opened the door again, and still it was not warm.

"Q. That is twice.

"A. And then in a few minutes I put my biscuits in. They were there for 7 minutes. I opened the oven door, and a terrible explosion and the flames leaped around me."

She stated there were two burners under the oven, and, in several places in her testimony, insisted that they were both lighted. On cross-examination she was asked:

"How many years' experience have you had with a gas stove?

"A. For the last 20 years.

"Q. You say this stove was in a very bad condition when you looked at it; you say it was rusty?

"A. I was there for one meal when I reported the ill condition of the stove.

"Q. To whom did you report the ill condition?

"A. To Mrs. Jacobs.

[250] "Q. And what did you tell her?

"A. This stove will not stew or bake satisfactory and something had to be done to it.

"Q. Did you tell her anything else at that time?

"A. No."

In another part of her cross-examination she was asked:

"Just tell the jury how you lit the oven (these burners) at the time this accident happened.

"A. The oven was lit and had been burning for 20 minutes before the accident happened.

"Q. It was burning?

"A. For 20 minutes before the accident.

"Q. Are you sure it was 20 minutes?

"A. Yes, because I watched the clock."

In answer to a question by a juror, she said:

"Wait a minute. It burned for 10 minutes, and I opened the oven door to find out if my oven was warm enough to put in my rolls, and it was not warm enough to put in my rolls, so I closed the oven door and waited for the heat to increase, and I opened the oven door, and still it wasn't quite warm enough, and closed it again, and opened it again and put in my rolls, and the rolls were in for 7 minutes, and then I opened the door, and that is when the explosion happened so I got this terrible burn."

The negligence charged upon the defendant is:

"That this defendant carelessly and negligently allowed the said stove to become in a defective, dilapidated and dangerous condition, and the burners, flues and gas-pipes in the said stove to become so burned, rusted and corroded that gas would escape and accumulate in the said stove, making the same dangerous and unsafe when any person should attempt to light and operate the said stove."

A fair construction of this allegation is that the stove was in such a dilapidated condition that, although the flames used in cooking were extinguished, [251] the gas continued to escape into the oven, so that, on lighting it again, the accumulated volume of gas would be immediately exploded. In other words, the substance of the charge of negligence is that the stove was in such a state that the mere attempt to light it would at once set off an explosion and not that the blast would occur after the gas had been burning for some time. On the hypothesis that the stove leaked, the testimony given by the plaintiff shows the gas must have been gathering in the oven for 3 hours, or from the time the new burners were installed at 3 o'clock until she lighted the oven at 6 o'clock; and further, if her testimony is true, the explosion would have occurred the instant the match was applied; but, as a matter of fact, as she states, both burners had been lighted at least 20 minutes before the blast went off. There is no evidence to show any smell of escaping gas prior to lighting the oven. Neither is there anything to disclose that there was any way for it to escape into the oven, except through the pilot light and the two burners which had been put in only 3 hours before. There is nothing showing that there were any pipes in the oven, and the record is utterly silent as to whether there was any defect in the new burners in use when the accident is said to have occurred.

2. The averment of negligence must be proven as laid, according to the familiar rule that the testimony must correspond with the allegations of the complaint: *Knahtla v. Oregon Short-Line, etc. R. Co.* 21 Ore. 136, 27 Pac. 91. The charge of negligence and the narration of the mishap do not correspond with each other. The mere occurrence of the injury furnishes no cause of action. Under the rule of the evidence corresponding with the allegations, it is incumbent upon the [252] plaintiff, not only to establish the happening of the accident as stated, but also that it happened on account of the negligence alleged in the complaint. Although she testified that the pipes were rusty and corroded, the plaintiff did not show in any way that rust or corrosion was inflammable or that they would cause a sudden detonation of the fuel vapor. It cannot be fairly said that gas was continually escaping into the oven for

3 hours, and that, upon being lighted, the explosion did not occur until 20 minutes afterward, for it is scientific fact of which the court will take notice that gas ordinarily used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an instant explosion, if it is present in any considerable volume. According to the plaintiff's testimony, she opened the oven 3 different times after it was lighted and before the accident happened. It cannot be rationally deduced that, under the circumstances, the disruption arose from any previously accumulated gas. The only way it could get into the oven, so far as it appears from the testimony, was through the two new burners recently installed and the pilot light by which they were ignited. She insists, however, that both these burners were lighted; and, this being true, they necessarily must have consumed the gas passing through them.

The plaintiff counts somewhat upon the cross-examination of experts offered by the defendant. One hypothetical question was this:

"Mr. Patterson, if, as a matter of fact, from leaks either from the burners or from other pipes, or the stopping of the vent-pipes failing to carry away leaking gas, gas had escaped into the oven, the oven door being closed, is it possible that in the course of time, with the gas leaking into the oven, and the burners underneath [253] burning at full flow for several minutes, that constantly increasing heat added to the constantly accumulated gas might cause an explosion, just the same as if flame were brought to the gas? Is that impossible under those conditions?"

"A. No, sir."

This interrogatory is not applicable to the case, for the reason that there was no evidence of any stopping of the vent-pipe nor of any leak from any pipe or any way in which the gas could get into the oven, except through the lighted burners. To be available, a hypothetical question must be based upon some other evidence in the case corresponding with the hypothesis advanced. In short, having alleged the negligence to consist in allowing the stove to become so out of repair that it would leak gas to such an extent as to make it dangerous to attempt to light it, the plaintiff must establish that averment as stated, and the requirement is not met by proving that, after the stove had been lighted for more than 20 minutes, an explosion occurred.

4. Such a state of the testimony leaves the jury merely to speculate upon the actual cause of the accident, and the authorities are unanimous to the effect that a recovery cannot be made to depend upon pure speculation. The plaintiff, having assumed the burden of proof, must make her case as laid in

her complaint. There is a gap both in her pleadings and her testimony between the alleged negligence and the injury of which she complains.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to enter a judgment of nonsuit. Reversed.

Moore, C.J., and Benson and Harris, JJ., concur.

Rehearing denied September 7, 1915.

NOTE.

Liability of Master to Domestic Servant.

Introductory, 499.

For Negligence:

Duty of Master, 499.

Contributory Negligence, 501.

Assumption of Risk, 503.

Application of Fellow Servant Doctrine, 504.

Under Workmen's Compensation Act, 504.

Introductory.

This note discusses the liability of a master for personal injuries to a domestic servant, both within the law of negligence and under a workmen's compensation act. While liability for injury to persons performing menial service in a restaurant, hotel or club is not as a rule included, a few cases of that kind which are closely analogous to those of household servants are cited.

For Negligence.

DUTY OF MASTER.

The employer of a domestic servant residing in his home occupies to the servant a relation somewhat different from that of an employer of day labor, and is bound to exercise over the servant a certain measure of care and protection. Thus in *Larson v. Berquist*, 34 Kan. 334, 8 Pac. 407, 55 Am. Rep. 249, the facts and conclusion of the court were stated as follows: "It is stated in the petition that the plaintiff's daughter was an inexperienced girl of tender years, and that during the employment her menses began, causing her great pain and sickness; that after gaining her confidence the defendants took advantage of her weakness, youth and inexperience, and in order that she might continue in their service and perform a great and unusual amount of labor for them, they negligently, wilfully and wickedly advised her that menstruation was a dangerous disease, likely to cause insanity and death, and that the best and only known remedy there-

fore was hard and unrelenting labor. It is alleged further, that by reason of these representations and the influence wrongfully exerted upon her by the defendants, she was exposed to danger and hardship, made to do work for them far beyond her strength, and that they compelled her to perform the labor of two persons, by reason of which she became very sick, was permanently crippled and disabled, and ever since that time her father has been not only deprived of her assistance and service, but has been required to expend for necessary care, nursing and medical attendance, the sum of \$500. If the facts are as recited in the petition, they show that the defendants not only failed in their duty, but were grossly negligent of the plaintiff's daughter. Their conduct toward her was wanton and cruel in the extreme, for the consequence of which, if there is no concurrent negligence of the plaintiff, the defendants are answerable. By the strongest principles of morality and good faith, they should have given her reasonable care and honest counsel. At no period of her life was such care more important or necessary. She was a motherless girl of tender years, who relied, as the defendants knew, upon their advice. For the purposes of gain they misused her confidence, took advantage of her immaturity and her lack of discretion and judgment, and directly caused and compelled her to do that which resulted in great and permanent injury to herself, and a consequent loss to her father. It is said by the defendants that she was under no obligation to perform labor beyond her strength, and might have declined the service exacted, under the requirements of the contract; and also that she had no right to rely upon misrepresentations of the defendants, as she had equal means of information with them. This would be true if the person injured had been an adult of ordinary prudence and discretion; but as we have seen, a different rule applies in the case of a child of tender years, who is unable to appreciate the dangers to which she would be subjected in performing the service required of her."

But in *Jordan v. Hovey*, 72 Mo. 574, 37 Am. Rep. 447, it was held in a jurisdiction wherein at the time no action lay for seduction that a master was not liable for aiding and abetting the seduction of his servant by a third person. The court said: "Nor do we perceive how any right of action can accrue to the plaintiff by reason of the fact that the relation of master and servant existed between defendant and herself, at the time of his alleged misconduct. She was under no lawful constraint, as servant, either to hear or heed his corrupt counsel, and while, in a moral point of view, the existence of that relation undoubtedly adds to the turpitude

of his conduct, yet neither the common law nor any statute of this state will warrant us in holding that such conduct on the part of master constitutes a violation of his legal obligations to the servant."

The employer of a domestic servant is bound to exercise reasonable care to furnish to the servant safe appliances and a safe place to work. In *Collins v. Harrison*, 25 R. I. 487, 56 Atl. 678, 64 L.R.A. 156, it was said: "The general rule is that a master is bound to provide appliances for a servant, and the term appliances is stated in 1 Bailey's Pers. Inj. 1, to include machinery, apparatus, and premises. This rule is usually invoked in cases where a servant is employed in some mechanical work, but we fail to see why it is not equally applicable to a domestic servant."

Thus the negligence of the master has been held to be for the jury where a servant was injured by stepping into a hole in the porch floor, which was covered with boards inadequate to sustain her weight. *Fearon v. Mullins*, 38 Mont. 45, 98 Pac. 650. A like holding was made where a servant was injured by falling into a disused well in the yard, the covering boards of which had become rotten. *Cordler v. Keffel*, 161 Cal. 475, 119 Pac. 658. So in *Shaw v. Feltman*, 121 App. Div. 597, 106 N. Y. S. 1043, a question for the jury was held to have been made by proof of an injury to a domestic servant, by the fall of a defective skylight in the kitchen. In *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 515, 859, it was held to be a question for the jury whether a master was negligent in furnishing a ladder which by reason of its excessive length was not a safe appliance for the purpose for which the servant was directed to use it. Compare the decision on a second appeal, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L.R.A. 441. In *Burnside v. Peterson*, 43 Colo. 382, 96 Pac. 256, 17 L.R.A. (N.S.) 76, it was held to be a question for the jury whether a master was negligent in having a trap door leading down cellar from the kitchen which was not provided with hinges or fastenings to prevent it from tipping. In *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, it was said: "The plaintiff fell and was hurt on a flight of stairs, consisting of twelve or thirteen steps leading from the kitchen of the defendant's boarding-house out of doors to the back yard. The stairway was covered and enclosed except on the side towards the yard, and there was a skylight over a portion of it, in which two or three panes of glass had for a long time been broken, so that rain, snow, and sleet came through and fell upon the stairs below. The evidence tended to show that at the time of the accident the weather was cold, and it was snowing, and that the stairs were slippery from snow and

ice upon them. The plaintiff had occasion to use these stairs frequently as a servant of the defendant, and it was the duty of the defendant to keep them safe, so far as the exercise of reasonable care and diligence on her part would accomplish that result. It was a duty of which she could not relieve herself by delegating it to another. If she could properly intrust a part of the work to a mere servant, she, or somebody representing her for whose conduct she would be responsible, must exercise reasonable care and supervision to see that the desired result was attained. In view of the fact that the glass over the stairs had been broken out for a long time, exposing the stairs to an accumulation of snow and ice, we are of opinion that it was a question for the jury whether she was negligent in allowing the stairs to become slippery, and that it cannot be said, as matter of law, that she is relieved from liability even if it was the duty of her servant, the engineer, to clean the stairs, and if his negligence contributed to the plaintiff's injury."

In *Battle v. Robinson*, 27 R. I. 588, 65 Atl. 273, the master was held to be liable, the facts and the court's conclusion thereon being stated as follows: "The plaintiff, who was employed by the defendant as a domestic servant, in returning to the premises, about midnight, passed through an unfastened gate leading to a passageway running between the defendant's house and the fence bounding the estate on the west, and immediately fell into a depression about four feet deep, with steps on both sides, which furnished an entrance to the basement of the house. The depression extended from the building nearly to the fence, and lay directly in the path of a person entering the gate. By this fall the plaintiff was badly injured and disabled. The evidence shows, further, that the plaintiff had seen other servants use this passage in entering the premises. Another passage to the rear of the premises led from a side street, and had been used by the plaintiff on other occasions. She had never used the passage in which the accident occurred, and had received no warning that the depression was there. So far as she knew, this passage was as safe as the other, and it was a shorter and more convenient way for her to get to her room than was the other way, which involved a walk around three sides of a rectangle of which the way she took was the fourth side. We think that, in these circumstances, it was negligence on the part of the defendant to leave the gate unfastened at night without at least placing a light there or giving warning of the danger to the plaintiff."

In *Collins v. Harrison*, 25 R. I. 489, 56 Atl. 678, 64 L.R.A. 156, a cause of action was held to be stated by a declaration which alleged that "the plaintiff was employed by

the defendant as housekeeper, the defendant agreeing to provide the plaintiff with board and lodging; that the roof over the room in which the plaintiff slept was out of repair and leaked, so that the plaintiff's bed and bedding became wet and unfit to use; that the plaintiff gave notice to the defendant to the condition of her room; that she could not sleep in it; that he then promised, if she would remain in his employ, to repair the roof and provide suitable bedding; and that, relying on the promise she remained seven days, being obliged to sleep in said room, by reason of which she became sick."

In *Bark v. Dixon*, 115 Minn. 172, Ann. Cas. 1912D 775, 131 N. W. 1078, it was held to be a question for the jury whether the master furnished to his servant tainted food whereby she was made sick.

A wife giving to a domestic servant a direction proper in itself is not liable because it involves the use of defective appliance provided by the husband, whereby the servant is injured. *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L.R.A. 441, wherein it was said: "Now in this case nothing can be clearer than that defendant was acting within the orbit of her duty to her husband when giving the order alleged in the petition. This is the theory of the petition which claims that the command was negligently given, owing to the fact that the ladder furnished for climbing into the loft, by reason of its length, could not be used for that purpose with safety. So that it readily appears that defendant in giving the order was not guilty of an act of direct and positive wrong to plaintiff, but simply of giving an order in her husband's business, which, solely owing to the length of the ladder, furnished by her husband, for the purpose, and she having no other, was a negligent order. But it must be remembered that it was no part of defendant's duty to furnish a ladder of proper length, nor does it appear she had the wherewithal to do so. If it was not her duty, then she cannot be charged with even so much as negligence in failing to provide a ladder of requisite length; for negligence is simply duty violated or unperformed. The mere giving of the order, then, to get the pigeons was not a negligent order."

In *Flynn v. Beebe*, 98 Mass. 575, the facts were stated as follows: "Mrs. Flynn was employed at the defendant's house to do chores on February 20, 1866, when the defendant's wife directed her to wash a skirt. She went into the washroom, and there found a tub lying bottom up, turned it over, and put into it a rubbing board and the skirt. The defendant's wife brought a pailful of water 'from the stove,' and poured it into the tub; and then, needing more water for

the washing, Mrs. Flynn procured it in a dipper, which she filled two or three times from a kettle on the stove, and poured into the tub. Mrs. Flynn then put her hands into the tub and drew the skirt against the rubbing board. In doing so one of her hands was severely cut; which was the injury in question. She cried out in pain; and the defendant's wife came and examined the tub, and found in it a piece of glass about an inch square, apparently a fragment of a bottle." The court said: "We are unable to perceive that there was any evidence whatever that the injury which the plaintiff received was occasioned by negligence of the defendant, or of any agent or servant of his. There was no evidence to show how the piece of glass which cut her hand came into the washtub. The probability would seem to be that it either adhered to the skirt which was to be washed, or was in the kettle upon the stove from which water was taken. But in either case it did not appear that the defendant or his wife knew, or had any reason to suspect, that it was there; or that there was any want of due care on the part of either. The whole foundation of the action therefore failed. The plaintiffs' counsel puts his case upon the ground that an employer is bound to furnish safe and suitable means and instruments for the performance of his work to the person whom he employs. This is true to some extent, but not absolutely and without qualification. He is bound to exercise reasonable and proper care and diligence in furnishing them; but is not an insurer against accidents."

A domestic servant who as part of her compensation is furnished a sleeping room in the master's house is with respect to her occupancy thereof a servant and not a tenant, and the master is liable for injuries caused by the fall of a defective ceiling. *Siedentop v. Buse*, 21 App. Div. 592, 47 N. Y. S. 809; *Anderson v. Steinreich*, 32 Misc. 680, 66 N. Y. S. 498. Compare *Walker v. Gleason*, 109 App. Div. 791, 96 N. Y. S. 843 (janitress paying rent for room).

In the reported case, an action by a cook for personal injuries caused by the explosion of a gas stove, the evidence is held to be insufficient to show any negligence on the part of the master with respect to the condition of the stove.

CONTRIBUTORY NEGLIGENCE.

Whether a domestic servant was guilty of contributory negligence precluding a recovery for personal injuries is a question for the jury unless the evidence is such as to admit of no other conclusion than that the servant was negligent. In *Cordler v. Keffel*, 161 Cal. 475, 119 Pac. 658, a gardener injured by

falling into a defectively covered well was held not to have been guilty of contributory negligence. The facts were stated as follows: "In the nursery grounds was a well one hundred and twenty-five feet deep, thirty feet of which was filled with water. It was dug many years before and was not in use. It was covered with boards lying flat a little above the natural surface of the earth. By reason of age and decay they had become weak and insufficient to support the plaintiff's weight. Plaintiff did not know of the existence of the well. Defendant did not inform him thereof, and the appearance of the boards did not indicate to him that there was a well or excavation beneath them. He had been working about the premises for some time. The ground around and near the well had been spaded the day before the accident. The plaintiff had been directed to rake and pulverize the soil turned up by the spading. On the morning of the injury he walked two and a half miles to the nursery and got his rake out of the toolhouse in the nursery to go to work. He had been in the habit, while at work, of taking off his coat and hanging it upon a standpipe near this well and also in the habit of obtaining water to drink from said standpipe. Feeling thirsty from his walk he went to the standpipe to get a drink and hang his coat thereon. The covering of this well lay directly in his way and he walked over it, whereupon it broke with his weight and he fell into the well. It is alleged that the defendant was negligent in permitting the boards to remain upon the well until they had become weak from decay, and in failing to inform the plaintiff of the existence of the well and the condition of the boards. The plaintiff's testimony is to the effect that he did not know of the existence of the well until he fell into it, that the defendant did not tell him of it and that there was nothing in the appearance of the boards to indicate that there was a well under them, that it was about five or six inches above the level of the ground and all level and that the boards looked all right when he stepped upon them. He had seen them the day before but had paid no particular attention to them. There was other testimony to the effect that the boards were supported by stringers or cross-pieces, which were in a condition of dry rot on the under side and that from an inspection of the upper surface they did not look decayed." The court said: "We see nothing here to compel the conclusion that the plaintiff failed to use due care in walking across the covering. It was obviously laid so that persons walking across it would not fall into the well. Under the circumstances it was for the jury to determine whether or not a reasonably prudent man would walk across it or around it. The decision of the jury in

such a case can be vacated only by the trial court on motion for a new trial. On appeal it is conclusive. There is no just basis for the claim that the plaintiff was not engaged in the service for which he was employed while walking over the boards. He had reached the place of work and the time was at hand, he had obtained the rake from the toolhouse and was proceeding to hang his coat at the usual place when the accident occurred. He was clearly within the general scope of his employment, was going where he had a right to go, and where he might reasonably be expected to go if occasion arose. He was, therefore, not a mere licensee or trespasser and he did not assume the risk of injury from the rotten condition of the boards of which he was unaware."

In *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, wherein it appeared that a servant was injured by falling on an outside stairway which had become slippery from snow and ice it was said: "There was evidence for the jury on the question whether the plaintiff was in the exercise of due care in trying to go down the stairs. She had occasion to go there, and although it was dark and she knew there was snow and ice on the steps, it was the way provided for her use, she was very familiar with it, she had hold of the rail and was trying to go safely, and it does not appear that she knew the stairs were so slippery that it would be careless to try to pass over them. The fact that she knew there was some danger in trying to go over them does not show, as matter of law, that she was negligent. This part of the case was rightly submitted to the jury."

In *Battle v. Robinson*, 27 R. I. 588, 65 Atl. 273, a servant coming in late at night was held not to be negligent as a matter of law in using a passageway which she had seen other servants use, in ignorance of a depression therein.

But in *McGuirk v. Shattuck*, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454, it appeared that the master sent a wagon to bring the servant to his house. There being but a single seat in the wagon, the servant put a chair in the back of the wagon and sat on that. While the wagon was turning a corner she was thrown out and injured. The court said: "The plaintiff further contends that the defendants were negligent in failing to furnish a safe and suitable wagon. If the wagon was unsuitable by reason of the want of the second seat, this was obvious; and if the plaintiff, being aware of it, saw fit to put in a camp chair, and to sit in it, and if this mode of riding was unsafe, it was her own act rather than the negligence of the defendants that led to the injury."

In *Ahern v. Hildreth*, 183 Mass. 296, 67 N. E. 328, it appeared that on the second floor

of the master's house a glass was set into the floor surmounted by a railing two feet high. The servant unnecessarily climbed over the railing and started to walk across the glass which broke under her weight injuring her. It was held that her negligence was the cause of the accident.

In *McMahon v. O'Donnell*, 32 Neb. 27, 48 N. W. 824, it appeared that a nurse girl was injured while voluntarily operating a straw cutter. The court said: "The defense is, that the plaintiff preferred to be outdoors playing with the children, to being confined in the house; that on the day on which she was injured she took three of the children and went into the loft of the barn and began operating the straw cutter with a son of the defendant, seven or eight years of age, to feed the machine. As he fed the machine rather slowly, she made him step aside and fed the machine herself while turning the crank, and permitted her finger to be drawn into the machine, and the injury for which this suit is brought, done. Whatever the actual facts may be the clear preponderance of the testimony sustains the defense."

In *Waxham v. Fink*, 86 Neb. 180, 21 Ann. Cas. 301, 125 N. W. 145, 28 L.R.A. (N.S.) 367, it was suggested but not decided that a servant was negligent in not noticing that a trap door had been opened by a fellow servant.

ASSUMPTION OF RISK.

A domestic servant assumes those risks which are incident to the employment and obvious to the common understanding. Thus in *Moriarty v. Miller*, 99 Neb. 614, 157 N. W. 329, a scrub woman was held to have assumed the risk of injury from kneeling on beer bottle caps lying on the dining room floor. The court said: "Her own testimony shows that Mrs. Moriarty was fully aware of the fact that beer caps were often to be found on the floor at or near the place where she says she was injured. It was the duty of the porter and her to clean and scrub these rooms. She knew that the waitress had pulled a beer cap after the porter had swept and left the room, and that it was not improbable that the cap might fall at or near the place where she was working. The proper performance of her cleaning duty seems to require that a scrub woman should look at the floor she is cleaning and pick up any waste matter or articles which have dropped on it. It seems clear to us that in scrubbing floors it is a very ordinary and common danger that tacks, pins or other foreign substances, which if knelt upon will produce injury, may have dropped upon the floor, especially in a public room such as a café. This was an ordinary risk of the employment and one which plaintiff assumed."

In *Herold v. Pfister*, 92 Wis. 417, 66 N. W. 355, it was held that the risk of injury from an irregularity two inches high and thirteen inches wide in the kitchen floor was assumed by a servant girl sixteen years of age who had worked there six months.

In *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 515, 859, it was held that a domestic servant did not assume the risk of using a ladder of excessive length for certain work which she had been directed to perform. But on a second appeal, *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L.R.A. 441, it was said: "As already seen, the plaintiff was fully conversant with the alleged defect in the ladder; its length, for otherwise it was sound. She had ascended it four or five times before, and gotten the pigeons out of the loft without trouble, and as this thing occurred four or five times a year, as plaintiff says she had been using the new ladder for a year or more when the accident happened. She had also used the old ladder before it had been discarded. So that it is simply indisputable that if ever the doctrine of the assumption of obvious risks is to be applied, it ought to be applied in the present instance. Being thus applied, the result seems to be inevitable that plaintiff on this ground alone has no cause of action and no standing in court."

In *Mausfield v. Baddeley*, 34 L. T. N. S. (Eng.) 696, wherein a sewing woman sued for injuries from the bite of a vicious dog kept in the kitchen, it was held that the risk was not incident to her employment.

In *Fearon v. Mullins*, 38 Mont. 45, 98 Pac. 650, the question whether a domestic servant assumed the risk resulting from the defective condition of the floor of a porch was held to be for the jury.

In *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, it appeared that several panes of glass were broken in a window in the covering of a stairway. In stormy weather snow or rain blew in making the stairs slippery. This condition had existed for several months. It was held to be a question for the jury whether a domestic servant assumed the risk of using the stairs.

In *Cordier v. Keffel*, 161 Cal. 475, 119 Pac. 658, a gardener was held not to assume the risk of injury from a defectively covered well in the yard, he knowing nothing of the existence of the well and there being nothing in the appearance of the board covering to indicate that there was a well there.

In *Burnside v. Peterson*, 43 Colo. 382, 96 Pac. 256, 17 L.R.A. (N.S.) 76, it was held that a servant did not assume the risk of injury from a trapdoor in the floor which was without fastenings and was liable to tip. The court said: "It is said that the only risk that appellee contends she was subjected to

was that arising from the absence of hinges on the trapdoor, and that she assumed this risk. If appellee's right to recover depended upon the absence of hinges alone, it might be successfully contended, under the facts disclosed by the evidence, that this risk was assumed by her. The rule applicable to assumption of risk is thus stated: 'An employee assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence.'—*Monarch Min. etc. Co. v. De Voe*, 36 Colo. 270, 273, 85 Pac. 633, and cases cited. The testimony is to the effect that, in the absence of hinges, fastenings or bolts, the trapdoor was unsafe and insecure. The absence of hinges or other fastenings on the top of the door was open and obvious; not so, however, with reference to fastenings which might have been attached to the under side of the trapdoor, which would have made the same safe and secure, or to the cleats upon which the door rested. The testimony showed that appellee had no occasion to use, and never did use, the trapdoor; that she never saw the under side of it or the cleats upon which it rested. There is no rule which imposes upon a servant the duty of making an inspection or examination for the purpose of discovering defects which are not open and obvious; the exercise of the ordinary diligence imposed upon an employee does not extend to this length. If an inspection of the underside of the trapdoor, or of the cleats upon which it rested, was necessary to appraise appellee of the defects in the door, its fastenings or its supports, which defect caused the accident, it is manifest that the defect was not obvious, and under the testimony was unknown to appellee, and not of such a character as to charge appellee with notice or knowledge thereof, so as to bring her within the rule of assumption of risk."

In *Sidentop v. Buse*, 21 App. Div. 592, 47 N. Y. S. 809, a servant who knew that the plaster on the ceiling of her sleeping room was cracked, but who was assured by her employer that there was no danger, was held not to assume the risk of injury from the falling of the plaster.

In *Jonas v. Blanchard* (Ga.) 91 S. E. 61, a domestic servant was held to have assumed the risk of injury from the fall of a water tank while assisting the master in stopping a leak in the pipe.

APPLICATION OF FELLOW SERVANT DOCTRINE.

The earlier cases passing on the question whether a domestic servant is a fellow servant of a child or another servant of the

master, so as to preclude a recovery by the domestic servant for injuries caused by their negligence are reviewed in the note to *Waxham v. Fink*, 21 Ann. Cas. 301. In accord with the cases therein cited holding the fellow servant doctrine to be applicable is the more recent case of *Ryan v. Phipps*, 146 App. Div. 642, 131 N. Y. S. 438, wherein it was held that a scrub woman could not recover for an injury due to the negligence of the night watchman whom she was assisting to open the house. So in *Hess v. Furst*, 117 N. Y. S. 939, a waitress who slipped on a piece of fat lying on the kitchen floor and was injured, was held to be a fellow servant of the cook by whom the fat was dropped.

But in *O'Bierne v. Stafford*, 87 Conn. 354, 87 Atl. 743, 46 L.R.A. (N.S.) 1183, it appeared that a domestic servant had an agreement with her employer that she was to be taken to church in his automobile every Sunday. While being so carried she was injured through the negligence of the chauffeur. Holding that she was entitled to recover the court said: "Let us next ascertain if Miss O'Bierne, at the time of the accident, was an employee of the defendant? She was his house servant, and in one sense continued in his employ during the period of employment, wherever she might be and whether upon her own or her master's business. Her church-going cannot be said to have been connected with that employment. It was no part of her duty as a servant to go to church. She was free to go or not, and to choose the church she would go to. She was under no obligation to ride in the car; she was performing no service for him in so doing. On the contrary, he was rendering her the service required by his contract. The defendant did not pay her to ride in his car; she paid the defendant for the ride. This was as much a part consideration for her services as the wages paid her. On the way to and from the church her time was her own. She was traveling for her own purposes, and the right of the defendant to her services at this time was not 'merely dormant, but wholly suspended.' As she was not engaged in the defendant's work when she was injured, she was not a coemployee with McAuliffe."

Under Workmen's Compensation Act.

The workmen's compensation acts of most of the American jurisdictions exclude domestic servants from their operation. See the note to *Uphoff v. Industrial Board*, reported ante, this volume, at page 1. Under the acts not so restricted, apparently no cases have arisen involving injury to servants of that kind except in England. In that jurisdiction it has been held that a charwoman working two days weekly at a certain house

was a servant within the act. Dewhurst v. Mather [1908] 2 K. B. (Eng.) 754, wherein the Master of the Rolls said: "But then it is said that this washerwoman was not engaged under 'a contract of service' within s. 13 of the act. The evidence shows that she went on Friday week and on alternate Tuesdays regularly, without any further instructions, and she went on other days of the week to other persons. Under these circumstances the learned judge has found, and I do not see how he could have failed to find, that there was a contract of service of a periodical nature. It seems to me to come exactly within the language of the First Schedule, clause 1, sub-s. 2 (b), which contains these words relating to the earnings of a workman: 'Where the workman had entered into concurrent contracts of service with two or more employers, under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of employer for whom he was working at the time of the accident.' The act obviously contemplates a case in which the engagement is not for the whole time, but for a portion of time with one employer and for a portion of time with another employer. That being so, it seems to me reasonably plain that this is not, to use the language of s. 13 of the Act, an employment of 'a casual nature.' It was an employment of a regular nature. It was for definite periods, perfectly well known to both employer and employee." But in Hill v. Begg [1908] 2 K. B. (Eng.) 802, a window cleaner employed for a day from time to time was held to be a casual laborer. See also Rennie v. Reid [1908] Sc. Ct. Sess. 1051, 45 Scott. L. Rep. 814.

A domestic servant injured by the fall of mortar from the ceiling of her sleeping room sustains an injury arising out of and in the course of her employment. Aldridge v. Merry [1913] 2 Ir. R. 308. So the death of a domestic servant by a fire whereby the house of her mistress was destroyed has been held to be due to a cause arising out of the employment. Chitty v. Nelson, 126 L. T. N. S. 172, 2 B. W. C. C. 496, wherein it was said: "In the present case it will be conceded that, but for the fact of the deceased being in the service of the respondent at the time of the fire, the accident by which she lost her life would not have happened to her. It will also be conceded that it was part of her duty to sleep in the room assigned to her, a duty which involved a certain amount of risk in case of fire—a risk to which she was exposed not only on account of the distance from the ground, but also from the fact that her fellow servant was an elderly wom-

an suffering from bad legs, which naturally would enhance the difficulties of any rapid escapes for her and also for the deceased if she determined to stand by her, as it is in evidence she actually did. This being so, I am of opinion that the fact of sleeping in this room and sharing it with an elderly and inactive fellow servant was part of a duty which the deceased owed to her employer and to herself—a duty which exposed her to a risk in case of fire more than the usual and ordinary risk, and the consequence of which proved fatal to her; and therefore, finding this as a fact, I hold that the accident by which the deceased lost her life did arise both out of and in the course of her employment in the respondent's service." In Wright v. Scott, 5 B. W. C. C. 431, a groom thrown by a horse which he was exercising was held to have been injured in the course of his employment. A like holding was made in Bullworthy v. Glanfield, 7 B. W. C. C. 191, as to a window cleaner injured while unnecessarily attempting to pass from window to window on an outside ledge instead of entering the house to get to the next window.

A maid whose clothing caught fire while she was drying her hair has been held not to sustain an injury arising out of her employment, though she was incidentally tending a child at the time. Clifford v. Joy, 43 Ir. L. T. 193, 2 B. W. C. C. 32. So a domestic servant struck through a ball playfully thrown by a fellow servant is not within the terms of the act, Wilson v. Laing, 46 Scott. L. Rep. 843, 2 B. W. C. C. 118; neither is a servant who, returning to the house late at night, is injured while attempting to enter through a window, Watson v. Sherwood, 127 L. T. N. S. 86, 2 B. W. C. C. 462. So under the English doctrine that "street accidents" are not within the act unless the servant is by reason of the employment subjected to peril other than that to which the public at large is subject, it has been held that compensation could not be recovered by a charwoman sent to post a letter and injured by slipping on a banana peeling on the sidewalk. Sheldon v. Needham [1914] W. C. & Ins. Rep. (Eng.) 274, 30 Times L. Rep. 590, 58 Sol. J. 652. In Craske v. Wigan [1909] 2 K. B. 635, the facts and the conclusion of the court thereon were stated as follows: "The facts may be shortly stated. A lady's maid was engaged in the nursery doing some work of her own which she was entitled to do, and the doing of which did not prevent her from being at that time in the course of her employment. It was a hot evening. The window was open, and the light in the nursery happened to be electric light. A cockchafer came in at the window. She was alarmed at it and hit her own eye with her thumb, with very serious consequences. In that state of things is it

possible for us to say that this was an accident arising not merely 'in the course of' but 'out of' the employment? It seems to me that that was a risk in no way incidental to the employment of a lady's maid. She was not placed by reason of the employment in a position of any special danger. The incursion of a cockchafer through an open window into a room where there is a light is a risk common to all humanity, and it is altogether impossible to say that the alarm caused to the applicant by the flight of the cockchafer, followed by her putting her thumb into her eye, was something which arose out of her employment."

ROBINSON

v.

STATE.

Florida Supreme Court—April 27, 1915.

69 Fla. 521; 68 So. 649.

Indictment — Requisites of Charge — Definiteness.

Where the language of an indictment for murder in the first degree is clear enough to enable the jury to easily understand it, and is not so vague as to mislead the accused and embarrass her in the preparation of her defense or expose her to substantial danger of another prosecution for the same offense, the indictment, if not otherwise defective, should not be quashed.

[See 14 R. C. L. tit. *Indictments and Informations*, p. 171.]

Homicide — Indictment — Failure to Allege Mortal Wound or Injury.

An indictment for murder in the first degree is not defective for failure to allege that the defendant administered to the deceased "a mortal wound" or "mortal injury" or "mortal sickness," where the language of the indictment sets up a plain, direct, and certain state of facts constituting the crime, from which the connection between the facts alleged as the cause of death and the death itself appears.

Indictment — Requisite Degree of Certainty.

Where the language of an indictment is sufficiently certain to enable an innocent person to prepare for trial, and furnishes the accused with reasonable information of what he is called upon to answer by setting forth the constituent elements of the crime charged, it cannot be maintained that the accused is not apprised of the nature and cause of the accusation against him.

Criminal Law — Trial — Right of Private Counsel to Assist Prosecution.

A member of the bar privately employed by citizens interested in the suppression of

crime may, with the consent of the state attorney and the court, be permitted to participate in the prosecution of a criminal cause in the circuit courts of this state, as assistant to the state attorney.

[See note at end of this case.]

Homicide — Premeditation — Evidence.

Premeditation is an essential element of the crime of murder. Its existence may be inferred from the circumstances of the case. Where a woman is charged with the murder of her infant child, and the evidence tends to show that it was destroyed immediately upon its birth, evidence of the woman's intention or desire before the birth of the child to produce an abortion is admissible as tending to show the existence of a motive for the destruction of the infant and of a premeditated design to destroy it.

Criminal Law — Review — Weight of Evidence.

A verdict will not be set aside as against the evidence where there is evidence to support it, and where it does not appear that the jury were not governed by the evidence.

Instructions — Consideration Together.

Where an instruction is considered in connection with other instructions upon the same subject, or the entire charge, and is found to be free from the defects complained of in the assignment of error, the assignment will fail.

(Syllabus by Court.)

Error to Circuit Court, Columbia county:
HORNE, Judge.

Carrie Robinson convicted of murder and brings error. The facts are stated in the opinion. **AFFIRMED.**

J. B. Hodges for plaintiff in error.

T. F. West and C. O. Andrews for defendant in error.

[523] ELLIS, J.—Carrie Robinson, a white woman, was indicted for the murder of her infant child, and was found guilty of murder in the first degree and recommended to mercy. She was sentenced to imprisonment in the State prison at hard labor for the period of her natural life.

A motion was made to quash the indictment, which motion was overruled, and such order is assigned as error. The motion contains ten grounds, but only the fifth and ninth grounds are argued, the others being expressly abandoned. The fifth ground of the motion is as follows: "5. Because said indictment fails to allege the manner of the death of the deceased;" and the ninth ground is as follows: "9. Because said indictment fails to show that deceased received a mortal wound or injury at the hands of defendant whereby death was caused."

The indictment, omitting the venue, is as follows: "In the name of the State of Florida.

The Grand Jurors of the State of Florida, duly chosen, empanelled and sworn diligently to inquire and true presentment make in and [524] for the body of the County of Columbia, upon their oath present that Carrie Robinson late of said County, on the 13th day of April, A. D. 1914, in the County and State aforesaid, with force and arms, in and upon a certain child then recently born of the said Carrie Robinson and not named of and from a premeditated design to effect the death of said child did unlawfully make an assault; and the said Carrie Robinson of and from a premeditated design to effect the death of the said child with the hands of her, the said Carrie Robinson, placed and tightly pressed around and upon the neck of the said child, she, the said Carrie Robinson did then and there unlawfully of and from a premeditated design to effect the death of the said child give to the said child upon and around the neck of the said child a mortal pressure, choking and strangling the said child of and from which said mortal pressure, choking and strangling the said child did then and there die; contrary to the laws of the State of Florida.

Stafford Caldwell, State Attorney."

It is contended for plaintiff in error that inasmuch as the indictment does not allege that the defendant administered to the child a "mortal wound" or a "mortal injury" or a "mortal sickness" it is fatally defective and because the indictment does not allege that the "pressure was administered with the hands of defendant," nor how it was done, the indictment is invalid. The latter point is not argued. The brief for the plaintiff in error containing merely a suggestion that the pressure was not alleged to have been made with the hands of the defendant. The manner and means of the killing is sufficiently alleged under the provisions of Sections 3961 and 3962 of the General Statutes. The nature of the offense charged is [525] described in such language as was sufficiently clear to enable the jury easily to understand it, and it was not so vague, indistinct and indefinite as to mislead the accused and embarrass her in the preparation of her defense, or expose her to substantial danger of a new prosecution for the same offense. Indictments and informations should be upheld whenever there has been a substantial compliance with the law as announced in those sections of the General Statutes of Florida. *Barber v. State*, 52 Fla. 5, 42 So. 86; *Lewis v. State*, 55 Fla. 54, 45 So. 998; *Tillman v. State*, 58 Fla. 113, 19 Ann. Cas. 91, 50 So. 675, 138 Am. St. Rep. 100. The assault is alleged to have been made by the defendant unlawfully and from a premeditated design

to effect the death of her child; the manner of the assault is shown to have been with the hands of the defendant "placed and tightly pressed around and upon the neck of the said child." The indictment then alleges that the defendant did "then and there unlawfully of and from a premeditated design to effect the death of the said child give to the said child upon and around the neck of the said child a mortal pressure," etc. The manner and means of the assault, and the intention with which it was made are clearly shown. The language of the indictment might have been made clearer as counsel for the plaintiff in error insists, by the insertion of the words suggested in his brief; but the statute does not require the highest standard of excellence in the phraseology of indictments. If the language is clear enough to enable the jury to easily understand it and not so vague as to mislead the accused and embarrass her in the preparation of her defense or expose her to substantial danger of another prosecution for the same offense, it is sufficient. *Dickens v. State*, 50 Fla. 17, 38 So. 909.

The contention of the plaintiff in error that the indictment [526] is fatally defective because it does not allege that the defendant administered to the child a "mortal wound" or a "mortal injury" or a "mortal sickness" is not well founded. In the case of *Brown v. State*, 18 Fla. 472, Judge Randall, then Chief Justice of this court, announced as his view of the question that "In addition to requiring the statement of the cause and the manner of the death, the further statement that the wound was 'mortal' has no authority in the logic of the law. The practice has conformed to the forms prescribed by an ancient court and been perpetuated by the compilers of form books and precedents: and in my judgment the use of the words 'mortal wounds' in an indictment for murder by felonious wounding are unnecessary and superfluous, where the indictment alleges a wounding which produces death and precludes the suggestion that the death was caused by any other means." In *Keech v. State*, 15 Fla. 591, it was held that where the wound inflicted was an incised wound its dimensions should be given and that the part of the body in which the deceased was wounded should be particularly stated. But the views as announced in the *Keech Case* on this subject have been abandoned. See *Hodge v. State*, 26 Fla. 11, 7 So. 593; *Walker v. State*, 34 Fla. 167, 16 So. 80, 43 Am. St. Rep. 186; *Roberson v. State*, 42 Fla. 223, 28 So. 424. The views expressed by Judge Randall have not been repudiated by this court. The case cited by counsel for plaintiff in error do not sustain his position that the indictment should allege that the wound inflicted was

mortal. Although in the cases cited the indictment alleged the wounds to have been mortal, in neither case was the point raised, and the indictments were held to be valid or invalid for other and different reasons. In the case at bar there was no incised wound. Death was alleged to have been produced by a "pressure [527] upon and around the neck." The pressure was alleged to be "a mortal pressure" choking and strangling the child, "of and from which said mortal pressure choking and strangling the said child did then and there die." What better allegation could be made than the choking and strangling were mortal? What more is necessary to apprise the defendant of the nature and cause of the accusation against her than a plain, direct and certain statement of the facts constituting the crime from which the connection between the facts alleged as the cause of death and the death itself appears? See 21 Cyc. 847. The indictment shows the adequacy of the means employed to produce death, because it is distinctly averred that the child died of the choking and strangling, produced by the pressure of the defendant's hands on the neck of the deceased, which pressure is alleged to have been mortal. 1 Stark Crim. Pleading 93; Lane v. State, 151 Ind. 511, 51 N. E. 1056; State v. Noblett, 47 N. C. 418.

The second assignment of error is as follows: "That the court erred in overruling and denying the defendant's demand for the nature and cause of the accusation attempted to be made against her." The motion to quash the indictment contained a ground based upon the same right of the defendant; that she should be informed of the nature of the "charge and accusation against her," or as the constitution provides: "to demand the nature and cause of the accusation against" her. When the motion to quash the indictment was overruled the defendant below, by her attorney, presented her demand as stated, which was "overruled and denied." This provision in the constitution was based upon the presumption of innocence, and requires such certainty in indictments and informations as will enable an *innocent* person to prepare [528] for trial, that will furnish the accused with reasonable information of what he is called upon to answer by setting forth the constituent elements of the offence or crime with which he is charged. This provision requires that the accusation shall set forth with reasonable certainty a charge of the crime for which the prisoner is to be tried. The object of the provision being to protect the innocent, not to shield the guilty. The indictment being duly presented in court, upon being arraigned the prisoner has the right to have it read to him; thus he is

advised of, and has the nature and cause of the accusation against him. See *Noles v. State*, 24 Ala. 672; *Conner v. Com.* 13 Bush (Ky.) 714; *State v. Verrill*, 54 Me. 408; *State v. Learned*, 47 Me. 426; *Newcomb v. State*, 37 Miss. 383; *Norris v. State*, 33 Miss. 373; *Com. v. Phillips*, 16 Pick. (Mass.) 211; *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25; *State v. Doran*, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; *Moline v. State*, 67 Neb. 164, 93 N. W. 228. The indictment was sufficient in its allegations to apprise the defendant of the nature and cause of the accusation against her. She moved the court by her counsel to quash the indictment, and she was then arraigned and pleaded not guilty. It appears that in this particular her constitutional rights were fully secured to her.

The record disclosed the following situation: After the defendant had been arraigned and pleaded not guilty to the indictment and the jury sworn to try the issue joined, it appeared that the State Attorney "was being assisted in the trial of said cause by Mr. F. P. Cone, an attorney at law," the defendant, by her counsel, moved the court "that the statute relating to the employment of private counsel be complied with; that the State Attorney make [529] an application to the court, showing the necessity of the employment of private counsel by him, and if the counsel is employed by private parties, that the interest of those parties who employed private counsel be disclosed to the court and to the defendant, in order that it may be shown whether or not those parties have such an interest as entitles them to prosecute crime in this court." In this motion the defendant asserted that it was her right in the trial of this cause, that the State should be represented only by the public prosecutor, the State Attorney, unless it was made to appear that the State's business rendered it necessary for the State Attorney to procure the assistance of a member of the bar to be compensated by the State Attorney or by private parties having "such an interest as entitles them to prosecute crime in this court." The record discloses that the State Attorney made the following statement to the court: "State Attorney. In my place as counsel I will state that Mr. Cone is not employed by any private interest; he is employed by parties who are interested in this case, but he is not employed by any one who is interested by personal motives any more than they are interested in the efforts of the State Attorney. The case however is under my direction and control as State Attorney. I propose to be present and prosecute the case with Mr. Cone's help, and I have no objection to his being sworn. I will ask the court to swear Mr. Cone as Assistant State Attorney during

the trial." The court denied the defendant's motion and decided that "Mr. Cone might be sworn as an assistant to the State Attorney for the prosecution of this case." To this ruling of the court the defendant by her counsel excepted and the ruling forms the basis of the third assignment of error. The defendant by her counsel then interposed the following objection: "We object to Mr. Cone being sworn as assistant [530] State Attorney, because it is not represented by the State Attorney that the amount of the State's business at this term of court warrants the securing by him of private counsel to assist him in the prosecution of this case; and further it is not shown that if employed by private parties, what those parties' interest in this case may be." The State Attorney then replied as follows: "The State Attorney represents to the court as an officer of this court and as State Attorney that Mr. Cone is not employed by any private party interested in this case from any personal motive; that Mr. Cone is employed by a proportion of the citizens of Columbia County acting as a citizenship interested in the suppression of crime and not from any party or parties interested in the prosecution of the defendant from motives of revenge, hatred or any other personal motive directly connected with the death of the person alleged to have been killed. The State further represents to the court that by reason of the volume of business transacted and to be transacted at this term of court, by reason of the congested condition of the docket, by reason of the number of causes to be tried and to have been tried, the time that the present State Attorney was required with the Grand Jury a number of cases at this term, for which indictments were returned at the last term of the court while the State Attorney of another Circuit was representing the State in this county, with which cases the regular State Attorney only had an opportunity to become familiar at this term of court, that it is advisable that the State Attorney have an assistant in this case, and for that reason he requests that Mr. F. P. Cone be sworn as Assistant State Attorney."

The defendant's objection was overruled by the court, to which ruling the defendant excepted by her counsel, [531] and makes it the basis of the fourth assignment of error. Mr. Cone "was then sworn by the court as an Assistant State Attorney in the prosecution of this case." The defendant interposed the following objection: "Defendant objects to the participation of Mr. Cone as Assistant State's Attorney in this case, because the statement of the State Attorney shows that Mr. Cone has not been paid by himself, the State Attorney, as required by law, but that

he has been paid by private citizens of this county and their interest has not been shown in the record here." This objection was overruled, and forms the basis of the fifth assignment of error.

By these objections the defendant by her counsel presented fully the question, whether in this jurisdiction a member of the bar, privately employed, by "citizens interested in the suppression of crime," may with the consent of the State Attorney and the court be permitted to participate in the prosecution of a criminal cause, as Assistant to the State Attorney.

This question is not answered by Section 1791 General Statutes of Florida, 1906, which is as follows: "The State Attorney, by and with the consent of court, may procure the assistance of any member of the bar when the amount of the State business renders it necessary, either in the grand jury room to advise them upon legal points and framing indictments, or in court to prosecute criminals. But such assistant shall not be authorized to sign any indictments or administer any oaths, or to perform any other duty except the giving of legal advice, drawing up of indictments, and the prosecuting of criminals in open court. His compensation shall be paid by the State Attorney and not by the State."

[532] In that statute the Legislature has recognized the policy of the employment by the State Attorney by and with the consent of the court, of assistance when the amount of the State's business renders it necessary. In such case the duties of the Assistant are defined by the Statute. *Miller v. State*, 42 Fla. 266, 28 So. 208. The Statutes of this State make it the duty of the State Attorneys to appear in the Circuit Courts within their judicial circuits and prosecute or defend on behalf of the State all suits, applications or motions, civil or criminal, in which the State is a party, to attend the grand jury for the purpose of examining witnesses in their presence, or giving legal advice in any matter before them, to summon all witnesses required on behalf of the State, etc. Gen. Stats. of 1906, sections 1779-1781. And to assist the Attorney General in the preparation and presentation of all appeals to the Supreme Court from the Circuit Court of their respective Circuits of all cases civil or criminal in which the State is a party. They may also be required by the Governor to exchange Circuits when he thinks that the ends of justice require it, or the State Attorney may be assigned to discharge the duties of State Attorney in any Circuit of the State at any regular or special term of the Circuit Court. They are also required to represent the State in all cases of habeas corpus aris-

ing in their respective Circuits, and to represent the State either in person or by assistant, in cases of preliminary trials of persons charged with capital offenses, in all cases where the Committing Magistrates give them timely notice as required by the statute, except in such counties where Criminal Courts of Record or County Courts may be established. Chap. 5399 Laws of Fla. 1905.

Our view is that these statutes, Chapter 5399 Act of [533] 1905, and Sections 1779-1781 Gen. Stats. of 1906, do not give to the State Attorney the exclusive duty to conduct and manage criminal prosecutions, nor as declarative of a public policy against the employment by private persons, of an attorney to conduct or assist in the prosecution of criminal cases, as has been held by the Supreme Courts of Massachusetts, Michigan and Wisconsin.

In *Thalheim v. State*, 38 Fla. 169, 20 So. 938, the court said that it found the overwhelming weight of authority in favor of the practice of allowing attorneys employed or paid by private parties to assist the State Attorney in the prosecution of persons charged with crime. It is proper, said the court, "For the State Attorney when there is no express statutory prohibition, to obtain, with the consent of the court, the assistance of other counsel, and other members of the bar are not incompetent to be engaged for such assistance and taking part in the trial by reason of being retained and compensated by the prosecuting witness, the party injured by the crime, or other private interests." The only point of difference between the case at bar and the *Thalheim* Case is, that in the latter case the private counsel were employed by the people whose property was alleged to have been embezzled, who had a close, direct or concrete interest it may be said in the prosecution, while in the case at bar the private counsel was employed by people whose interest in the prosecution was abstract, it was the interest of citizens in the suppression of crime. In this they were further removed from the personal hatred and desire for revenge than might be those whose property was taken or relatives slain or outraged. But the *Thalheim* case seems not to have been decided upon the theory that persons whose property has been taken or relatives slain or outraged, [534] have peculiar right to employ private counsel to assist the State Attorney in the prosecution of the wrong done. The court quoted at length from Supreme Court of North Dakota in the case of *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686, in which State at the time of the trial of the cause, the statute made it the duty of the State Attorney for the county to "prosecute all criminal

offenses triable in that county." The court said: "We are unable to discover in the statute any other policy than that of transferring the control of criminal prosecutions from private to public hands."

It has been the practice in this State for many years for counsel employed by persons desirous of a conviction in a criminal cause to assist the prosecuting attorney in the conduct of the prosecution. Public justice sometimes requires it. A community does not surrender its interests in the prosecution of criminals simply because a prosecuting officer is charged with the duty of conducting the prosecution of all criminal cases. When assistance is offered to the State Attorney, it may not be rendered without his consent and that of the court whose duty it is at all times to see that the defendant obtains a fair and impartial trial. The State Attorney is required to be present at the trial, remaining at all stages of the case in control of the prosecution. It is his duty as well as that of the court to see that the prosecution "does not degenerate into a private persecution, and that the administration of the criminal law is not made a vehicle of oppression for the gratification of private malice, or the accomplishment of private gain or advantage." As was said in the case of *State v. O'Brien*, 35 Mont. 482, 10 Ann. Cas. 1006, 90 Pac. 514: "The defendant is entitled to a fair and impartial trial, but nothing more. Special counsel are subject to the same control by [535] the court as the public prosecutor, and so long as they are not guilty of conduct prejudicial to the defendant the latter has no right to complain."

At Common Law criminal prosecutions were generally carried on by individuals interested in the punishment of the accused and not by the public. But our system does not exclude counsel for interested persons, whether their interest be concrete or abstract, from all participation in the prosecution. We do not apprehend the danger which counsel fears from such practice. Private counsel cannot initiate the proceedings or conduct them. The Legislature has taken the control of criminal prosecutions in the Circuit, County and Criminal Courts of Record out of private hands and placed it in the hands of public officials chosen for that purpose, but there is nothing in the statute to warrant the conclusion that counsel employed by interested persons may not assist the public prosecutor in the prosecution of a criminal case with the latter's consent and that of the court. See *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *State v. Fitzgerald*, 49 Ia. 260, 31 Am. Rep. 148; *State*

v. Helm, 92 Ia. 540, 61 N. W. 246; People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L.R.A. 75; State v. Wells, 54 Kan. 161, 37 Pac. 1005; State v. Bartlett, 55 Me. 200; State v. Bartlett, 105 Me. 212, 74 Atl. 18, 134 Am. St. Rep. 542, 24 L.R.A.(N.S.) 564; Hayner v. People, 213 Ill. 142, 72 N. E. 792; Shular v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; Jackson v. Com. 96 Va. 107, 30 S. E. 452; Com. v. Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670; State v. Rue, 72 Minn. 296, 75 N. W. 235. The Nebraska Supreme Court held the same way. Polin v. State, 14 Neb. 540, 16 N. W. 898; [536] Bradshaw v. State, 17 Neb. 147, 22 N. W. 361, and other cases. But by a divided court in the case of McKay v. State, 90 Neb. 63, Ann. Cas. 1913B 1034, 132 N. W. 741, 39 L.R.A.(N.S.) 714, decided in 1911 under a recent statute prescribing the duties of County Attorneys, receded from its former holding. See also State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329. There is nothing in the record to show that Mr. Cone conducted himself in any manner unbecoming an officer of the court, nor that the defendant suffered any injustice from his connection with the case. We think the assignments numbered 3, 4 and 5 are not sustained.

The sixth and seventh assignments of error rest upon the action of the court in overruling defendant's objection to certain questions propounded to witnesses. The questions were in substance the same to each witness, and their answers similar. The assignments are discussed together and will be considered together. The question first complained of was as follows: By the State's Counsel to Thomas George, a witness for the State. "I will ask you if within a short length of time prior to last April, that is April, 1914, you heard any conversation by and between the defendant and any other person with reference to the doing away of an unborn infant?" The objection made was, "That the question is leading; that it is not shown what length of time before the alleged date of the homicide; and upon the further ground that it seeks testimony relative to the crime of abortion, and not the crime of murder." The questions to Elsie McNish were as follows: "Q. Have you ever had any talk before April this last gone April, with the defendant, Mrs. Robinson, about doing away with an unborn child? A. Yes, sir. Counsel for defendant. We object to the question, because it is not shown how long before the commission of the crime laid in the indictment; because it is leading, and because [537] it tends to show that the evidence sought out of this witness is relative to the crime of abortion, which is an indictable offense under our law, and the person

mentioned was not in being at the time that the witness is testifying about. By the Court: The question is too broad. State Attorney: It is a preliminary question only. Q. State whether or not during the latter part of last year, 1913, or the early part of this year, 1914, you had any talk with the defendant, Mrs. Robinson, about getting rid of an unborn child? Counsel for defendant: We object to the question because it is leading; we object upon the ground that the party defendant is charged with murdering was not in being at that time, and it is relative to the crime of abortion and not murder. The court overruled the objection, to which ruling the defendant, by her counsel, duly excepts." These questions as the replies to them show, were intended to elicit information as to the fact of the pregnancy of the defendant at the time inquired about, and the defendant's desire to conceal the birth of the child. Premeditation is an essential element of the crime of murder, and may be inferred from the circumstances of the case. Hicks v. State, 25 Fla. 535, 6 So. 441; Lovett v. State, 30 Fla. 142, 11 So. 550, 17 L.R.A. 705; Keigans v. State, 52 Fla. 57, 41 So. 886; Barnhill v. State, 56 Fla. 16, 48 So. 251. It was proper for the State to show by evidence that prior to the birth of the child the defendant meditated its destruction. Though if the foetus had been destroyed pursuant to her design to produce an abortion, it would not have been murder, yet the state of her mind concerning the unborn child would tend to throw light upon the question whether after the act of parturition it had been destroyed by her and the reason which operated in her mind for its destruction. See Wallace v. State, 7 Tex. App. 570, and Harris v. [538] State, 28 Tex. App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837.

A motion for a new trial was made and overruled, and forms the basis of the eighth assignment of error. The first two grounds of the motion attack the sufficiency of the evidence to support the verdict.

The evidence is conflicting. The State's case rested upon the testimony of the witness Bertha Scott, with such corroborating circumstances as were testified to by the husband of this negress, Dave Scott, and other witnesses who testified as to the pregnancy of the defendant. Assuming that the facts sworn to by these witnesses were true, there is sufficient evidence to support the verdict, and it was the jury's province to determine the credibility of the witnesses and the weight of the evidence.

This court has held in a long line of decisions that where there is any evidence to support the verdict, it will not be set aside as against the evidence, where it does not

appear that the jury were not governed by it. *Adams v. State*, 56 Fla. 1, 48 So. 219; *Barnhill v. State*, 56 Fla. 16, 48 So. 251; *Kent v. State*, 53 Fla. 51, 43 So. 773; *Lindsey v. State*, 53 Fla. 56, 43 So. 87; *Williams v. State*, 45 Fla. 128, 34 So. 279; *Logan v. State*, 58 Fla. 72, 50 So. 536.

The fifth, sixth and seventh grounds of the motion attack certain charges of the court numbered three, five and twelve. The assignment of error, however, so far as it involves the last numbered charge, is abandoned.

The third and fifth instructions were as follows:

"3. The unlawful killing of a human being when perpetrated from and with a premeditated design to effect the death of the person killed is murder in the first degree, [539] upon the birth of a living child, that is one that breathes and lives after its birth, it becomes and is a human being within the meaning of the law of murder and it's as much a crime to kill a person that has just begun to live as to kill one that has lived for many years."

"5. If you believe from the evidence in this case beyond a reasonable doubt that the defendant was with child and that on April 13th, 1914, or at any other time prior to the finding of the indictment she was delivered of, and gave birth to a child and that such child was born and that it lived for some period of time, no matter how short, and that the defendant in this County and State by and with her hands by a choking, strangling and pressure killed the child from and with a premeditated design to effect the death of said child, and that from and as a result of such choking, strangling and pressure the child died and not otherwise, then you should find the defendant guilty of murder in the first degree."

We find no error in either instruction, and when read together they are completely relieved from the criticism made by the counsel for plaintiff in error upon each. No undue importance was given in these instructions to any particular feature of the alleged crime, nor was the testimony of any particular witness singled out and given undue prominence. The entire charge bearing upon the subject should be considered in determining whether there is error. *Hallbeck v. State*, 57 Fla. 15, 49 So. 153; *Lewis v. State*, 55 Fla. 54, 45 So. 998; *Davis v. State*, 54 Fla. 34, 44 So. 757.

The judgment of the court below is affirmed.

Taylor, C. J., and Shackelford, Cockrell and Whitfield, JJ., concur.

[540] ON PETITION FOR REHEARING.

ELLIS, J.—The plaintiff in error filed a petition for rehearing on the ground that

the court "omitted to consider the fact that said indictment fails to allege that a mortal wound, or any wound whatever, was administered to the deceased by the defendant." and that the allegations of the indictment do not "preclude the suggestion that the death was caused by any other means" than by a "mortal pressure, choking and strangling."

The indictment does not allege that a wound was inflicted upon the child who was killed, but alleges that the defendant gave "to the said child upon and around the neck of said child a mortal pressure, choking and strangling the said child of and from which said mortal pressure, choking and strangling the said child did then and there die," etc. The court said in its opinion that the indictment showed the adequacy of the means employed to produce death. That the indictment contained a plain, direct and certain statement of the facts constituting the crime from which the "connection between the facts alleged as the cause of death and the death itself appears." If it appears from the allegations of the indictment that the facts therein alleged produced the death, the suggestion that death might have been caused by other means is necessarily precluded.

The court did not omit the consideration of the questions referred to in the petition as the opinion shows. The petition is therefore denied.

All concur.

NOTE.

Right of Private Counsel to Assist Prosecution in Criminal Case.

The purpose of this note is to review the recent cases discussing the right of private counsel to assist the prosecution in a criminal case. The earlier cases are collated in the note to *Territory v. Chong Chak Lai*, Ann. Cas. 1912B 657.

The general rule is that private counsel may be permitted to assist in the prosecution of criminal cases. The rule has been applied to private counsel employed by the complaining witness or by associations for the suppression of vice or even in some cases when the prosecuting attorney himself has appointed private counsel to assist him. *Clinton v. State*, 58 Fla. 23, 50 So. 580; *Lindsay v. State*, 138 Ga. 818, 76 S. E. 369; *Territory v. Robello*, 20 Hawaii 7; *Territory v. Soga*, 20 Hawaii 71; *State v. Petrich*, 122 La. 127, 47 So. 438; *State v. Britton*, 131 La. 877, 60 So. 379; *Peterson v. Koochiching County*, 133 Minn. 343, 158 N. W. 605; *People v. Sanducci*, 195 N. Y. 361, 88 N. E. 385; *McClintic v. Cavender*, 75 W. Va. 800, 83 S. E. 78; *Rex v. Gilmore*, 6 Ont. L. Rep. 286, 7 Can. Crim. Cas. 219; *Rex v. Jun Goon*, 33 West.

L. Rep. (British Columbia) 761, 10 West. W. Rep. 24. And see the reported case.

In *Territory v. Robello*, 20 Hawaii 7, it was held that unless otherwise directed by the attorney general, a county attorney or his deputy could permit private counsel to assist in trying a criminal case.

In *State v. Petrich*, 122 La. 127, 47 So. 438, it was held to be proper for the attorney for a complaining corporation to assist the district attorney in a criminal trial for embezzlement, and as the latter was present throughout the trial, he could delegate as much as he chose to the assistant.

In *State v. Britton*, 131 La. 877, 60 So. 379, it was held that where the district attorney was absent on account of sickness, and a duly appointed special district attorney was conducting the trial, he had the right to engage private counsel to assist him; and it was further held that when he was absent from the courtroom with the permission of the court, the private counsel had the right to represent the state at the impaneling of the jury.

In *People v. Sanducci*, 195 N. Y. 361, 88 N. E. 385, it was held that where pursuant to a statute a county judge authorized the district attorney to appoint private counsel to assist him at a trial, and the district attorney then appointed the judge, this did not affect any legal right of the defendant, but it was disapproved of by the court as a matter affecting the public. The court said: "Upon due application the district attorney was authorized by the county judge of Allegany county to employ counsel to assist him in the trial of the defendant. When this authority was conferred nothing was said as to what lawyer should be employed, but a few days later the district attorney retained the same person as counsel, who, as county judge, had authorized the employment of counsel. Thus the county judge acted officially and personally in the same transaction. He officially authorized a contract to be made, which could not have been made without his approval, and then personally made the contract himself, as one of the parties thereto. As county judge he authorized the retainer and then as a lawyer accepted the retainer himself. While this does not concern the defendant and he has no legal right, as defendant, to complain of it, it does concern the public and for this reason we deem it our duty to express our disapproval of the course pursued."

To permit private counsel to assist in the prosecution of a criminal case, it is necessary that the appointment shall be made with the consent of the court and generally with the consent of the prosecuting attorney. Thus in *Com. v. Golden*, 21 Pa. Dist. 547, it was held that an assistant counsel in order to have

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the right to aid the district attorney must be appointed with the consent of the court. In *Rex v. Gilmore*, 6 Ont. L. Rep. 286, 7 Can. Crim. Cas. 219, it was held that the private informant at whose instigations an indictment for perjury was preferred had no right to appear by counsel and take part in the prosecution without the consent of the Crown. See also the reported case.

ZIMMERMAN ET AL.

v.

WESTERN AND SOUTHERN FIRE INSURANCE COMPANY ET AL.

Arkansas Supreme Court—December 20, 1915.

121 Ark. 408; 181 S. W. 283.

Corporations — Liability of Director for Neglect — Limitation of Action.

An action under Kirby's Dig. § 863, providing that any director of a bank or other corporation, intentionally neglecting or refusing to perform the duties of his office, shall be severally liable for debts of the corporation during the period of his neglect or refusal to perform the duties, must be brought within three years from such refusal, and is thereafter barred.

Election of Director — Necessity for Acceptance.

Evidence that one, claimed to be a director of a bank, had never performed the duties of the office; was re-elected to it after his attempted resignation; that he was without the state for over five years and took no part in the conduct of the affairs of the bank, although at one time, while without the state, he assisted in the purchase of a farm for the bank, is insufficient to show that he was in fact a director, since, before becoming such, it was necessary for him to accept the office.

[See note at end of this case.]

Liability of Directors — Persons Entitled to Enforce — Person Participating in Unlawful Act.

Where officers of an insurance company and a bank conspire for the purchase of the insurance company's stock, and entries are made on the books of the bank so as to conceal that fact from the directors and stockholders, they cannot be liable severally to the depositor for any debt of the bank so accruing, since the insurance company cannot hold directors for any liability founded on the company's participation in a wrongful act.

Appeal from Benton Chancery Court: HUMPHREYS, Chancellor.

Consolidated actions by Western and Southern Fire Insurance Company et al., plaintiffs, against R. D. Zimmerman et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. MODIFIED.

Williams & Williams and McGill & Lindsey for appellants.

E. P. Watson, A. L. Smith, Dick Rice and Rice and Dickson for appellees.

[409] McCULLOCH, C. J.—This appeal involves several consolidated actions instituted in the chancery court of Benton County against defendants, Zimmerman and others, directors of a defunct banking corporation doing business at Siloam Springs, to recover on account of liability alleged to have been incurred by reason of their neglect of duty in the management of the affairs of said bank. The bank was declared to be insolvent in the summer of 1910, and a receiver was appointed, and the uncontradicted evidence in this case shows that it had been insolvent for [410] three or four years, at least, prior to the appointment of a receiver. The evidence is sufficient to warrant a finding that there was gross mismanagement of the affairs and business of the bank, causing considerable loss to the depositors and stockholders. These actions were instituted shortly after the appointment of a receiver, and at the trial of the cause before the chancellor there was a decree in favor of the plaintiffs for the recovery of a large sum of money against all of the directors save one, and those against whom the decree was rendered appeal to this court. The plaintiffs appeal from the decree exonerating the other director, Murphy, and also from that part of the decree which held that the directors were not liable for a deposit of \$20,000 made by the Western & Southern Fire Insurance Company, one of the plaintiffs.

(1) It is not seriously contended here that the decree against the directors was erroneous, except against Zimmerman, who defends on the ground that he was not a director within the period of the statute of limitations which runs against the causes of action of the plaintiffs. In other words, he contends that he was not a director after April, 1906, and that as to liability of the directors which accrued after that time he cannot be included. It seems to be conceded in the argument that the statutory period of limitation is three years. This court held that that was the period of limitation under Kirby's Digest, section 859, which imposes a liability on the president and secretary of any corporation for neglect of duty in failing to file the certificate prescribed by statute. The present actions are founded on section

863 of Kirby's Digest, which provides that if any president, "directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them respectively, such of them as so neglect or refuse shall be jointly and severally liable, in an action founded on this statute, for all the debts of such corporation contracted during the period of any such neglect or refusal." The same statute of limitation applies under both sections. Therefore, [411] the chancellor was correct in holding that three years was the period of limitation applicable in this case.

We are of the opinion that according to the clear preponderance of the testimony, appellant Zimmerman did not serve as a director after the meeting of stockholders on April 15, 1906, and that he is not liable in any of these actions. The minutes of the meeting of stockholders, as recorded on the books of the corporation, were introduced in evidence, and they recite that Zimmerman was elected at each meeting of the stockholders up to and including the year 1909. This is about all the evidence that was adduced tending to show that he was a director. Mr. Covey, the receiver, testified as to conversations which he had with Zimmerman after his own appointment as receiver, and those conversations merely show that he apprised Zimmerman of the fact that the minutes showed that he was a director, and that Zimmerman requested him to look into the matter and write to him further on the subject. The testimony of Mr. Covey is hardly sufficient to show an admission on the part of Zimmerman that he was in fact a director in the corporation.

Turning to the testimony adduced by appellant, it shows very clearly that Zimmerman was not a director. In fact, there is no substantial dispute on that point. Zimmerman shows that he moved to Texas in April, 1906, and came back to Siloam Springs only occasionally to visit his family. In March, 1906, he informed the president of the bank, Mr. Morris, that he would not be able to serve as director, and proposed to resign. Morris told him that it would be inconvenient to call a meeting for the purpose of electing a successor, but promised that he would not be re-elected at the meeting in April. Zimmerman testified that he was not present at the April meeting, and never received any information until after the appointment of a receiver that he had been re-elected as a director, or that the minutes recited that fact. Morris corroborated Zimmerman and testified concerning his conversation with the latter in March, 1906, and he stated that Zimmerman was not present at the April meeting. Lafollette, the assistant cashier, testified to the same effect.

[412] (2-3-4) Several witnesses were introduced by the plaintiffs who testified that Zimmerman was back at Siloam Springs oftener than he claims in his own testimony. That testimony, however, has very little probative force in establishing the fact that Zimmerman knew that he had been elected as director or that he assumed to act as such. The minutes of the corporation were very loosely kept and were unsigned, but conceding that they were competent evidence tending to show the election of Zimmerman as a director, that testimony is subject to be rebutted, and in addition to that, in order to hold Zimmerman liable, it is essential that he should have accepted the appointment. Under some circumstances an acceptance may be presumed, but certainly not in the face of the fact shown by this testimony that Zimmerman had in advance of the meeting informed the president and secretary of his proposed resignation and of his refusal to serve any further in that capacity. There must be an acceptance of the office of director before any liability can flow from the failure to discharge the duties of the office. *Des Arc Bank v. Moody*, 110 Ark. 39, 161 S. W. 134. A director has the right to resign at any time, and no formal acceptance of the resignation is required. 2 Cook on Corporations (7 ed.) section 624. Note to the case of *Zeltner v. Henry Zeltner Brewing Co.* 174 N. Y. 247, 66 N. E. 810, 95 Am. St. Rep. 574. Strictly speaking, there was no resignation of appellant Zimmerman. Though he proposed to resign, he acquiesced in the counter proposal of the president that he hold on until the stockholders' meeting in April, when his successor was to be elected, but his proposal to resign and his refusal in advance to serve any longer is competent evidence in the case to establish the fact that he was not aware of the fact that he was re-elected in April, and that he did not assume to act under the re-election. It is claimed that it was his duty to serve until his successor was elected, and assumed to take over the office. He had the power to continue to serve, but he did not assume the exercise of that power, and, on the contrary, abandoned the exercise of the duties of the office; and, according to the preponderance of the evidence in [413] the case, he had nothing further to do with the management of the affairs of the corporation.

The case of *Van Amburgh v. Baker*, 81 N. Y. 46, is directly in point. That was a suit against the directors or trustees on account of their failure to file an annual report under a statute similar to the statutes of this State. Some of the directors sought to be charged had, in advance of an annual meeting, indicated their unwillingness to serve for another term, and the court, in holding that they were not liable, said: "Here the defendants

not only ceased to act as trustees, but before the expiration of the year for which they were elected, they made a distinct avowal that they would not act as directors after February 25, 1875. To hold the defendants liable, under such circumstances, for not making the report in January, 1876, would be both against reason and authority." In that case the directors were not re-elected, but liability was sought to be established by reason of the fact that it was their duty to hold over and to continue to discharge the duties of the office until their successors were elected. Disposing of that contention, the court said: "Unless they (the directors) chose to act, their offices became vacant at the end of the year. It was not necessary for them to resign at the end of the year, to produce a vacancy. The vacancy would come from the termination of their terms of office."

It appears from the evidence that Zimmerman, while in Texas, assisted in the purchase of a large farm for the bank in that State but the service was performed at the request of the president and not as one of the directors.

We are of the opinion, therefore, that there is no liability on the part of Zimmerman established, for the reason, as above indicated, that he had completely severed his official connection with the corporation at the meeting in April, 1906, and was not responsible for any mismanagement of the affairs of the corporation after that time.

(5) As to the cross-appeal of the plaintiffs, we need only discuss one feature, and that relates to the [414] failure of the chancellor to render a decree in favor of the Western & Southern Fire Insurance Company for a deposit of \$20,000. It appears from the evidence that this deposit was a result of the private arrangement between the president and cashier of the bank with the insurance company for the purchase of stock in the insurance company which was then being promoted. It was done without the knowledge of others connected with the bank and the certificates of deposit were purposely issued in a way to conceal the transaction from those who examined the affairs of the bank. In other words, the certificates of the deposit were taken from the back of the books of blanks so that they would not be discovered. The chancellor held that the act of the president and cashier in purchasing stock of the insurance company was *ultra vires* and void, and that the acceptance of the special deposit, which was a part of the same transaction, having been done secretly and through connivance with the insurance company as a depositor, the directors could not be held liable for it. That conclusion is so obviously correct that no discussion is called for. The insurance company cannot hold the directors responsible for liability founded in their own

participation in the wrongful act of the other officers of the bank in purchasing stock of the insurance company and in concealing the deposit.

The decree against Zimmerman is reversed, and each of the causes is as to him dismissed, but in all other respects the decree of the chancellor is affirmed.

NOTE.

Acceptance of Office in Private Corporation.

In accordance with the decision rendered in the reported case, it has been generally held that when a person is elected to an office in a private corporation it is necessary for him to accept in order to become an officer. *Bramblet v. Commonwealth Land, etc. Co.* 83 S. W. 599, 26 Ky. L. Rep. 1176; *Blake v. Bayley*, 16 Gray (Mass.) 531; *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203; *Cameron v. Seaman*, 69 N. Y. 396, 25 Am. Rep. 212; *United Growers Co. v. Eisner*, 22 App. Div. 1, 47 N. Y. S. 906. Compare *Booker v. Young*, 12 Grat. (Va.) 303. Thus in *Cameron v. Seaman*, supra, the court, dealing with the rights of a stockholder in a corporation, said: "The fact that he was elected a trustee did not alone invest him with the character of trustee, so as to charge him with the duties and responsibilities of the office. There must in addition have been an acceptance on his part of the office to which he was elected. He was not bound to accept the position. He did not by becoming a stockholder in the corporation undertake to act as trustee if elected. It was not necessary that the defendant should by a direct and positive act assent to the action of the stockholders. His acceptance could be shown by conduct on his part indicating an intention to accept the office, and might be implied from circumstances. In this case there is nothing to show such an intention, and the circumstances proved are inconsistent with the theory that he accepted the office."

In order to become an officer the person chosen must accept during the term for which he is elected. *Bramblet v. Commonwealth Land, etc. Co.* 83 S. W. 599, 26 Ky. L. Rep. 1176.

Where no qualification is required and in the absence of an express declaration or statute or controlling usage to the contrary, a person elected to an office in a corporation is presumed to accept. *Halpin v. Mutual Brewing Co.* 20 App. Div. 583, 47 N. Y. S. 412; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253; *Danville, etc. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278 (where the one chosen has been notified). See also *Delano v. Smith Charities*, 138 Mass. 63.

But the presumption may be rebutted. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

In *Union Bank v. Keim*, 52 App. Div. 135, 64 N. Y. S. 1070, affirmed 169 N. Y. 587, 62 N. E. 1101, the court said: "The defendant, in paragraph 10 of his answer, stated that he had attended a meeting of the board of directors on or about the 18th day of April, 1896 (he had been elected April 3, 1896), that he subsequently learned that representations made to induce his attendance at such meeting were false, and he then refused to further act as a director. This was sufficient evidence to make out a prima facie case as to his having served as a director after his election, and thereby accepted the office."

A person elected to an office in a private corporation may refuse to accept. *Standard Oil Co. v. Morrison, etc. Co.* 54 Ill. App. 531, wherein it was said: "We know of no rule of law or ethics which will hold a man to acceptance of the office of director of a private business corporation against his will, and the assumption that Seegers was a director of the corporation on December 12th, when the corporation executed the judgment notes to him, is, we think, unfounded. His reasons for refusing to serve as a director appear from the evidence to have been such as any other-wise busy man might have had, and not as a part of a plan with the corporation to gain for himself undue preferential rights. He had been, it is true, a director of the corporation during the preceding year, but his refusal to accept a re-election or to serve as such any longer was most expressive and positive, and after that he cannot be held to have been a director."

One who accepts an office in a corporation is presumed to accept with full knowledge of the by-laws of the corporation. *Jones v. Vance Shoe Co.* 92 Ill. App. 158. And he is subject to such by-laws. *Salton v. New Beeston Cycle Co.* [1899] 1 Ch. (Eng.) 775; *In re Hercynia Copper Co.* [1894] 2 Ch. (Eng.) 403, 63 L. J. Ch. 567, 7 Rep. 214, 70 L. T. N. S. 709, 42 W. R. 593, 1 Manson 286. "Where a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration, and all the benefits which those articles provide for directors." *In re Anglo-Austrian Printing, etc. Union* [1892] 2 Ch. (Eng.) 158, 61 L. J. Ch. 481, 66 L. T. N. S. 593, 40 W. R. 518.

A person who accepts an appointment as director, knowing that the holding of a certain number of shares is a necessary qualification, is held to have contracted with the

corporation that he will, within a reasonable time, obtain the requisite shares. *Molineaux v. London, etc. Ins. Co.* [1902] 2 K. B. (Eng.) 589, 71 L. J. K. B. 848, 87 L. T. N. S. 324, 51 W. R. 36, 18 Times L. Rep. 753; *In re Pelotas Coffee Co.* L. R. 20 Eq. (Eng.) 506, 44 L. J. Ch. 622; *In re Hampshire Co-operative Milk Co.* 29 W. R. (Eng.) 170; *In re Bread Supply Assoc.* 62 L. J. Ch. (Eng.) 376, 3 Rep. 288, 68 L. T. N. S. 434.

"The fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification." *In re Metropolitan Public Carriage, etc. L. R. 9 Ch. (Eng.) 102, 43 L. J. Ch. (Eng.) 153, 29 L. T. N. S. 562, 22 W. R. 171.* And in that case the court commented on *In re National Ins. etc. Assoc. 4 De G. F. & J. (Eng.) 78, 8 Jur. (N. S.) 951*, as follows: "In that case the naked question was raised, whether from the acceptance of the office of director and the consequent authorized representation to the world that the person so accepting was a director, such representation being continued over a certain period of time—whether from that alone a contract with the company to take shares could be inferred. In that particular case the option was either to have shares or to insure in the company. But there were various ways by which the shares might be acquired, and the Lords Justices held that, from the mere acceptance of the office of director, without more, they could not infer a contract to become a shareholder." See also *In re Wheal Buller Consols*, 38 Ch. D. (Eng.) 42, 57 L. J. Ch. 333, 58 L. T. N. S. 823, 36 W. R. 723.

STATE EX REL. ATTORNEY GENERAL

v.

KNIGHT.

North Carolina Supreme Court—May 25, 1915.

169 N. Car. 333; 85 S. E. 418.

Elections — Right to Vote — Nature of Right.

Under Const. art. 6, § 1, providing that every male person possessing specified quali-

fications shall be entitled to vote at any election, a woman is not a voter, as the right to vote is not a natural right, but one conferred by law, which can be exercised only by those upon whom it is conferred.

Public Officers — Eligibility — Restriction to Voters — Women.

Under Const. art. 6, § 7, providing that every voter, except as in that article disqualified, shall be eligible to office, and section 8, providing that the classes of "persons" therein specified shall be disqualified for office, only a voter is qualified to hold office; the word "persons," in section 8, though comprehensive enough to include women, applies only to voters, as they are the only persons referred to in that article.

Notaries Public — Notary as Officer.

Revisal 1905, § 989, provides that the execution of all deeds may be proved or acknowledged before any of the "officials" therein specified. Section 2347 authorizes the governor to appoint notaries, who shall hold their "office" for two years, and shall qualify by taking an oath of office and the oaths prescribed for officers. Section 2350 gives notaries power to take and certify the acknowledgment of deeds, to administer oaths and affirmations in matters incident to their "offices," etc., and subsequent sections refer to their "office," their "official acts," etc. It is held that the position of notary public is an "office," within Const. art. 6, § 7, providing that every voter, except as in that article disqualified, shall be eligible to office, especially as the probate of a deed is a judicial act, and the judicial function is performed by the notary, and not, as claimed, by the clerk of the court.

Right of Woman to Be Notary Public.

As the position of notary public is an "office," the legislature cannot change its character by calling it a place of trust and profit, and Pub. Laws 1915, c. 12, authorizing the appointment of women as notaries public, and providing that this position shall be deemed a place of trust and profit, and not an office, is invalid.

[See note at end of this case.]

Constitutional Law — Statute Violating Constitution — Duty of Court to Declare Nullity.

It is not only within the power, but it is the duty, of the courts in proper cases to declare an act of the legislature unconstitutional, as the constitution is the supreme law which all judges are sworn to support, and the courts, in declaring what the law is, must, in case of a conflict between the constitution and a statute, sustain the constitution.

Appeal from Superior Court, Buncombe county: WEBB, Judge.

Action by State, on relation of attorney general, against Noland Knight. Judgment for defendant. State appeals. REVERSED.

[334] This is an action instituted by the State upon the relation of the Attorney-General against the defendant, a married woman, to inquire into and test her right to hold the position of notary public under chapter 12 of the Public Laws of 1915, which provides: "That the Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed a place of trust and profit, and not an office."

There was a judgment in favor of the defendant, and the State appealed.

T. W. Bickett for appellant.

Martin, Rollins & Wright and *John A. Moore* for appellee.

ALLEN, J.—There are five questions directly or indirectly involved in this appeal:

1. Is a woman a voter in North Carolina?
2. If not a voter, is she eligible to office?
3. Is the position of notary public a public office?
4. If an office, can the General Assembly affect its character by calling it a "place of trust and profit," without changing its functions?
5. Has this Court the power to say that the General Assembly has exceeded its authority, and that the act passed by it is unconstitutional?

The right to hold the position of notary public is of slight moment to the women of the State or to the public, but it is of supreme importance that these questions shall be correctly decided, because they involve constitutional principles, and we approach their consideration mindful of our duty to declare what the law is, and not what we would have it to be, and of our obligation to maintain and uphold the Constitution until it is changed by the people, in whose hands the power of amendment rests.

1. *Is a woman a voter in North Carolina, and can she be one without constitutional amendment?*

The law writers agree that the right of suffrage is not a natural or inherent right, and that it is a privilege conferred by the State,

[335] Judge Cooley in his treatise on Constitutional Law, page 260, says: "Suffrage cannot be the natural right of the individual, because it does not exist for the benefit of the individual, but for the benefit of the State itself. Suffrage must come to the individual, not as a right, but as a regulation which the State establishes as a means of perpetuating its own existence, and of insuring to the people the blessings it was intended to secure. Suffrage is never a necessary accompaniment of State citizenship, and

the great majority of the citizens are always excluded, and are represented by others at the polls;" and in 15 Cyc. 280, the editor sums up the authorities in the following statement of the law: "In all periods and in all countries it may be safely assumed that no privilege has been held to be more exclusively within the control of governmental power than the privilege of voting, each State in turn regulating the subject by sovereign political will. The right of suffrage once granted may be taken away by the exercise of sovereign power, and if taken away, no vested right is violated or bill of attainder passed. None of the elementary writers include the right of suffrage among the rights of property or of person. It is not an absolute, unqualified personal right, but is altogether conventional. It is not a natural right of the citizen, but a franchise dependent upon law, by which it must be conferred to permit its existence."

If, therefore, the right to vote is not a natural right, but one conferred by law, only those can exercise the privilege upon whom it is conferred, and when we turn to our Constitution, Article VI, section 1, we find it provided that "Every male person born in the United States, and every male person who has been naturalized, 21 years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the State, except as herein otherwise provided;" and as the privilege of voting is not a natural right and is conferred on males alone, this, of course, excludes females.

The exact question was considered in *Spencer v. Board of Registration*, 1 McAuther (D. C.) 169, 29 Am. Rep. 582; *Gougar v. Timberlake*, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 487, 37 L.R.A. 644; and in *People v. Barber*, 48 Hun 198, 15 N. Y. St. Rep. 601, and it was held in each that women are excluded from voting under a constitution which confers the right to vote on males; and in *Minor v. Happersett*, 88 U. S. 162, 22 U. S. (L. ed.) 627, the whole decision rests upon the assumption that this is the law.

2. *If not a voter, can a woman hold office in North Carolina?*

We turn again to the Constitution, and find it provided in Article VI, section 7, that "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office," and the construction placed upon this section by our Court in an opinion written by Chief Justice Clark in *Pace v. Raleigh*, 140 N. C. 65, 52 S. E. 277, is that no one can hold office who is not a voter. He says in that case: "Nor have we been inadvertent to the [336] fact that under the former constitutional provision one who was an elector,

that is, qualified to register, was eligible to office, though not registered, and that under the amendment no one is eligible to office unless he is a voter."

The language, "except as in this article disqualified," refers to voters (males) who deny the existence of God, or who have been convicted of crime. (Art. VI, sec. 8.) In other words, voters are eligible to office except as *they* are disqualified, and the word "persons" appearing in section 8, while comprehensive enough to include women, only applies to voters, as they are the only persons referred to in the article.

This is the construction placed on these sections of the Constitution in *Lee v. Dunn*, 73 N. C. 602, which is cited with approval in *Spruill v. Bateman*, 162 N. C. 588, Ann. Cas. 1915B 515, 77 S. E. 768. The Court says: "The Constitution, Art. VI, sec. 1, prescribes the qualification of voters to be as follows: 'Every male person, etc., 21 years old or upwards, who shall have resided in this State twelve months next preceding the election and thirty days in the county in which he offers to vote, shall be deemed an elector.'

"The fourth section is as follows: 'Every voter, except as hereinafter provided, shall be eligible to office,' etc.

"The exception above is contained in the fifth section, as follows: 'The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted of treason, perjury, or of any other infamous crime, or of corruption or malpractice in office, unless such person shall have been legally restored to citizenship.'

"So that every voter who does not deny the being of God, and has not been convicted of crime, is eligible to office in this State. And this comes so near including every man that it may be said that almost every man is eligible to office; that is to say, is electable, if the people choose to elect."

This statement of the law is in accord with authority elsewhere.

In *Mechem on Public Officers*, sec. 64, the author says: "The right to hold a public office under our political system is not a natural right. It exists, where it exists at all, only because and by virtue of some law expressly or impliedly creating and conferring it;" and in section 69: "Where no limitations are prescribed, however, the right to hold a public office under our political system is an implied attribute of a citizen and is presumed to be coextensive with that of voting at an election held for the purpose of choosing an incumbent of that office; those and those only who are competent to select

the officer being competent to hold the office;" and in *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, the Court says: "We have already seen that the grounds upon which a person not an elector is [337] excluded from holding public office is that the powers and functions of a free and independent government must be exercised by those by whom such government was instituted, that is, by the electors thereof. So if a person who is not an elector attempts to exercise the functions of a public office, the courts, upon proper proceedings being instituted for that purpose, will oust him."

This conclusion that only voters are eligible to office under our Constitution is an application of the maxim, *Expressio unius est exclusio alterius*, of which the Supreme Court of Illinois said, in *People v. Hutchinson*, 172 Ill. 498, 50 N. E. 599, quoting from *State v. Wrightson*, 56 N. J. L. 201, 28 Atl. 56, 22 L.R.A. 548: "In the construction of statutes it is a cardinal rule, which applies as well to constitutional provisions, that when the law is in the affirmative, that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner, upon the maxim, *Expressio unius est exclusio alterius*. 1 Plow. 206; 9 Bac. Ab. 235; Sedg. Stat. Con. 30."

Under this rule, as the Constitution says affirmatively that "Every voter, etc., shall be eligible to office," the affirmation contains the negative that no one except a voter can hold office.

It follows that as a woman is not a voter, she is not eligible to office.

3. Is the position of notary public an office?

What is the definition of notary public as given by the lexicographers? *Black's Law Dictionary*: "A public office whose functions are," etc. *Bouvier's Law Dictionary*: "An officer appointed by," etc. *The Century*: "A public officer authorized," etc. *Webster*: "A public officer who," etc.

What do the text-writers on the law say? *Mechem on Public Officers*, sec. 47: "A notary public is a public officer." 21 Am. & Eng. Enc. of Law, 555: "The office of a notary public is a public office." 29 Cyc. 1068: "The office of a notary public has long been known both to the civil and to the common law. It exists and is recognized throughout the commercial world, and has been said to be 'known to the law of nations.' It is a public office, being in most of the States a State office, although in few States it has been regarded as a county office, and its functions, once simple, have now a wider scope."

That the position was recognized as an office at common law is shown by the follow-

ing, taken from 5 Comyn's Dig. 140, when speaking of protests of bills of exchange: "The protest must be made by a public notary upon all foreign bills of exchange, because he is a *public officer* to whom credit is given;" and by the opinion of Buller, J., in *Leftley v. Mills*, 4 T. R. (Eng.) 175 (1791), that "The demand of a foreign bill must be made by a notary public, to whom credit is given, because he is a *public officer*." (Italics ours.)

[338] What is the opinion of the judges?

In each of the following cases it is held that a notary public is a public officer: *Emmerling v. Graham*, 14 La. Ann. 389; *State v. Davidson*, 92 Tenn. 531, 22 S. W. 203, 20 L.R.A. 311; *Teutonia Loan, etc. Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; *Opinion of Justices*, 150 Mass. 586, 23 N. E. 850, 6 L.R.A. 842; *State v. Hodges*, 107 Ark. 272, 154 S. W. 506; *Pierce v. Indseth*, 106 U. S. 546, 1 S. Ct. 418, 27 U. S. (L. ed.) 254; *Ohio Nat. Bank v. Hopkins*, 8 App. Cas. (D. C.) 146; *Kirksey v. Bates*, 7 Porter (Ala.) 529, 31 Am. Dec. 722; *State v. Adams*, 58 Ohio 612, 51 N. E. 135, 65 Am. St. Rep. 792, 41 L.R.A. 727; *Governor v. Gordan*, 15 Ala. 72; *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 49; *Smith v. Meador*, 74 Ga. 416, 58 Am. Rep. 438; *Browne v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484, 9 Am. Dec. 463; *Keeney v. Leas*, 14 Ia. 464; *Britton v. Niccolls*, 104 U. S. 766, 26 U. S. (L. ed.) 917; *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 28 L.R.A. 384; *Bettmen v. Warwick*, 108 Fed. 47, 47 C. C. A. 185; *Ashcraft v. Chapman*, 38 Conn. 232; In re *Opinion of Justices*, 73 N. H. 621, 6 Ann. Cas. 283, 62 Atl. 969, 5 L.R.A. (N.S.) 415; *State v. Clarke*, 21 Nev. 335, 31 Pac. 545, 37 Am. St. Rep. 517, 18 L.R.A. 313; *Gharst v. St. Louis Transit Co.* 115 Mo. App. 409, 91 S. W. 453; *Carroll v. State*, 58 Ala. 396.

We quote from only a few of these citations, but all are to the same effect.

In the case from Connecticut Chief Justice Butler says: "Notaries were originally mere commercial scribes. Becoming important to the commercial world, their appointment was provided for and their duties regulated by public law, and they became sworn public officers."

In the case from New York: "The very designation of 'notary public' indicates a relation the office sustains to the body politic. It is impossible to regard him as other than a public officer."

In the case from Indiana: "A notary public is a public officer. The office originated in the early Roman jurisprudence, and was known in England before the Conquest."

In the case from District of Columbia: "It is a well known attribute of a notary public

that he is a public officer, recognized as such by the common law and the law of nations."

In the case from *Pierce v. Indseth*, 106 U. S. 546, 1 S. Ct. 418, 27 U. S. (L. ed.) 254: "The Court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world."

The executive, legislative, and judicial construction in this State also favors the view that the position of notary public is a public office:

The executive, because until the last General Assembly met no woman had been appointed by the Governor a notary public, except in one instance, and then by mistake, as only the initials of the person applying for appointment were given, and when the mistake was discovered the commission was withdrawn.

The legislative, because for more than one hundred years the position has been spoken of in the statutes as an office.

The earliest reference to the position we have been able to find is in the Acts of 1777, vol. 1, Laws of N. C. ch. 118, sec. 15, which provides [339] that "The Governor, for the time being, shall . . . appoint one or more persons . . . to act as notary or notaries, . . . who shall take the oath appointed to be taken for the qualification of *public officers* and also an oath of office."

In the Revised Statutes of 1836-7 it is provided that "The Governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries, who, on exhibiting their commission to the county court of the county in which they shall act, shall be duly qualified by taking before said court an *oath of office* and the oaths prescribed for *officers*." This section was re-enacted in the Revised Code of 1854, ch. 75, sec. 1, and in the Revision of 1905, sec. 2347, except in the latter act it is added: "who shall hold *their office* for two years from and after the date of their appointment." (Italics ours.)

By the judicial, because in *Long v. Crews*, 113 N. C. 256, 18 S. E. 499, it was held that the probate of a deed in trust before a notary public who was a preferred creditor was invalid, upon the principle of the common law that no one can sit in judgment upon his own cause, and the present Chief Justice, writing the opinion, says for the Court: "The attempted acknowledgment of the deed in trust before a notary public who was a preferred creditor therein *was before an officer* disqualified to act, and hence a nullity," and the same learned judge says, in *Smith v. Ayden Lumber Co.* 144 N. C. 49, 56 S. E. 555: "That the *officer, here a notary public*," and in his concurring opinion in

Nicholson v. Eureka Lumber Co. 160 N. C. 37, Ann. Cas. 1914C 202, 75 S. E. 730: "*It cannot be doubted that a notary public is a public office.*" (Italics ours.)

The only expression we have found in our reports apparently in conflict with these authorities is in Worthy v. Barrett, 63 N. C. 199, in which an opinion of the Attorney-General of the United States of 1867 is quoted, which classifies notaries public among those positions that are not offices.

The case of Worthy v. Barrett was this: Worthy was elected sheriff of Moore County in 1868, and the commissioners of the county refused to induct him into office because he had been sheriff of the county before and during the war, and the question presented to the Supreme Court was whether he was an officer within the meaning of the Reconstruction Acts, and therefore disqualified until his disabilities had been removed.

The Court held that he was an officer because he was required to take an oath to support the Constitution, saying: "The oath to support the Constitution is the test," and quoted the opinion of the Attorney-General in support of this position, because he said in his opinion, in speaking of county officers: "I have arrived at the conclusion that they are subject to disqualification if they were required to take as part of their official oath the oath to support the Constitution of the United States."

[340] We do not concur in the view that the oath to support the Constitution is the test, but if this should be adopted and the point decided in this case of Worthy v. Barrett approved, it would be decisive against the defendant, because notaries public, both before and since the act of 1915, now under consideration, have been and are required to take an oath to support the Constitution.

The opinion quoted in the case by the Attorney-General of the United States, that notaries are not public officers, is also in direct conflict with the opinion of the Supreme Court of the United States in Pierce v. Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 U. S. (L. ed.) 254, thereafter decided, that notaries "are officers recognized by the commercial law of the world."

The case of Lawrence v. Hodges, 92 N. C. 672, 53 Am. Rep. 436, has, in our judgment, no bearing upon the question involved in this appeal. It was held in that case that it was competent for the Legislature to authorize clerks of the Superior Court to act as notaries public, and this is no more than an application of the principle stated by Associate Justice Brown in McCullers v. Wake County, 158 N. C. 80, Ann. Cas. 1913D 507, 73 S. E. 816, of simply annexing additional powers and duties to an office already exist-

ing. He says, among other things: "This legislation is not novel in North Carolina. . . . In 1901 the Legislature passed a similar act. . . . We also have the familiar case of the Governor, who is made by law a trustee of the University of the State and chairman of the board, and is required to perform these duties and also act as chairman of the executive committee of the trustees. . . . In West Virginia the law requires the Governor, Auditor, Treasurer, Superintendent of Schools, and Attorney-General to serve on the Board of Public Works, and prescribes the duties of said board. The Court of Appeals in an elaborate opinion held the act valid, saying, in substance, it simply prescribes additional powers to be performed by officers already elected by the people, and that it does not amount to an appointment to an office created by law, but that it only amounts to requiring the officers of the executive department, by virtue of their respective offices to which they have been elected by the people, to act as members of the Board of Public Works; that it in substance simply annexes additional powers and duties to their respective offices. . . . We could multiply authorities in support of these views."

We have no means of knowing the opinion of the Attorney-General of the State except from his public conduct and public utterances. He is a plaintiff in the action, and filed a complaint alleging that the defendant was unlawfully using the powers and duties of the position of notary public, and, when there was an adverse judgment against him in the Superior Court, appealed to this Court, and upon the argument strenuously insisted that the act of the General Assembly passed in 1915 was invalid if the position of notary public was a public office prior to its [341] enactment, and that the only debatable question was whether it was a public office, and he cited perhaps twenty authorities holding the position to be a public office.

The Governor has declined to make more than one appointment until the courts have determined the validity of the act.

We have, then, the opinion of a General Assembly which refused to pass the act until the Governor had agreed that he would make only one appointment before its constitutionality was determined; the opinion of the Governor, who has made only one appointment, and then for the purpose of presenting the question to the courts, and the opinion of the Attorney-General, if he has given one, who is a plaintiff in the action and is seeking to oust the defendant from office.

Is it not clear that these officials have not expressed any opinion, and that they have simply acted so that the question might be

considered, and have placed the responsibility of final decision upon the courts?

It is but fair and just to the Attorney-General to say that he has acted in this matter as he has in all others coming before our Court. He is always candid and presents his contentions with learning and ability; but he feels that it is his duty to give the Court the benefit of all authority he finds, whether in support of his contention or not.

It is also suggested that women are admitted to practice law in this State, and that lawyers are officers and are required to take oaths to support the Constitution, and, in addition, an oath of office; but as is said in 4 Cyc. 898: "An attorney does not hold an office in the constitutional or statutory sense of that term, but is an officer of the court, exercising a privilege or franchise."

If, however, we discard the definition of the term and the opinion of the law writers and of the judges, and the construction placed upon it by the different departments of State, and apply the test of the functions to be performed by the incumbent of the position, we reach the same conclusion.

In *Mechem on Public Officers*, sec. 1, it is said that an office is "a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public," and this definition was adopted and approved in a unanimous opinion of this Court in *State v. Smith*, 145 N. C. 467, 59 S. E. 649, and again at this term in *Groves v. Barden*, 169 N. C. 8, 84 S. E. 1042, L.R.A.1917A 228, and in the latter case it was also said that the performance of an executive, legislative, or judicial act is the test of a public office.

The extent to which the power may be exercised is not material. It is the fact that the power exists which is determinative. It was held in *Midgett v. Gray*, 159 N. C. 443, 74 S. E. 1050, by the unanimous opinion of the Court, [342] that the position of school committeeman is a public office, and although the scope of the duties are confined, the position was regarded of such importance that its acceptance vacated the office of clerk of the Superior Court under the constitutional provision forbidding the holding of two offices.

One of the duties which a notary public may perform is taking the probate of deeds, and this is a judicial act.

In *Paul v. Carpenter*, 70 N. C. 508, Rodman, J., speaking for the Court, says: "To take the acknowledgment and privy examination of a *feme covert* to a deed conveying her land is a judicial act;" and in *White v. Connelly*, 105 N. C. 68, 11 S. E. 177, Associate Justice Clark says: "Admitting to probate is a judicial act," and this is approved

in *Piland v. Taylor*, 113 N. C. 1, 18 S. E. 70, and in *Long v. Crews*, 113 N. C. 256, 18 S. E. 499.

"The officer who takes an acknowledgment (of the execution of a deed) acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument." *Wasson v. Connor*, 54 Miss. 352. "It is well settled that the certificate of a judge or a justice of the peace of the acknowledgment of a deed or mortgage is a judicial act. Conceding such to be the effect of a certificate of a judge or justice, yet it was contended on the argument that like effect should not be given to the certificate of a notary. Why not? He is a public officer, commissioned by the Governor. He is acting under oath, like other officials in the performance of judicial duties. Whatever officer is authorized to take the acknowledgment, to him is given a judicial act." *Com. v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805.

The defendant contends, however, that if it is conceded that the probate of a deed is a judicial act, the judicial function is performed by the clerk, and not by the notary public; that the notary takes and certifies the evidence, and the clerk upon this certificate adjudicates the probate.

The authorities are, in our opinion, against this position. In section 989 of the Revisal it is provided that "The execution of all deeds of conveyance, etc., may be proven or acknowledged before any one of the following officials of this State: the several justices of the Supreme Court, the several judges of the Superior Court, commissioners of affidavits appointed by the Governor of this State, the clerk of the Supreme Court, the several clerks of the Superior Courts, the deputy clerks of the Superior Courts, the several clerks of the criminal courts, notaries public, and the several justices of the peace."

In this section notaries are not only classified among the *officials of the State*, but among its judicial officers, and all acquire jurisdiction to [343] take the proofs and acknowledgments of deeds from the same source and in the same language.

If so, by what rule of construction can it be said that a judge or clerk is exercising a judicial power when taking the proof or acknowledgment of a deed, and that a notary is not?

Again, the respective duties of the notary public and the clerk in admitting to probate, when both act, show that the notary is re-

quired to exercise discretion and judgment, while the duties of the clerk are mechanical and clerical.

The notary is not required to certify the evidence, but "to take and certify the acknowledgment or proof" (Rev. sec. 2359), and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed; (2) that they acknowledge the execution of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto; while, on the other hand, the clerk is only required to examine the certificate and adjudge that it is correct and order registration, which only renders it necessary to compare the certificate of the notary with the form prescribed by statute for the purpose of seeing if they are substantially alike.

This position is, we think, fully sustained by *Young v. Jackson*, 92 N. C. 147, and *Darden v. Neuse*, etc. R. Steam Boat Co. 107 N. C. 446, 12 S. E. 46, in which it was held that the probate and registration of a deed was valid without an adjudication by the clerk that it was in due form and without an order of registration, this requirement of the statute being held to be directory.

In the *Jackson* case the Court says: "The important thing required with a view to registration is that the deed or other instrument requiring registration shall be proven before a tribunal or officer authorized by law to take and certify the probate;" and in the *Darden* case: "We therefore hold that where an acknowledgment or proof of the execution of a deed or other paper required or allowed to be registered is lawfully taken by any officer other than the clerk of the Superior Court of the county where the land lies, it is not essential to the validity of its registration that the latter should add an adjudication or order of registration to the certificate and fiat of the officer taking the probate."

It is true that in both of these cases the probate was taken before a clerk of the Superior Court, but in a county other than that in which the land was situate, and the authority of such officer in regard to probate is derived from the same source as is the authority of a notary, and is no greater, and the cases make no distinction between the positions in this respect, the language in one of the cases being "before a tribunal or officer," and in the other, "before any officer." These cases were decided before the enactment of section 999 of the Revisal, but that does not affect them as authority for the position that taking proof is judicial.

[344] If, therefore, admitting to probate is a judicial function, and the duties imposed upon the clerk are directory and not manda-

tory, it would seem that the performance of the judicial act is with the notary.

There is no conflict between these decisions and the case of *Evans v. Etheridge*, 99 N. C. 47, 5 S. E. 386, because in the latter case the Court was dealing with the certificate of a commissioner of affidavits of another State under a statute which required the clerk, when acting upon the certificate of a commissioner, to "adjudge such deed or other instrument to be duly acknowledged or proved in such manner as if made or taken before him."

Another important function of a notary public is the power to protest commercial paper, and here his act, attested by his notarial seal, is recognized at home and abroad, because he is a public officer, and the maxim, *Omnia presumuntur esse rite acta*, which is applied to the acts of officers and not to those of the private individual, prevails. "The protest must be made by a notary public upon all foreign bills of exchange, because he is a public officer to whom credit is given." 5 Comyn's Dig. 140. "The demand of a foreign bill must be made by a notary public, to whom credit is given because he is a public officer." *Leftley v. Mills*, 4 T. R. (Eng.) 175. "The notary is a public officer commissioned by the State, and possessing an official seal, and full faith and credit are given to his official acts, in foreign countries as well as his own." 2 Dan. Neg. Inst. sec. 934. "Notaries are public officers of the whole commercial world." *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 51.

"As public officers, notaries are entitled to the presumption of law in their favor that they have performed their duty, unless the contrary appears. . . . Every intendment is to be in favor of the fair performance of his duty by the notary." *McAndrew v. Radway*, 34 N. Y. 514.

Again, we said in *Groves v. Barden* that while the final test of an office was the performance of a judicial, executive, or legislative act, that there were the following evidences as to the character of the position: "That an oath to support the Constitution is required, or that a bond for the faithful performance of duties must be executed, or that the duties are prescribed by law and not regulated by contract, or that the incumbent discharges independent duties and is not acting under the direction of others, or that the duties are permanent in their nature and not occasional and intermittent, and that the term is fixed and continuing and not temporary, or that the position is named an office or an employment in the statute creating it."

It will be found upon comparison that all these evidences were present as to the position of notary public prior to the passage of

the act now before us, except the giving of a bond.

He is required to take an oath to support the Constitution; his duties are prescribed by law and not regulated by contract; he performs independent [345] duties and does not act under the direction of others; his duties are continuing and permanent; the term is fixed, and, until the last General Assembly met, the position had been called an office in all legislative acts since 1777.

It is also evident that in the opinion of the General Assembly of 1915 it was an office. If not, why pass the act at all? The Governor has power under the general law to appoint notaries, and if not an office, he could have appointed women to the position before the act was passed; and if this was the opinion of the General Assembly, that it was not an office, the act is no more than a suggestion or advice to the Governor. It was because the position was known and recognized as an office that the words were added to the act, "and this position shall be deemed a place of trust and profit, and not an office," meaning it is an office now, but "shall be" hereafter a place of trust and profit.

It is also significant that the General Assembly, in passing the act of 1915, did not undertake to amend chapter 55 of the Revised, entitled "Notaries," and it leaves that chapter unimpaired, unless repealed by implication.

That chapter provides: "The Governor may . . . appoint one or more fit persons in every county to act as notaries, who shall hold their office for two years . . . and shall be duly qualified by taking before said clerk an oath of office and the oaths prescribed for officers" (sec. 2347); "The Governor shall issue to each a commission" (sec. 2347); "Notaries public shall have power to take and certify the acknowledgment or proof of deeds, etc.; to take depositions and to administer oaths and affirmations in matters incident to or belonging to the duties of their offices; and to take affidavits to be used before a court, judge, or other officer within the State, and shall have full power to take the privy examination of *femes covert*" (sec. 2350); "Notaries public shall have full power and authority to perform the functions of their office in any and all counties of the State, and full faith and credit shall be given to any of their official acts" (sec. 2350); "They are required to state after their official signature the date of the expiration of their commissions, but the failure to do so shall not thereby invalidate 'their official acts' (sec. 2351); 'Official acts by notaries shall be attested by their notarial seals' (sec. 2352).

It seems, therefore, to be established, by every test that can be applied, that hereto-

fore the position of notary public has been a public office.

4. *If an office, can the General Assembly, by calling it a "place of trust and profit," without changing the functions, affect its character?*

The contention of the defendant is that as the position of notary public is not named in the Constitution, and is created by statute, that the qualifications for holding office named in the Constitution do not apply [346] to it, and that the General Assembly may determine who can hold the position. In other words, that as the position is created by the Legislature, the constitutional provision as to holding office does not apply to it.

We cannot approve this position without following it to its logical conclusion, and to do so it must be applied to all offices not named in the Constitution and created by legislative act, and as to them we must hold that the Legislature may call them "places of trust and profit" and say who may hold them, without regard the Constitution.

There is no such classification of offices as large and small, and we cannot yield to the suggestion that the position of notary public, if an office, is not of great importance, and that therefore we may hold that the constitutional qualifications for office do not apply to that position and stop, because when this case is decided it becomes a precedent, and as said by Disraeli, "A precedent embalms a principle." If the principle is not safe and sound, we may well adopt the words of Portia, who replied, when urged to do a little wrong that great good might come of it:

"Twill be recorded for a precedent;
And many an error by the same example,
Will rush into the State. It cannot be.

Let us, then, see to what conclusions the principle naturally and inevitably leads, and, first, as to the offices to which it must be applied.

We find among the offices created by legislative act, now in existence, and not mentioned in the Constitution, three Corporation Commissioners, a Commissioner of Agriculture, an Insurance Commissioner, a Commissioner of Labor, the directors and superintendent of the State's Prison, the State Librarian, the Marshal of the Supreme Court, the Keeper of the Capitol, the members of the Historical Commission, the Assistant Attorney-General, mayors, aldermen, police justices, and constables; and, if the position of the defendant is sustained, the General Assembly may call all of these "places of trust and profit" and may say that women can hold them.

This would produce an anomalous condition, as a woman could hold the position of

Commissioner of Agriculture, because created by the General Assembly, and could not be Superintendent of Public Instruction, because named in the Constitution; she could be a Corporation Commissioner and not a coroner; she could be Insurance Commissioner and not a county surveyor.

This, however, would not be the end, because if the principle is once admitted that the provisions in the Constitution as to qualifications for office do not apply to offices created by the General Assembly, it follows logically that the qualifications for voters in the Constitution do not apply to such offices, and the General Assembly would not only have the power to say that women could vote for all of these positions, but it could [347] also strike down the educational and other qualifications of voters as to these offices, because the contention is as to offices created by the Legislature that they are under the control of the Legislature and not under or bound by the limitations in the Constitution.

This would be in direct conflict with the decision in *Van Bokkelen v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465, in which the Court had under consideration Article VI, section 1, of the Constitution of 1868, of which Article VI, section 1, of the present Constitution is an exact copy, and it was there held that the qualifications of electors prescribed by the Constitution applied to all elections, the Court saying: "The Constitution provides that every male person 21 years old, resident in the State twelve months and in the county thirty days, shall be an elector (Art. VI, sec. 1). An elector for what? The Constitution does not say for what. Does it mean for President, or for members of Congress, or for Governor, or for judges, or for members of the General Assembly, or for county officers, or for township or town officers, or for what else? There it stands by itself, without explanation; that every such person shall be an elector—a voter. It evidently means to designate those persons as a *class*, to vote generally whenever the polls are opened and elections held for anything connected with the General Government or the State or local government."

Again, this construction would place it in the power of the General Assembly to nullify Article XIV, section 7, of the Constitution, forbidding the holding by one person of two offices, because the Legislature could simply say that a particular position was not an office, but an employment, and thereby enable one to hold two positions now known as offices.

We cannot think that the framers of the Constitution intended such a result.

The Revolution of 1776 was largely a protest against the exercise of arbitrary power,

and one of the principal reasons for adopting a written Constitution was that limitations should be placed upon the exercise of power, and it is said in our Constitution, Art. I, sec. 37, that "all powers not herein delegated remain with the people." The Constitution is intended to be permanent, and was adopted not only to meet conditions then existing, but for the future, and it was the purpose of the people that it should remain unimpaired until changed by the people themselves.

It is not an enemy to progress, but as it is the result of deliberate consideration and mature judgment, first expressed in convention and then approved by the people, it is so framed that it cannot be changed in a day; the people, then, agreeing upon the fundamental law for the present and the future, and knowing that times of agitation and popular clamor would come, while reserving the power of amendment, in their wisdom [348] imposed a restraint upon themselves by making the powers of amendment slow enough to give time for reflection before final action.

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it.

"The life-giving principles and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution. It is their commission, and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, the Constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. . . . The Constitution is the origin and measure of legislative authority. It says to legislatures, Thus far ye shall go, and no further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One encroachment leads to another; precedent gives

birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the Constitution eventually destroyed. . . . Omnipotence in legislation is despotic." *Vanhorne v. Dorrance*, 2 Dall. 304, 1 U. S. (L. ed.) 391.

The functions of government were distributed in the Constitution among three departments, legislative, judicial, and executive, and all authority conferred by the people is exercised under one of these departments.

As new agencies are required, the General Assembly has the power to create them, and, when no longer necessary, to abolish them; but when created, they fall within one of the departments and exist under the Constitution and subject to its restrictions.

The language of the Court in *Worthy v. Barrett*, *supra*, in reference to the Constitution of the United States is applicable to our own Constitution, as the two are in this respect practically identical. The Court says: "The Government of the United States is divided into three branches—legislative, judicial, and executive. These three parts make one whole. There is no other part or parcel. It follows that there can be no office in the Government that is not in one of these departments. There can be no officer unless he be the incumbent of an office. Therefore, [349] there can be no officer except he be in some office in one of these three departments."

If they are not under the Constitution, by what authority do they exist? It cannot be that we are living as to a part of our Government under the Constitution, and as to another part outside the Constitution, without restrictions or limitations.

It is, however, doubtful if the General Assembly has made any change in the law by stating that the position of notary public is a "place of trust and profit."

In Article XIV, section 7, of the Constitution it is provided: "No person who shall hold any office or place of trust or profit," etc., shall hold or exercise any other office or "place of trust or profit;" and in construing this language it was said, in *Doyle v. Raleigh*, 89 N. C. 136, 45 Am. Rep. 677: "It is apparent from the association that 'places of trust or profit' are intended which approximate to but are not offices, and yet convey the same general level in dignity and importance. The manifest intent is to prevent double officeholding—that offices and places of public trust should not accumulate in a single person; and the superadded words of 'places of trust or profit' were put there to avoid evasions in giving too technical a meaning to the preceding words." This was affirmed in *State v. Smith*, 145 N. C. 477, 59 S. E. 649, in an opinion by Justice Brown, in which he adds: "The most important

characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government. In this respect the terms 'office' and 'places of trust,' as used in our Constitution, are synonymous."

Both of these cases were approved at this term by the unanimous opinion of the Court in *Groves v. Barden*, 169 N. C. 8, 84 S. E. 1042, L.R.A.1917A 228.

It is, therefore, at least debatable, conceding the power to exist, if the General Assembly made any change in the position by calling it a "place of trust and profit."

Can we find a better definition of an office than that it is a "place of trust and profit?" In 29 Cyc. 1361, it is said that "An office in the abstract sense may be defined as a duty, charge, or trust, a place of trust, a position to which certain duties are attached."

If, however, other words had been used, we are of opinion that by merely giving it a name the General Assembly has not changed the character of the position. *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113.

The last case cited (*Wood v. Bellamy*) is historical.

In 1896 there was a change of administration in the State, and a new political party came into power. The General Assembly of 1897 passed an act by which it attempted to give control to the new party of different State institutions, and, among others, of the State Hospital at Raleigh. Among other things, it was provided in the act that the board of directors [350] having charge of the institution should be abolished and that the powers, rights, and duties heretofore prescribed by law to said board shall hereafter be granted to and imposed upon a board of trustees; and it was then further provided: "It is not the intention of the General Assembly that the trustees herein provided for shall be offices within the meaning of section 7 of Article XIV of the Constitution, and they are declared to be special trustees for the special purposes of this act."

The Court, speaking of this part of the act, said: "These places have been held to be offices, as we have declared in this opinion, and the Legislature by simply declaring that they are not to be offices does not change the nature of the thing. . . . It is idle, under the decision of this Court, to say that such a position as these defendants hold is not an office, as it would be to say that a horse is not a horse because one may choose to call him some other animal."

This principle was also fully recognized and approved at this term in *Groves v. Barden*, *supra*, in which it was held that the name given to a position by the General As-

sembly was evidence of the character of the position, but that this "was not determinative or conclusive."

The case of Wood v. Bellamy is one of the officeholding cases that was not overruled by Mial v. Ellington, 134 N. C. 131, as is shown by the concurring opinion of Chief Justice Clark, who also concurred in the opinion in Wood v. Bellamy. He says, at page 166: "In Wood v. Bellamy there was an application of Hoke v. Henderson, 15 N. C. 1, in a case when new incumbents were placed in offices as to which there had been no change of duties, but a change of name only. This decision was within the limits of the original decision. It was the subsequent case, beginning with Day's case, 124 N. C. 362, which carried it further, causing it to be denied, and its ultimate and inevitable overthrow."

The inference seems to be clear that, in the opinion of the writer, Wood v. Bellamy was correctly decided, and that the character of a position is not affected when there is "no change of duties, but a change of name only."

It is true, there is language in the opinion in Brown v. Turner, 70 N. C. 93, which sustains the contention of the defendant that the character of the position is determined solely by the fact that it is, or is not, called an office in the legislative act; but this question was not before the Court.

The point in controversy and decided was as to the power of the General Assembly to abolish the office of Public Printer and to invest a joint committee of the House and Senate with the authority to contract for the public printing.

If, however, the case is regarded as authority, it is in direct conflict with the subsequent case of Wood v. Bellamy, and with State v. Smith, 145 [351] N. C. 476, 59 S. E. 649, and Groves v. Barden, 169 N. C. 8, 84 S. E. 1042, L.R.A.1917A 228, both holding that the character of the position is determined by the functions to be performed, and not by the name.

It is also expressly declared in the latter case that "the fact that the lawmaking power may have declared the position an office or employment, although not conclusive, is entitled to consideration;" and we are asked to say, in direct opposition to that opinion, that as the General Assembly has said that the position of notary public is a place of trust and profit, and not an office, that this declaration is conclusive.

There are also a number of decisions from the courts of other States of eminent learning and ability, supporting the position of the defendant that the qualifications for holding office, prescribed by the Constitution, do not apply to offices created by the Legislature, and that as to such offices the Legislature

may say who may fill them; but there are two insuperable objections to following them.

In the first place, these decisions are based on the constitutions of the respective States, and in no one of these constitutions can be found the provision which is in the Constitution of our State: "Every voter, except as in this article disqualified, shall be eligible to office;" nor has it been declared by the courts of those States, as it has been with us, that "No one is eligible to office unless he is a voter." Pace v. Raleigh, 140 N. C. 70, 52 S. E. 277.

In the next place, the doctrine that offices created by the General Assembly are not under the restrictions and limitations of the Constitution was repudiated in Spruill v. Bateman, 162 N. C. 588, Ann. Cas. 1915B 515, 77 S. E. 768.

The office of recorder or police justice is not mentioned in the Constitution, and it owes its origin and existence to legislative action, and yet it was held in the Bateman case that the qualifications of the Constitution for holding office applied to it, and that the General Assembly did not have the power to say that the recorder should be a licensed attorney, because this was not a qualification named in the Constitution; and if this case stands and is authority, whatever else may be deduced from it, it cannot be held that offices created by the General Assembly are not under the Constitution and not controlled by its provisions.

We are, therefore, of opinion that the General Assembly has not changed the character of the position by calling it a "place of trust and profit," and that it exceeded its power when it declared that a woman could hold the position of notary public.

5. If so, has this Court the power to say that the General Assembly has exceeded its authority and that the act passed by it is unconstitutional?

The text-writers and the decided cases agree that it is not only within the power, but that it is the duty, of the courts in proper cases to declare [352] an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.

The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the

will of the legislators, who are but agents of the people.

The principle is well stated in 6 Ruling Case Law, 72, that "Since the Constitution is intended for the observance of the judiciary as well as the other departments of Government, and the judges are sworn to support its provisions, the courts are not at liberty to overlook or disregard its commands, and, therefore, when it is clear that a statute transgresses the authority vested in the Legislature by the Constitution, it is the duty of the courts to declare the act unconstitutional, and from this duty they cannot shrink without violating their oaths of office. The duty, therefore, to declare a law unconstitutional in a proper case cannot be declined, and must be performed in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question."

The first exercise of this power in this State was in 1787, in *Bayard v. Singleton*, 1 N. C. 5, and one of the latest was in 1912, in *Drainage Com'rs v. Webb*, 160 N. C. 594, 76 S. E. 552, in which an act was held unconstitutional by the unanimous opinion of the Court, written by the present Chief Justice.

In *Sutton v. Phillips*, 116 N. C. 504, 21 S. E. 968, in an opinion written by Chief Justice Clark, the Court says: "While the courts have the power, and it is their duty, in proper cases, to declare an act of the Legislature unconstitutional, it is a well recognized principle that the courts will not declare that this co-ordinate branch of the Government has exceeded the powers vested in it unless it is plainly and clearly the case;" and this language was approved and affirmed in the case of *In re Watson*, 157 N. C. 349.

In 1913 an act of the General Assembly was declared to be unconstitutional in *Asbury v. Albemarle*, 162 N. C. 248, 78 S. E. 146, 44 L.R.A.(N.S.) 1189, and in *Shute Sewerage Co. v. Monroe*, 162 N. C. 275, 78 S. E. 151, and in each case the judge of the Superior Court sustained the constitutionality of the act, and two members of this Court dissented, Associate Justice Hoke and the writer of this opinion.

Between these cases that are cited, running from the first volume of our Reports to the 160th, covering a period of one hundred and twenty-five years, there could be cited fifty or more cases in which acts of the [353] General Assembly have been declared unconstitutional, and we find no judicial opinion to the contrary.

The legislative and executive departments have recognized the existence of this power in the courts in the passage and execution

of the act now before us, because it is a part of the history of the act that, after its introduction, the General Assembly hesitated and refused to take final action until assured by the head of the executive department that only one appointment would be made until the constitutionality of the act was passed upon by the courts.

We are, therefore, of opinion, upon the whole case:

1. That a woman is not a voter in this State.
2. That as she is not a voter, she is not eligible to office.
3. That the position of notary public is a public office.
4. That being a public office, the General Assembly cannot change its character by simply making a change in the name.
5. That the act of the General Assembly declaring that a woman may hold the office of notary public is unconstitutional and void.

Our State Government and the right to hold office are based on male suffrage, and if this policy is to be changed, it must not be done by the courts, as the power to amend is reserved to the people alone. If we exercise the power, we violate the Constitution we are required to support and maintain, and establish a precedent which will furnish an opportunity to change the policy of our Government in a way not contemplated by the Constitution.

We cannot hold that a woman may hold the office of notary public, and stop. If we take the first step, we must do so upon the principle that offices created by the General Assembly are not bound by the limitations of the Constitution, and if this principle is established, we must follow it to its legitimate and logical conclusion, and apply it to all offices created by the Legislature.

We have no right to deal with the question upon ground of sentiment or personal inclination.

Our duty is performed when we declare the law as we understand it to be, giving to the subject careful consideration and exercising our deliberate judgment, and it cannot be performed otherwise.

Neither the wisdom of extending the right of suffrage to women nor their fitness to hold office is remotely involved in this appeal. These are questions which must be submitted to and determined by the people.

We have not been inadvertent to the statistics which have been urged upon our consideration. These may be important upon the question as to the desirability of changing the Constitution, but cannot aid us in the construction of our written Constitution unless it is shown that in States where women

are notaries the constitutions are like ours, and this has not been done.

[354] In some of these States women are voters and can, of course, hold any office, and in others they have qualified and restricted suffrage, and in England there is no written Constitution.

The number of questions urged upon our consideration on the oral argument and in the briefs, some of them new and important, and the propriety of giving satisfactory reasons for denying a request or demand of woman, whether addressed to the individual or to the judge, have rendered it necessary to extend the discussion further than would otherwise be required.

Reversed.

CLARK, C. J. (*dissenting*).—There is but one question presented by this appeal.

The General Assembly of North Carolina at its late session enacted chapter 12, Laws 1915, as follows: "The Governor is hereby authorized to appoint women as well as men to be notaries public, and this position shall be deemed a place of trust and profit, and not an office."

Upon this authority from the lawmaking department of the Government, to whom by the Constitution that duty is intrusted, the Governor of the State issued his commission to Mrs. Noland Knight, the defendant, as a notary public. Thereafter this *quo warranto* proceeding was brought, averring that a notary public was not a place of trust or profit, as the Legislature had enacted, but was in truth an office, and therefore that the commission issued to her by the executive department of the State under the authority of the Legislature was a nullity because she was a woman.

The action was brought before Judge Webb of the Superior Court, who sustained the action of the General Assembly and of the Governor, and declined to hold their acts void. On argument in this Court, the Attorney-General, while he combated some of the propositions of the defendant's counsel, admitted that the act was valid, saying then, and also in a written opinion: "In the face of the legislative declaration, there ought not to be any serious trouble about the matter."

The sole question, therefore, is, after this action of the lawmaking department and the Governor, and the admission of the relator, the Attorney-General, himself, in open court, "Ought the defendant be deprived of her appointment?" There can, of course, be other questions, more or less collateral, discussed, but that is the sole question presented on this record. If she can be thus deprived, it can be done only upon the ground that the above acts of the Legislature and of the Gov-

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ernor are in violation of the Constitution. It cannot be contended that the Legislature acted ignorantly or unadvisedly. In that body there were many able men, among whom were lawyers of acknowledged prominence and recognized ability. They were under an oath to support the Constitution, [355] as much so as the members of this bench. No one will impute to that body a desire to evade or fraudulently circumvent the Constitution which they were sworn to support. No one has suggested that. The matter was fully discussed in both houses, was thoroughly understood, and the bill passed the General Assembly by a large majority in both houses.

If this Court deems it is its duty to so decree, it ought to point out the paragraph in the Constitution which gives it the power, in its opinion, to hold this action of the Legislature and the Governor in violation of the Constitution; for the Governor as well as the members of the General Assembly are under the sanction of an oath to maintain the Constitution. The act "authorized" but did not require him to appoint women notaries public.

The General Assembly of 1913 passed an act in almost identical terms authorizing the appointment of women as trustees upon the public school boards, and with the same provision, that such "position shall be deemed a place of trust and profit, and not an office." That act has been recognized without question and acted upon. One hundred and fifty women have been appointed to such positions and have discharged the duties thereof with credit to themselves and to the benefit of the public.

There is no provision of the Constitution which defines an "office," and none which creates the position of notary public. The Legislature, therefore, could not act in violation of the Constitution in drawing the line, as it did, between positions of trust or profit and offices. Certainly not, unless the duties of a notary public are of themselves so inherently an office and unless it has been so generally recognized as such that to term it not an office would be a fraud in legislation.

Every department of the State Government has always recognized that a notary public is not an office, for in this Legislature, as in preceding ones, several members were at the same time notaries. The Constitution forbids persons holding two offices at the same time. Art. XIV, sec. 7. Yet no Legislature has ever held that a member could not be a notary. The Governors (most of whom have been lawyers) have appointed members of the Legislature to be notaries while continuing to sit as members, and no court has ever held the act of any notary invalid because

he continued to act as such while a member of a Legislature. The effect of the majority decision in this case may invalidate many instruments acknowledged before notaries, heretofore recognized as valid.

The words "office" and "public office" are very frequently used loosely without any intention to draw the line as to whether a position is an "office," a "place of trust or profit," or a "public employment," and it is due to that fact that many opinions have spoken of the position of notary public as an office. "Office" means simply a "duty," from the Latin word [356] *officium*; and as this position is called "notary public," it has been frequently, in casual writing of opinions, referred to as a public office.

But there has been no opinion of the Supreme Court of this State nor, it is believed, of any other State which has ever held the position to be a "public office" when the line was being drawn between "public offices" and "places of trust or profit" or "public employment." It is stated positively, after much research, that no court at any time, in any State or country whatever, has held the position to be a public office when there was an act of the Legislature decreeing it not to be a public office. In the Opinion of the Justices, 165 Mass. 599, 43 N. E. 927, 32 L.R.A. 350, the Court held that in that State the position of notary public was named and created by the Constitution, and, therefore the Legislature could not make it a "place of trust or profit" or a public employment merely, stating, however, that if the position was created (as it is in this State) by the Legislature, that body would be competent to make it such position as they saw fit.

In this State there have been two or three decisions which loosely refer to the position of notary public as an "office," but that was at the time when the statute referred to it as an office. It took its rank as an office from such statute, and if the General Assembly had the power to pass the act recognizing it as an office, the General Assembly of 1915 had the power to make it a "place of trust or profit." Nothing is better settled than that the act of one Legislature can be repealed or amended by a succeeding one. Neither act has any validity except as the organized expression of the public will of the time, which is subject to change or modification by any subsequent legislature.

In our own State this Court has followed (*Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961, 65 L.R.A. 697), the decisions, universal elsewhere, that the Legislature has entire power over offices created, not by the Constitution, but by the Legislature itself (*Scown v. Czarnecki*, 264 Ill. 305, Ann. Cas. 1915A 772, L.R.A.1915B 247, and numerous cases

there cited), and has said in words exactly applicable to the facts of this case (*Brown v. Turner*, 70 N. C. 100): "When the Legislature created and called it an office it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the lawmaking power impressed that stamp upon it; therefore, when that stamp was effaced by the repealing act it shrank to the level of an undefined duty. The authority that invested these duties with the name and dignity of a public office afterwards divested them of that name and dignity."

We have, however, had two instances in this State in which the question was sharply presented whether the position of notary public was an office or not, and in both it was held not to be, and in those cases only was the question squarely presented.

In 1867 it became an important matter to draw the line between what positions in this State were offices and what were not. The Attorney- [357] General of the United States, on 12 June, 1867, published his "considered opinion" (as our Court styled it), in which he defined what positions were offices and what public employments were not offices. The thirteenth paragraph in his opinion, after reciting what were "offices," says, as to those "not offices:" "13. Persons who exercise mere agencies or employments under State authority are not disqualified, such as commissioners to lay out roads, commissioners of public works, visitors of State institutions, directors of State banks or other State institutions, *notaries public, commissioners to take acknowledgment of deeds, and lawyers.*" That opinion of the Attorney-General of the United States is quoted in full by our Supreme Court and adopted, *Worthy v. Barrett*, 63 N. C. 203.

This Court subsequently and continuously down to this time has recognized its correctness, for this Court without question has been licensing women as lawyers, certainly a far more important position, and the statute requires that all lawyers must take an oath of office and an oath of allegiance both to the State and Federal Governments.

The only other case in which the point has been exactly presented was *Lawrence v. Hodges*, 92 N. C. 681. The Constitution, Art. XIV, sec. 7, provides: "No person who shall hold any office or place of trust or profit under the United States, or this State, or any other State, . . . shall hold or exercise any other office or place of trust or profit under the authority of this State." *Revisal*, 2349, provides: "The clerks of the Superior Court may act as notaries public in their several counties by virtue of their office as clerks, and may certify their notarial acts under

the seals of their respective courts." It cannot be contested that clerks of the courts are public officers created by the Constitution. If, therefore, the position of notary public was an "office" also, the same person could not hold both positions. The act of Congress required certain mortgages on vessels to be acknowledged before a notary public, and in *Lawrence v. Hodges* the question was presented whether the clerks were valid notaries public, and it was held in 92 N. C. 681, 53 Am. Rep. 436, that they were. It thus conclusively appears that in both the cases in which the point was presented the position of notary public was held not to be an office.

McCullers v. Wake County, 158 N. C. 80, Ann. Cas. 1913D 507, 73 S. E. 816, holding that the Governor and others can discharge certain functions *ex officio*, in no wise conflicts with *Lawrence v. Hodges*. If it did, all that would be necessary would be to provide that any woman who held the position of school trustee, to which she is eligible, can *ex officio* discharge the duties of a notary public. The position of "lawyer" has been often styled an "office," but women were admitted to the bar in this State because it was found that to hold that position an office would disqualify a large part of the Legislature and many other officeholders, State and Federal. While the statute incidentally [358] refers to notaries public and lawyers as officers, there has been no express decision that a notary public is an office, till now.

But it has been argued by some that the position of notary public was an office at common law. If it had been, the common law is simply the English law, the largest part of which was the decisions of the English judges based upon their customs or the construction of their statutes, and of course subject to be changed at will by the Legislature of North Carolina in all matters that concern our self-governing people. In fact, however, a letter from Sir John Simon, at present Attorney-General of England, written in January of this year, says: "No act of Parliament has ever disqualified women from holding the position of notary public in this country, and it is very certain that none such could be passed." Even if it had been otherwise, it would not have disqualified the General Assembly of North Carolina from defining it to be a mere place of trust or profit, and authorizing women to hold it.

In *U. S. v. Bixby*, 10 Biss. 520, it was held by Gresham, J., that "at common law a minor is eligible to the position of notary public." In Virginia, which naturally more nearly follows the English law than any other State in the Union, its Attorney-General says: "In

this State any man or woman over 18 years of age can be a notary public."

But aside from any statute which (like our act of 1915) expressly makes the position "a place of trust or profit," or our previous statute, which, without expressly making it an office, merely required an oath of office (as is also required of lawyers, public administrators, and others who have been held to be not officers), the position in itself inherently is not an "office." The duties of a notary public are prescribed. (Rev. 2350) and are purely those of certificate and analogous to those of a commissioner to take affidavit, and have in them no element of an office.

The decisions have all held that to be a "public office" as distinguished from a "place of trust or profit" or a "public employment" the officer must possess and exercise some of the sovereign powers of the State, either executive, legislative, or judicial. *State v. Smith*, 145 N. C. 477, 59 S. E. 649, citing *Mechem on Pub. Officers*, sec. 1. A notary public cannot legislate. A notary cannot execute the law, and has no judicial functions. The duties of the position are simply to take down and certify evidence. For the purpose of certification, the notary has a seal, just as formerly any grantor in a deed had, to authenticate his act by his seal. This did not make every grantor a public officer. It is true that in certain rare cases a notary public has the power of contempt. So by statute has every referee in North Carolina (Rev. 492), but a referee certainly is not therefore an officer.

The entire experience and recognition of the rest of the world is against the position being *ex vi termini* a public office. In Massachusetts and in Ohio and one or two other States the position has been made [359] an office by the Constitution or a statute. After the passage of this act of our General Assembly an official inquiry was instituted as to the status of notary public in the other States. The replies from their judicial departments show that out of the fifty-three jurisdictions in the United States (i. e., forty-eight States, the District of Columbia, and the territories of Alaska, Porto Rico, Hawaii, and the Philippines) women are competent to be notaries public in all except ten, and in those ten they were held incompetent either because, as in Massachusetts, the Constitution had made the position an office or a statute had made it an office, or, as in a few of them, "it had not been the custom to admit women to hold the place, and there was no statute as yet authorizing them to fill the position." In no case was there found, or reported, a decision holding women incompetent to fill the place when there was

a statute authorizing them to do so, or providing that the position was not an office. Outside of these ten States (of our fifty-three jurisdictions) there is no country which disqualifies a woman to hold the position of notary public. There are semicivilized and barbarous countries in which they are allowed to hold no position whatever, and in those countries there is probably no such position.

There have been many cases in this Court, of course, holding acts of the Legislature unconstitutional. But no one has ever found express authority in the Constitution to do so, and it is claimed to exist by construction and inference of the courts in their own favor. This Court has, almost in every instance, therefore, wisely taken the pains to say that it will not exercise this assertion of supreme power in setting aside the action of the other departments of the Government unless such action was clearly unconstitutional, and has repeatedly quoted on this point *Ogden v. Saunders* (U. S. Supreme Court), 12 Wheaton 270, 6 U. S. (L. ed.) 606, in which it was held that the highest Court in the Union would not even hold a State act unconstitutional as in violation of the Federal Constitution unless it were so "beyond all reasonable doubt." This is the considerate language of that high Court: "It is but a decent respect due to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved *beyond all reasonable doubt*."

Ought not this Court to follow what we have so often quoted and approved, and out of a "decent respect to the wisdom, the integrity, and the patriotism of the legislative body" hold that the violation of the Constitution by that body in this case "is not proved beyond all reasonable doubt?"

This position had its origin in the Roman civil law. Its duties were, and still are, like those of a stenographer, with power only to certify the evidence taken down or acknowledgments made of instruments. The notary public has no legislative, executive, or judicial authority. He [360] cannot even probate a deed, but merely certifies its acknowledgment (*White v. Connelly*, 105 N. C. 65, 11 S. E. 177), though it is held that even a deputy clerk, who can probate it, is not an officer.

The Attorney-General of the State, in this very case, appearing in open Court, admitted the validity of this statute. The Attorney-General of the United States has said in an official opinion that "commissioners of affidavits, *notaries public*, and lawyers" are not public officers, and this Court in an unanimous opinion affirmed that ruling and

have acted upon it ever since as to the other two positions. Why overrule it now as to notaries public alone? The Attorney-General of Great Britain says that the law does not disqualify women from being notaries public. Why should we disqualify them? In all the other States and territories of the Union, except ten, women are admitted to be notaries public. In our own State the *Revisal*, 3349, permits the clerk of the court to be a notary public, which he could not be if it was an office, and this Court held, as above stated, that he was a valid notary public where the validity of a mortgage under a United States statute required the instrument to be acknowledged before a notary public. In the ten States not permitting women to be notaries public there is no statute permitting them to be.

If any opinion I have ever written, when the statute as to notaries was different, could be fairly construed as opposed to what is herein said by me, under the present statute, it would not be an estoppel to hold correctly in this case. Besides, I have no pride of opinion that compels me to prefer former opinions, of erroneous, to doing justice now. I have never deemed myself infallible, but hold that all judges should be glad of opportunity to correct their mistakes. We should grow wiser with the years; otherwise, experience is of no value. The infallibility of judges is not an American doctrine, nor indeed is it held anywhere.

Under changing conditions, due largely to the introduction of machinery, women are forced to seek new and wider employment. The Legislature, recognizing this, and learning that in some quarters there was opposition to their receiving fees in the purely clerical work of a notary public, owing to some passing references to the position as an "office" in two or three decisions, passed an act making the position merely "a place of trust or profit," and not an office, specifically authorizing the Governor to appoint women. This was purely a political question, and the Legislature was acting with an intelligent understanding of changed economic conditions and in a humane desire to do justice to a deserving class, and with full recognition of their obligation to observe the Constitution. The Governor was "authorized," not "required," to appoint women. He is one of the foremost lawyers of the State, with the intelligence, firmness, and patriotism to know and maintain the limitations of the Constitution. He appointed the plaintiff to [361] this position. The judge of the lower court, sworn also to obey the Constitution, and a learned lawyer, held that it was no violation of the Constitution for the Legislature to so enact. Our Attor-

ney-General, who brought this action, stated on the argument, after fuller investigation, and also in writing his opinion that the action of the Legislature is constitutional.

Ought this Court, by three votes to two, hold that this action of the executive department and of the Legislature and by the other judicial officers who have passed upon this matter has been beyond question a violation of the Constitution, and that, too, without specifying the provision of the Constitution that has been so dangerously and alarmingly violated when the Legislature has permitted women working for a living to earn a few needed fees by authorizing them when taking down and certifying evidence merely to authenticate their certificates by adding the impression of a seal? The statute provides that such impression of a seal does not make the position an office.

It has been urged, however, that fees are paid for impressing the seal! "Ay! there's the rub." Women are not voters, and there are those who think that fees should be reserved exclusively for voters, in recognition of their services. But these fees are not paid by the State or county, but by individuals, and notaries receive no salaries.

It was held in *Brown v. Turner*, 70 N. C. 100, that the position of Public Printer, worth many thousands of dollars, which the previous statute had made an "office," was reduced to the grade of a "place" because the Legislature said so, though the effect was that a Republican Court thus admitted the validity of the act of a Democratic Legislature in filling the "place" with a Democrat when the Republican Governor, holding it to be an "office," had appointed one of his own party.

In *State v. Smith*, 145 N. C. 476, 59 S. E. 649, this Court held that a public administrator who has a term of eight years, gives bond, and takes an oath of office (Rev. 19) is a mere "place" and not an "office," *Brown, J.*, quoting from Chief Justice Marshall, saying that "Although an office is a public employment, it does not follow that every public employment is an office." *State v. Smith* was cited with approval by *Allen, J.*, in *Boynton v. Heartt*, 158 N. C. 490, Ann. Cas. 1913D 616, 74 S. E. 470.

The Constitution of this State does not prohibit the Legislature from admitting women to any office. The prohibition is just the opposite, and merely forbids any one who is a voter from being disqualified to hold office. *Spruill v. Bateman*, 162 N. C. 591, Ann. Cas. 1915B 515, 77 S. E. 768.

Even if every position created by the Legislature, however small, could be held to be an office, notwithstanding legislative enactment to the contrary, the Constitution of

this State has never made the requirements for voting and for holding office the same. Prior to 1868 the Constitution imposed the ownership of property as a prerequisite for certain [362] offices. The Constitution of 1868, discarding all that, imposed the sole limitation upon the Legislature that no voter should be disqualified to hold office, with the exceptions therein named; which exceptions do not name women.

Singularly enough, the majority opinion in this case quotes from a judge who was a woman (*Portia*), when she held that *Shylock's* demand of a "pound of flesh" must be granted, because else the ruling would be "recorded as a precedent," etc. It will be recalled, however, that she almost immediately reversed that ruling, to which she had been overpersuaded, and rendered a just judgment on the merits. That case has been famous for ages as showing the competency of a woman for judicial position, in that she administered justice and was superior to the superstition that erroneous precedents are more sacred than justice. A woman herself, Judge *Portia* certainly did not intend that her decision should be quoted as authority that a woman could not be a notary.

The General Assembly has all the powers of legislation that the people themselves have, unless restrained by some provision of the Constitution. Cannot the Legislature of a sovereign State provide that the function of authenticating a certificate or acknowledgment or protest by making the impression of a seal on paper shall be a "place" and not an "office?" And that women may receive the fees for such work, if appointed?

The feudal and medieval theory as to women—"half angel and half idiot"—meant in practice that those above the necessity of work might be on public occasions spoken of as if "half angels," but that all classes of them, and all the time, were treated as at least "half idiots" and without legal rights. If married, they were submerged in the existence, and under the power, of their husbands, who had the right even to chastise them at will. This last right persisted in North Carolina down to 1874, when *Settle, J.*, in *State v. Oliver* 70 N. C. 61, said the courts had "advanced from that barbarism"—thus overruling the then recent cases of *State v. Black*, 60 N. C. 262, 86 Am. Dec. 436; *State v. Rhodes*, 61 N. C. 453, 98 Am. Dec. 78, and others. In all progressive communities feudal ideas have passed, or are passing, and women are held to be human beings, entitled to equal rights with men.

There is but one question in this case, "Can this defendant discharge the duties of a notary when so authorized by an act of

the Legislature and commissioned by the Governor? Or is she barred because she is a woman?"

Under the Constitution of the United States no one is debarred from holding any office, from President down, because of sex. What provision of the State Constitution will be shattered, and what detriment will the public welfare receive, if by legislative and executive authority a woman shall authenticate a certificate, made by herself, by impressing the seal upon a piece of paper?

[363] If the plaintiff were a man he would not be debarred from holding this appointment unless he were an idiot, a lunatic, or a convict. The Legislature, voicing the sentiment of the people of the State, have enacted that it is neither a crime nor a defect in this appointee to discharge the clerical duties of a notary public because she is a woman. Shall the Court hold that it is?

BROWN, J. (*dissenting*).—I concur in the opinion of the Court except as to the conclusion that the position of notary public is a public office. Therefore, I hold that a woman may well fill such place.

While I think the weight of authority is that it is a public office, there is some decided conflict of opinion upon the subject, and as I think it is a position a woman may well fill, I do not agree to the judgment rendered.

NOTE.

Right of Woman to Be Notary Public.

While it was said in Opinion of Justices, 73 N. H. 621, 6 Ann. Cas. 285, that the position of notary public is a public office which cannot be filled by a woman, the effect of that opinion has been abrogated by one of more recent date sustaining a statute authorizing the appointment of women to the position in question. Opinion of Justices (N. H.) 99 Atl. 999, wherein the judges said: "The question is whether the legislature has constitutional power to authorize the appointment of women to the office of notary public. The question is answered in the affirmative. The legislature has such power. In 1906, at the request of the governor and council, the justices expressed the opinion that the executive was without power to appoint a woman notary public, because a notary public was a public officer, and by our common law a woman could not hold public office and no legislation was discovered abrogating our common-law rule as to this office. In re Opinion of Justices, 73 N. H. 621, 62 Atl. 969, 6 Ann. Cas. 283, 5 L.R.A.(N.S.) 415. It was then stated that because the appointment of notaries was provided for in the Massachusetts constitution, it was there held,

that the legislature was without power to make the qualifications for the office different from what they were understood to be when the constitution was adopted (Opinion of Justices 165 Mass. 599, 43 N. E. 927, 32 L.R.A. 350), but it was said that notaries are not mentioned in our constitution. No opinion was then expressed upon the question of legislative power because that question was not within the constitutional advice requiring power of the body then asking."

The reported case holds that women are ineligible to the position of notary public under a constitutional provision whereby only "voters" are eligible to office. A like result was reached under a similar provision in the only other recent case on the subject State v. Hodges, 107 Ark. 272, 154 S. W. 506, wherein it was said: "The law of the state at the time of the adoption of the constitution, the whole frame and purport of the constitution itself and the general understanding and the practical construction given to the constitution by the lawmakers all support the conclusion that women are not eligible to hold public office, and are inconsistent with any other conclusion."

As to the validity in a foreign jurisdiction of an acknowledgment taken before a woman notary, see the note to Nicholson v. Eureka Lumber Co. Ann. Cas. 1914C 202.

WITTE

v.

HABEN.

Minnesota Supreme Court—November 5, 1915.

131 Minn. 71; 154 N. W. 662.

Arrest — Right to Arrest without Warrant — Insane Person.

In an action for false arrest and imprisonment it is not a justification that the defendant as a police officer made the arrest upon reliable information that the plaintiff was insane, that the officer in good faith believed this to be true, and that an ordinarily prudent person, under the same conditions, would have entertained and acted upon such belief, the arrest being made without warrant, and there being no proof of insanity, nor any urgent necessity for restraint, even had plaintiff been in fact insane.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, St. Louis county: HUGHES, Judge.

Action by Cornelius Witte, plaintiff, against Frank E. Haben, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **REVERSED.**

John A. Keyes for appellant.
S. C. Scott for respondent.

[72] *HOLT, J.*—Action for false imprisonment. Verdict for plaintiff, and from the order granting a new trial he appeals.

In a charge notable for perspicuity and brevity the jury were instructed that the evidence introduced by the defendant to substantiate the alleged justification for the arrest failed as a defense, and that their only duty was to determine and award the actual damages sustained by plaintiff, since all claims for punitive damages were withdrawn. By stipulation the verdict was reduced to \$400. The court approved this as a proper amount, but granted defendant's motion for a new trial solely upon the ground of error in the charge.

The defense pleaded was, in short: That defendant was a police officer in Hibbing; that he was advised by the chief of police that plaintiff was carrying a concealed weapon, was acting strangely, and there was some question of his sanity; that the defendant was instructed by said chief to arrest plaintiff and hold him in jail until his sanity could be investigated and determined; that defendant was advised by two other persons of certain strange acts of plaintiff; that defendant had reason to believe and did believe that plaintiff was mentally deranged; and that a physician was immediately called to make an examination of plaintiff upon whose advice he was held until the next day when he was released. It was conceded that the arrest was made without a warrant, and was not for any offense committed by plaintiff, or upon suspicion that he had committed a felony.

The learned trial court conceived that the law applied by him in submitting the case, although concededly in accord with text-books and decisions, was not reasonable and should not obtain in this state. He states: "I do not consider the rule that one who arrests another on the ground of mental unsoundness is liable for false imprisonment unless he can [73] prove that the person so arrested was mentally unsound, to be as reasonable as the rule that would require the person making such arrest to show facts and circumstances which would lead an ordinarily prudent man acting without malice to the belief that such person was mentally unsound; in other words, that as there was probably cause for believing the person mentally unsound from his actions,

conduct, manner of speech, or otherwise, that that would be a sufficient defense to an action for false imprisonment against the one making the arrest. Under the circumstances I am of the opinion that the latter rule should have been given to the jury, and it is for that reason alone that a new trial of this action is granted."

There is force in the position that it is a harsh rule to hold a police officer for false imprisonment, when the conduct of the one imprisoned has been such that the ordinarily prudent officer upon the information obtained would come to the conclusion that he was insane and ought to be detained. But, on the other hand, it is readily seen to what oppression and harm a rule would lend itself, under which a citizen may be deprived of his liberty without right and without redress because, at some time or other, he has exhibited certain peculiarities or abnormal traits which, through malice or otherwise, come to the ears of an officer who, in good faith, arrests upon the report. As said by the court in *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397: "The power to arrest without warrant, while it may in some cases be useful to the public, is dangerous to the citizen, for it may be perverted to purposes of private malice or revenge, and it ought not, therefore, to be enlarged." The mere fact that one has been arrested on the charge of insanity may be sufficient, as it was in this case, to give a reputation that will exclude the one concerned from earning a livelihood in positions of responsibility. But, above all, the law does not permit even an officer to restrain or imprison a person without a warrant, except for a public offense committed or attempted in the officer's presence, or when the person has committed a felony, or when a felony has been committed and the officer has reasonable cause for believing the person arrested the perpetrator, or upon a charge made upon reasonable cause of the commission of a felony by the person arrested. G. S. 1913, § 9066. No right, as already stated, was claimed to make the arrest under this statute. Neither was it alleged [74] nor attempted to be proven that plaintiff was insane or mentally unbalanced so that he might be subject to temporary restraint under subdivision 6 of section 8634, G. S. 1913. The record is barren of any testimony tending to show that plaintiff had ever attempted any crime, or had by word or deed disturbed any person, or had at any time been a menace to himself or others. On the day he was arrested he quietly walked to the depot and boarded the train under the observation of defendant, and the only peculiarity defendant noticed was that plaintiff looked around more than men ordinarily do. Under this situation no defense or justification for the arrest could exist. It was

unlawful and entitled plaintiff to damages. The court in the charge given took the right view. And an attentive examination of the evidence fails to make out justification for the arrest, even were the rule such as the learned trial court now deems it should be. But, as indicated, under our statutes and, we believe, under the common law, the rule is that in an action against an officer for false arrest and imprisonment the officer cannot justify upon the ground that he made the arrest upon reliable information that the person arrested was insane, that he fully believed this to be a fact, and as a reasonably prudent officer was justified in so believing. If he without a warrant arrests a person on the ground and belief that such person is insane, proof of insanity is the only defense in a suit for unlawful imprisonment, where there is no claim that any disturbance or impending danger necessitated the arrest. But even in cases of insanity arrest without legal warrant is not always justifiable. "An insane person may be arrested and detained without legal process only when it is reasonably necessary" (*Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304), and the court held that a state of mild insanity did not make it reasonably necessary. *Addison, Torts* (8th ed.) p. 184; 1 *Cooley, Torts* (3d ed.) pp. 309, 310, et seq.; *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; and *Colby v. Jackson*, 12 N. H. 526.

We are constrained to reverse the order granting a new trial and remand the case for judgment upon the verdict as reduced.

Order reversed.

NOTE.

Right to Arrest Person without Warrant on Ground of Insanity.

Where it appears that a person is dangerously insane any one may cause his arrest without a warrant. *Colby v. Jackson*, 12 N. H. 526; *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304; *Emmerich v. Thorley*, 35 App. Div. 452, 54 N. Y. S. 791. And see the reported case. In the leading case of *Colby v. Jackson*, *supra*, the court after laying down the rule gave the reason therefor as follows: "There was evidence that the plaintiff, at the time of his confinement, was so insane that it would have been dangerous to himself and his family to permit him to be at large. If it be lawful 'to lay hands upon another,' to preserve public decorum; to imprison persons till their anger shall be cooled, lest they

should kill each other; to break into a man's house and imprison him, lest he should murder his wife—it was certainly lawful for the defendant to imprison the plaintiff, whose state of mind was such as to expose himself and those dependent upon him to physical suffering, and perhaps to death. To do this, he needed no warrant; his duty as a citizen called on him to interfere in a case of such extreme urgency. In the recent case of *Bisgaard v. Duvall*, 169 Ia. 711, 151 N. W. 1051, the court held that where an insane person is likely to do mischief, both to himself and to others, he can be arrested without a warrant. The court said: "An insane person stands upon a different plane from that of a criminal, and for his own good, as well as for the protection of the community, he may often be restrained by any person, especially by anyone having an interest in him, or, by one whose safety may depend upon his detention, may be taken in charge without a warrant."

But a slight degree of insanity is not sufficient to warrant the arrest of a person without a warrant. *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304; *Anderdon v. Burrows*, 4 C. & P. 210, 19 E. C. L. 348. In the case last cited, it was held that the defendant, a physician, was not justified in causing the arrest of the plaintiff on information only, that he was insane. The court said: "Certainly the course taken by Dr. Burrows has been such as cannot by law be justified. He ought not to have sent two men with such instruments as these appear to have been sent with merely upon statements made by relations, unless those statements were such as to satisfy him that those steps were necessary to prevent the party from doing some immediate injury either to himself or others." See also the reported case. *Compare Hall v. Semple*, 3 F. & F. (Eng.) 337.

While a person may arrest a dangerous lunatic without a warrant he cannot detain him unnecessarily. *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323. And see *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304, where in the court said: "Under the right of self-defense it is lawful to seize and retain any person incapable of controlling his own actions, whose being at large endangers the safety of others. But this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity, and ceases with the necessity." *Compare Hall v. Semple*, 3 F. & F. (Eng.) 337.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY

v.

ARMBRUST.

Arkansas Supreme Court—December 13, 1915.

121 Ark. 351; 181 S. W. 131.

Railroads — Injury to Person Near Track — Object Falling from Train.

Plaintiff's affirmative showing that he stood 30 or 40 feet away from the track in a public road while defendant's fast mail train passed, and that a flying piece of coal from the tender struck him on the foot and knocked him down, makes a case to which the doctrine of *res ipsa loquitur* applies.

[See note at end of this case.]

Same.

In such case, defendant's evidence that the tender was properly loaded and that the coal had settled since it had been loaded is not sufficient to overcome plaintiff's *prima facie* proof of negligence, under the statute making railroads responsible for damages caused by the running of their trains, and the question of defendant's negligence is for the jury.

[See note at end of this case.]

Same.

In such case, plaintiff's *prima facie* showing of negligence entitles him to a recovery, unless defendant shows by a preponderance of the evidence that it was not guilty of negligence.

[See note at end of this case.]

Damages — Personal Injury — Pain and Suffering.

Plaintiff, in an action for injury from being struck on the foot by a flying lump of coal from defendant's tender, making an operation necessary and which would confine him to his bed for several weeks, may recover for suffering which resulted or will reasonably result in the future from the injury.

[See 9 Ann. Cas. 1051.]

Verdict Not Excessive.

A verdict of \$5,000 for an injury to plaintiff's foot, causing intense pain, and which in the four months between the injury and the trial had but little improved, necessitating an operation which might result in a complete recovery, though it would leave the foot permanently weaker, so that plaintiff, who had been earning \$1.50 a day, has been unable to work since, is not excessive.

[See 16 Ann. Cas. 8; Ann. Cas. 1913A 1361.]

Appeal from Circuit Court, Hot Spring county: EVANS, Judge.

Action by John Armbrust, plaintiff, against St. Louis, Iron Mountain and Southern Railway Company defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[352] John Armbrust sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for alleged personal injuries inflicted by the latter upon the former by its negligence. The facts in the case as shown by the testimony on the part of the plaintiff are substantially as follows:

On the 6th day of September, 1914, as John Armbrust approached a public crossing over the St. L., I. M. & S. Ry. Company's track near Malvern he saw a fast mail train approaching and stopped within thirty or forty feet of the track to let it pass. As the train passed he was standing in the public road that crossed the track. The time was between twelve and one o'clock in the afternoon. He stated that he caught a glimpse of something black coming from the tender, that he saw it flying, got a glimpse of it, and by that time was struck by the missile. A piece of coal struck him on the foot and drove a part of his sock, particles of coal, a shoe eyelet and a piece of shoe string down into his foot. It tore his shoe entirely off his foot and knocked him down.

The plaintiff testified that he saw the tender before the flying object left it and stated that it looked to him as if the tender was overloaded with coal and that he noticed a big pile of coal on the top of it.

Another witness testified that shortly after the plaintiff was hurt he was notified of the fact and went down to the crossing and saw him crawling over the track coming from the north side; that he helped him into a buggy and carried him to his house.

The physician who examined the plaintiff shortly afterwards testified as to the character and extent of his injuries and this testimony will be referred to later [353] on. The physician also testified that he took a piece of sock out of his foot and also some particles of coal.

Another witness, who resided near the scene of the accident, testified without objection, that two or three days afterwards she was passing over the crossing and saw a piece of coal near the track about as big as a half gallon bucket or a little larger; that pieces of coal were broken off of it and that the coal was far enough away from the track for a man to stand where it lay and be safe from a passing train.

The fireman who was on the fast train the day of the accident testified that the tender is loaded by the hostler; that it has a mould board on it put there to keep the coal from falling off; that the board comes up even with the tank and flares out; that the tender is usually loaded with coal to about the bottom of the mould board and that the coal is piled up higher in the middle; that he observed the way the tender was loaded on the day of the accident and that it was loaded in a proper manner so that the coal would not

fall off; that he did not see a lump of coal fall off the tender at the crossing where the accident is alleged to have occurred; and that he has seen coal fall off of the tender.

Another fireman and the hostler also testified as to the proper way to load coal on a tender and said that the tender in question was loaded in that manner because there had been no deviation from the rule.

The engineer on the fast train on the day in question testified that the coal is piled up to near the top of the mould board and is rounded up higher in the middle than on either side. All of the trainmen testified that the vibration of the train causes the coal to shake down and that it would be shaken down considerably between Argenta, the place where the tender was loaded, and the scene of the accident which was more than forty miles distant.

The jury returned a verdict for the plaintiff in the sum of \$5,000 and the defendant has appealed.

E. B. Kinsworthy, W. S. Donham, and T. D. Crawford for appellant.
J. C. Ross for appellee.

[356] *HART, J. (after stating the facts).—*
(1) It is insisted by counsel for the defendant that the evidence is not sufficient to warrant the verdict. We do not agree with counsel in this contention. The facts of the case bring it within the doctrine of *res ipsa loquitur*.

In the case of *Louisville, etc. R. Co. v. Reynolds* (Ky.) 71 S. W. 516, under a substantially similar state of facts, the Court of Appeals of Kentucky held that the doctrine of *res ipsa loquitur* applied. There a person was standing at the depot near the track for the purpose of boarding a passenger train, having been informed that it was approaching. The train turned out to be a freight train and just as the engine and tender passed the plaintiff he was struck by a piece of coal and the court held that the proof of the accident, under these circumstances, was sufficient to warrant the submission of the negligence of the defendant to the jury.

This principle has also been recognized by this court in many cases. In the case of *Price v. St. Louis, etc. R. Co.* 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79, the court, at page 491, said:

"The doctrine of *res ipsa loquitur* does not apply in cases where the accident or injury, unexplained by attendant circumstances, might as plausibly have resulted from negligence on the part of the passenger as the carrier. Nor is it applicable to the death of a passenger that comes by reason of circumstances and conditions that are personal and peculiar to him, and not by reason of any

management of, or accident to, or condition in, the train itself, over which the carrier has exclusive control. 'The true rule would seem to be that when the injury and circumstances attending it are so unusual, and of such a nature that it could not well have [357] happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury.'" To the same effect see *St. Louis, etc. R. Co. v. Neely*, 63 Ark. 636, 40 S. W. 130, 37 L.R.A. 616; *Gurdon, etc. R. Co. v. Calhoun*, 86 Ark. 76, 109 S. W. 1017, and *St. Louis, etc. R. Co. v. Carr*, 94 Ark. 240, 126 S. W. 850.

In the case before us the plaintiff himself testified that he stopped in the middle of the road near the public crossing over the railroad to let the fast mail train pass; that he was about thirty or forty feet away from the track and as the train approached it looked to him like the tender was overloaded with coal; that there was a big pile of coal on top of it; that a piece of coal struck him on the left foot and knocked him down; that he caught a glimpse of something black just before the coal struck him, and that it looked like it came from the tender of the passing train.

Another witness testified that just after the fast mail train passed on the day of the accident he was told that a man had been hurt and went down to the crossing and saw the plaintiff trying to crawl over it: and that his left foot was badly crushed.

The physicians who attended him soon afterwards picked particles of coal and a piece of his sock of the injured part of his foot. A day or two afterwards a neighbor saw a piece of coal about the size of a half gallon bucket lying near the track at the crossing and she stated that particles of coal had been broken off of this lump. This testimony made an affirmative showing on the part of the plaintiff that he was struck by a lump of coal from the passing train. It is true that the trainmen testified that the tender was loaded in a proper manner on the day in question and that the vibration of the train caused the coal to settle down and that when the tender was properly loaded the coal would settle down [358] to such an extent in going from Argenta, where the tender was loaded, to the scene of the accident near Malvern, that the coal would not roll off the tender. The jury had the witnesses before it and the ques-

tion of the credibility of the witnesses was solely for the jury. The evidence on the part of the defendant was not sufficient to overcome the affirmative showing of negligence made by the plaintiff. The testimony on the part of the plaintiff amounted to more than a conjecture or assumption of negligence on the part of the defendant. Though the evidence on the part of the defendant appears the more reasonable and consistent, yet the fact remains that the plaintiff's foot was injured by a piece of coal falling on it and a piece of coal was found near the scene of the accident. The trainmen themselves admitted that coal sometimes did fall from the tender, caused by the vibration of the train. Under the circumstances surrounding the accident, the jury might have found that the defendant's witnesses were mistaken in saying that the tender was properly loaded on the day in question; or they might have found that a lump of coal was allowed to fall off because of the careless handling of it by the fireman.

(2) We now come to consider the objections to the instructions. As we have already seen proof on the part of the plaintiff himself tends to show that he was struck by a piece of coal flying or projecting from the tender of one of defendant's fast passenger trains and under our statutes this was *prima facie* proof of negligence on the part of the defendant; in other words, we have uniformly held that under the statute in question, proof that a person's injury is caused by the running of a train, raises a presumption of negligence against the railroad company. The court so instructed the jury and counsel for the defendant admit that the instruction in this respect is correct but contend, however, that the court erred in instructing the jury because its instructions placed upon the defendant the burden of proving by a preponderance of the evidence that it was not guilty of negligence causing the plaintiff's injury, if it should find that the plaintiff [359] was struck by a piece of coal flying or propelled from defendant's train.

(3) There was no error upon the part of the court in so instructing the jury. Proof of the existence of the facts specified, under the statute, raised a presumption of negligence against the railway company and made a *prima facie* case against the plaintiff which, if not rebutted or overcome by the railway company, was sufficient to warrant the recovery against it. As soon as the plaintiff has made out a *prima facie* case, under the statute, he is entitled to recover unless the defendant introduces evidence to show that it is not guilty of negligence.

In the case of St. Louis, etc. R. Co. v. Bragg, 66 Ark. 248, 50 S. W. 273,—a stock

killing case—the plaintiff proved a state of facts sufficient to raise a presumption of negligence against the defendant and the court said there was no error in instructing the jury that if the defendant failed to show by a preponderance of the evidence that it used ordinary care to prevent the injury, they should find for the plaintiff. See also St. Louis, etc. R. Co. v. Ayers, 67 Ark. 371, 55 S. W. 159; and St. Louis, etc. R. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883.

(4) It is next insisted by counsel for the defendant that the court erred in an instruction given to the jury on the measure of damages. In that instruction the court told the jury that the plaintiff was entitled to recover for suffering which the jury might believe from the evidence had resulted or would reasonably result to the plaintiff in the future by reason of the alleged injury. Specific objection was made to the phrase, "or will reasonably result to the plaintiff in the future."

In the case of St. Louis, etc. R. Co. v. Bird, 106 Ark. 177, 153 S. W. 104, at page 186, the court said: "Unless there is testimony tending to show with reasonable certainty that the injury is permanent the court should not permit the jury to assess any damages for permanent injury. Mr. Hutchinson says, 'The jury may have taken into consideration future as well as past physical pain and suffering, but to [360] justify them in doing so it must be reasonably certain that such future pain and suffering are inevitable and if they be only probable or uncertain they cannot be taken into the estimate.'"

Counsel contend that there is a difference between the meaning of the expression "will reasonably result" as used in the instruction and the expression "will with reasonable certainty result" approved in the case just referred to. We cannot see any difference in the use of the two expressions. The court in plain terms told the jury that the plaintiff was entitled to recover damages to compensate himself for injuries actually sustained and reasonably certain to be suffered in the future. The evidence on the part of the plaintiff tended to show that an operation was necessary to be performed upon his foot and that the most successful condition that could be hoped for was that he would be confined to his bed for several weeks after the operation. Even the witnesses for the defendant testified that an operation was necessary to restore the foot of the plaintiff to its normal condition, the difference between them and the physicians for the plaintiff being as to the degree of the plaintiff's injury. The defendant's physician testified that a complete recovery would result from the operation and the plaintiff's physician

testified to the contrary. Therefore we do not think the court erred in giving the instruction in question.

(5) This brings us to a consideration of the excessiveness of the damages. The jury returned a verdict in favor of the plaintiff in the sum of \$5,000 and, under the circumstances, we do not think the verdict excessive. According to the testimony of the plaintiff himself as well as that of his physician he suffered intense pain as a result of his injury. The injury occurred September 6, 1914, and at the time of the trial, February 1, 1915, according to the testimony of the plaintiff's witnesses, but little improvement could be noted in his condition. The testimony showed that he had suffered great pain almost daily from the time he was injured up to the time [361] of the trial. That he must suffer pain in the future is certain. The doctors all agree that he must submit to an operation to take out a part of the bones of his foot if he ever expects to get well. Though the physicians for the defendant testify that a complete recovery would follow, the physician for the plaintiff testifies that his left foot would be weaker than his right as a result of the operation and that this condition would continue for the remainder of his life. The plaintiff earned \$1.50 per day and sometimes more at the time he received the injury and has been unable to do any work since. According to his own testimony and that of his physicians he has constant pain unless an opiate is given him to alleviate it. Under these circumstances, as above stated, we do not think the verdict was excessive.

Other errors in giving instructions are pressed upon us for a reversal of the judgment but we think the objections made by counsel are met by the principles of law above announced and on that account do not deem it necessary to take up each assignment and discuss it specifically. We think it is sufficient to say that we have examined the record and find no prejudicial errors in it.

Therefore the judgment will be affirmed.

NOTE.

Liability of Railroad Company for Personal Injuries Caused by Objects Thrown or Falling from Train.

Object Thrown by Employee, 540.

Object Thrown by Person Other than Employee 540.

Object Falling from Train, 541.

Object Thrown by Employee.

While the holding in *Willis v. Maysville*, etc. R. Co. 122 Ky. 658, 13 Ann. Cas. 74,

that where a person is injured by an object thrown from a train by an employee the railroad company will be held responsible if the injured person is rightfully in the place where he is struck, was not questioned in the recent case of *O'Brien v. Union Freight R. Co.* 209 Mass. 449, 95 N. E. 861, 36 L.R.A. (N.S.) 492, the rule was held not to be applicable to a licensee on the railroad company's premises. In that case it appeared that the plaintiff, the manager of a wholesale beef company, was in the freight yard of the defendant company in the early morning as a mere licensee. An engineer of a dummy engine was cleaning it out and was in a position where he could not see the plaintiff. The engineer threw hot ashes out of his engine and some of them struck the plaintiff in the face thereby injuring him. It was held that since the plaintiff was a mere licensee the railroad company could not be held liable for damages for the personal injuries thus caused, if they resulted from a lack of ordinary care on the part of the engineer and not from an intentionally injurious or wanton act on his part. The court said: "Where the danger is caused by an active act which is negligent the owner is answerable, or in other words that the owner or occupier owes to the licensee the duty to refrain from injuring him by an 'actively negligent act.' If the term 'actively negligent act' means such an act as may be regarded as wantonly, recklessly or intentionally injurious to the licensee, the proposition is true; but if it means such as is short of that and arises simply from the failure to exercise ordinary care, then the proposition is not in accordance with the law of this state, so far at least as respects acts done in the transaction of lawful business upon the premises."

Object Thrown by Person Other than Employee.

It has been held recently that where a person is injured by an object negligently thrown from a train by some one who is not an employee, the railroad company is liable if the act is committed either with the acquiescence or through the active intervention of its own employees. Thus in *Geddings v. Atlantic Coast Line R. Co.* 91 S. C. 477, 75 S. E. 284, it appeared that the defendant railroad company transported a number of cross arms for telegraph poles as freight, and that the employees of the telegraph company acting with the consent of the defendant, threw them out of the moving train on the railroad's right of way where the public was accustomed to travel. The plaintiff was injured thereby. It was held that the railroad company was liable. The court said: "It is the duty of a rail-

road company to load and unload its freight, and in the present case, the appellant could not escape liability, by delegating such duty to the telegraph company. . . . Unloading the cross arms at a point traveled by the public, while the train was running at a rapid rate of speed, tended to show a reckless disregard of the rights of the public and of the plaintiff."

In *Pittsburgh, etc. R. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356, it appeared that for two years the defendant had permitted postal clerks to throw mail pouches from rapidly moving trains on station platforms open to the public who desired to do business with the railroad, and that the plaintiff was injured by a pouch so thrown. The defendant was held to be liable because of its negligence in permitting the clerks to throw out the mail sacks. The court said: "The railroad companies are not primarily liable for the negligence of the servants of the government in discharging their duties. They are in no sense servants or employees of the company, and the only ground upon which the railroad company is held liable for their acts is that the mail clerks travel on the company's cars, and, by reason of that fact, have it in their power, by dangerous practices, to injure those who may lawfully be in close proximity to the company's road, and to whom the company owes a duty of exercising reasonable care to protect from injury by reason of the passage of its trains, and that the company has without objection suffered such mail clerks to indulge in such dangerous practices."

So in *Thomas v. Southern R. Co.* (N. C.) 92 S. E. 321, it was held that where a railroad company permitted postal clerks to throw out mail pouches from a train on the station platform, instead of using cranes provided for that purpose, and one of the sacks injured the plaintiff who was waiting to become a passenger, the railroad company was liable on the theory that it had permitted the use of a dangerous instrumentality.

Object Falling from Train.

Where an object negligently permitted to fall from a train injures a person who is in a place where he has a right to be, the railroad company is liable. In *Chicago, etc. R. Co. v. Pritchard*, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, it appeared that the defendant was assisting his employer to load a flat car with poles, and that there was a shout of "stop the train." The defendant jumped from the car and went around to the other side to see if he could help in any way. Owing to a de-

fect in the cars the poles fell on him, and before he could extricate himself he was run over and killed. It was held that the railroad company was liable, since the failure of the defendant to see that the car was in a proper condition was the proximate cause of the accident. The court said: "The primary act must have such a connection with the wrong that it stands in the relation of cause and effect, so that it can be said that it was the duty of the person committing such act to apprehend that injury might thereby occur to another. In this case the intervening cause was not a supervening cause; there was at the most on the part of the shipper only an omission to stay the injurious consequences of what had already been done. In these circumstances, if it can still be said that it was the duty of the company, in view of the imminence of the danger and the possibility that its dereliction would be overlooked by the shipper, to have apprehended that its act might lead to the injury of a third person and, as an ordinarily prudent person, to have guarded against it, then, within the modern authorities at least, its act was a proximate cause, since the case would be one in which there was an unbroken connection between the wrong and the injury. . . . The matter of proximate cause, while somewhat difficult clearly to put before juries, has in it no element which calls for the scholastic subtlety of the schoolman; in most cases an application of the doctrine only requires, after instructions concerning such of the general principles as the case involves, that the jurors should apply their every-day judgment, as practical men, to ascertain whether there has been such a delinquency on the part of the defendant, uninterrupted by any supervening cause, that the act or omission ought justly to be held as an efficient cause of the wrong."

In *Trinity, etc. R. Co. v. Blackshear*, (Tex.) 161 S. W. 395, wherein it appeared that the plaintiff was plowing in his own field fifty feet away from a railroad track and was struck by an iron spike thrown by a passing freight train, the railroad company was held to be liable on the theory that it was bound so to operate its trains as not to interfere with the plaintiff's right to enjoy his premises near the company's tracks.

In *Pittsburgh, etc. R. Co. v. Hoffman*, 57 Ind. App. 431, 107 N. E. 315, it appeared that a railroad company had employed an independent contractor to build a bridge, and that the contractor employed the plaintiff to act as a night watchman. In the early morning while the latter was going on his rounds the railroad company ran a train at a reckless rate of speed over a rough temporary

track on the bridge, and a piece of coal which had been badly packed on the tender of the engine fell and struck the plaintiff. The railroad company was held to be liable on the theory that the plaintiff was where he had a perfect right to be and that therefore the defendant was guilty of negligence in not using a high degree of care toward him. See also the reported case.

In *St. Louis, etc. R. Co. v. Carr*, 94 Ark. 246, 126 S. W. 850, the court said: "It is urged by counsel that the defendant had the right to use its tracks at the crossing, and that it only owed the duty to plaintiff not to injure him after having discovered his position of peril. But the rule relative to the liability of a railroad company for an injury done after a discovered peril is not applicable to the facts of this case, as adduced on the part of the plaintiff; for, according to the evidence of the plaintiff, he was a traveler in a public highway at the crossing of the defendant's tracks, and in such case he was not a trespasser or licensee on defendant's right of way, but he had the right to use the highway crossing. It is true that the railway company had also the right to the use of its tracks over the highway crossing. Where the railroad is situated upon a highway, the public has the right to use the highway as well as the railroad, and each must make reasonable and proper efforts, with due regard to the rights of the other and in view of all the circumstances, to foresee and avoid collision. And in such a case it is the duty of the railroad company to exercise ordinary care and prudence in the operation of its trains, and otherwise, to prevent injuring a traveler. The traveler should observe all the requirements of ordinary care; to him the track itself is a warning of danger, and he is under the duty to exercise precaution to inform himself of the proximity of the train, and to exercise ordinary prudence in avoiding injury. . . .

A railroad company is bound to use ordinary care and caution to avoid injuring persons who may be near its tracks, and who are rightfully at such place; and whether or not under all the circumstances of the case the railroad company was negligent in permitting any object or article which caused the injury to project or fall from its train of cars is a question of fact for the jury to determine."

In *Texas, etc. R. Co. v. Endsley* (Tex.) 119 S. W. 1150, it appeared that the plaintiff in the performance of his governmental duties was walking along the right of way of a railroad company on a path running beside a portion of the tracks which was frequently used by the public with the knowledge or the acquiescence of the railroad company, and was struck and injured by a swinging

door belonging to one of the cars of the train which had been insecurely fastened. The defendant was held to be liable on the theory that it owed ordinary care to the plaintiff who was a licensee of the company in using a footpath that was ordinarily safe for the public to use. The court said: "The rule, held to be applicable in this class of cases, is that, where a duty is owing to the plaintiff, as in this case, by the defendant, and the thing which inflicted the injury is shown to have been under the management of the defendant, or its servants, and the accident is such as in the ordinary course of things does not happen if those who have the management will use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from the want of ordinary care."

In *St. Louis Southwestern R. Co. of Texas v. Balthrop* (Tex.) 167 S. W. 246, it appeared that the plaintiff's wife was walking along a path on the south side of a railroad track within the corporate limits of a town, which track had been used for ten years by the public with the consent of the defendant company, and that she was struck and injured by a piece of scantling which was thrown from the floor of one of the cars of a passing train. The defendant was held to be liable on the theory that the plaintiff's wife was a licensee and that there was active negligence in allowing the scantling to remain on the floor of the car. The court said: "The rule is that, when a licensee is injured as a result of the passive negligence of the owner of the premises, such, by the way of illustration, as a failure in the instant case of appellant to keep the pathway in a safe condition, any injury resulting from such unsafe condition would not be actionable, since a licensee who goes upon defective premises and is injured because of such defect thereby contributes to the result. But, when a licensee is injured while on the premises by some active or special act of negligence of the owner, suit may be maintained."

Where a trespasser is injured by an object falling from a train, a railroad company is liable only for a reckless and wanton act, since it owes no duty to a trespasser. Thus in *Covington, etc. R. Transfer, etc. Co. v. Mulvey*, 135 Ky. 223, 122 S. W. 129, 26 L.R.A. (N.S.) 204, it appeared that the deceased was playing with some other boys on the private premises of the defendant company, adjoining its right of way, and that he was struck and killed by a lump of coal falling from a passing train. The court said: "This court has gone to the extent of holding that where a railroad track runs through a populous community, along or across streets, where from the nature of things persons may be reasonably expected at

any time, it is the duty of those in charge of the train to have it under reasonable control, to keep a lookout for persons using the track, and to give timely warning of the approach of the train. *Illinois Cent. R. Co. v. Murphy*, 123 Ky. 787, 97 S. W. 720, 30 Ky. L. Rep. 93, 11 L.R.A.(N.S.) 352. The reason for this rule is that the long and continued use of the track at the point in question by large numbers of persons is sufficient to indicate a reasonable certainty that persons will be found there. This rule has never been extended to cases where there was no customary use of the track at the point of the injury. The presence of persons on the track because of its customary use by the public being reasonably certain, there is a strong probability of some one's being injured unless proper precautions are taken to prevent accidents. The necessity for precaution is due to the fact that the very movement of a train is dangerous, and likely to injure those caught unawares. But the probability that a boy, who with a few other boys, plays upon the private premises of a railroad company, adjoining its right of way, will be in position to be struck by a lump of coal falling from a passing car is not so great as to impose upon the company the duty of loading its cars with reference to his presence, or of inspecting its cars to see that he is not injured by falling coal. Under such circumstances there is no liability, unless the injury is wanton or reckless."

In *Thomas v. Cincinnati, etc. Pac. R. Co.* 127 Ky. 169, 105 S. W. 379, 32 Ky. L. Rep. 67, it appeared that the plaintiff was walking on a railroad right of way in the country and not near a crossing. A freight train came along at a high rate of speed around a curve, and a gate used to keep the coal in the tender of the engine, which had been laid temporarily on top of the coal, toppled over and struck the plaintiff, causing serious injuries. It was held that the defendant company was not liable since the plaintiff was a trespasser and the company could be liable only for wanton negligence.

In *Welch v. Louisville, etc. R. Co.* (Ky.) 173 S. W. 338, it appeared that the plaintiff was walking along a railroad right of way in an unfrequented part of the country when a wreck occurred and she was injured by flying debris. The court said: "Actionable negligence consists in the failure to exercise that degree of care towards plaintiff which was due her by the defendants under the circumstances. In the absence of duty, there can be no negligence. It is the settled rule in this state that the only duty owing to a trespasser is to exercise ordinary care to avoid injuring him after his peril is discovered. A railroad company is not under the duty of flagging its trains in order to

avoid injuring a trespasser, unless reasonably necessary to avoid injuring him after his peril is discovered."

In *Louisville, etc. R. Co. v. Marlow*, 169 Ky. 140, 183 S. W. 470, wherein it was alleged that the plaintiff, while walking along a path on a railroad right of way, was struck by a piece of iron flying from a passing train, it was held that the defendant was not liable unless the plaintiff could show some affirmative or positive act of negligence on the part of those having charge of the train.

HERMAN AND BEN MARKS

v.

HAAS.

Iowa Supreme Court—June 20, 1914.

166 Iowa 340; 147 N. W. 740.

New Trial — Discretion of Trial Court.

The granting of a new trial rests largely in the discretion of the trial court, and will not be disturbed on appeal, except for an abuse of discretion.

Same.

A party appealing from an order granting a new trial after verdict in his favor has the burden of showing abuse of the trial court's discretion, and must show that the record is free from error as against the adverse party.

Evidence — Secondary Evidence of Document.

The admission in evidence of copies of invoices which the party offering the copies claims he sent to the adverse party is erroneous, where notice to produce the originals was not served on the adverse party, and where there was no examination of the adverse party as to their existence.

New Trial — Grounds — Erroneous Admission of Secondary Evidence.

In an action for merchandise sold and delivered, the error in permitting, over proper objection, the seller to introduce in evidence copies of invoices which he claimed he had sent to the buyer is sufficient to support the discretion exercised in granting a new trial after verdict for the seller.

[See note at end of this case.]

Damages — Market Value — What Constitutes — Manufactured Goods.

Where a manufacturer and wholesaler located in one city sells goods to a retailer located in another, the market value at the former city, plus the cost of transportation to the buyer, is presumptively the market value at the retailer's city.

New Trial — Grounds — Erroneous Admission of Evidence.

Where the propriety of admitting evidence in favor of the successful party is at least doubtful, the doubt should be resolved in support of the action of the trial court granting a new trial.

[See note at end of this case.]

Harmless Error — Cure of Error by Verdict.

Errors committed against a party are cured by a verdict in his favor.

Appeal and Error — Matters Reviewed — Error Favorable to Appellant.

A party who appeals from an order granting a new trial after verdict in his favor cannot assail the order on the ground that the trial court committed errors against him on the trial.

Same.

Where prejudicial errors are committed on the trial against each party, either can obtain a new trial in case of an adverse verdict.

Appeal from District Court, Hardin county: LEE, Judge.

Action by Herman and Ben Marks, plaintiff, against C. M. Haas, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

George W. Ward for appellant.

E. H. Lundy and Dean W. Peisen for appellee.

[341] EVANS, J.—The plaintiff is a corporation engaged in the manufacture of fur garments in Detroit, Mich. The defendant is a retail dealer in Eldora, Iowa. The plaintiff introduced evidence in support of its petition tending to show that it had sold and delivered to the defendant upon his order three bills of goods amounting to a total of \$140.83. The verdict in its favor was for such amount. Much of the evidence of the plaintiff was introduced over appropriate objections by the defendant. Several of the grounds of the motion for new trial by defendant were based upon the alleged improper admission of testimony on behalf of plaintiff. It is hardly necessary to repeat what we have often said, that the district court has a large discretion in the matter of granting a new trial. Only an abuse of such discretion will warrant our interference with an order granting a new trial. The party appealing from such order is under the burden of showing abuse of such discretion. For such purpose, it is manifestly incumbent upon him to show that the record was free from error as against the appellee. If there was prejudicial error as against the appellee, this of itself would ordinarily require the allowance of a new trial. The appellee in argument points out certain alleged errors prejudicial

to him which appear in the record of the trial. It will be sufficient to notice one of these.

The plaintiff introduced in evidence certain purported [342] copies of alleged invoices which it claimed to have sent to the defendant, and to which no objection had been made by the defendant as contended by the plaintiff. These purported copies were introduced over appropriate objections by the defendant. No foundation whatever was laid for their introduction by the plaintiff. No notice to produce the originals was served upon the defendant, nor was there any examination of the defendant as to their existence. Upon the whole record, we do not think the error was very important. But it was error, and was sufficient to support the discretion exercised by the trial court in granting a new trial.

Other alleged errors were pointed out by appellee and insisted upon. In view of the sufficiency of the ground already stated, we need not dwell upon these. We may say, however, that considerable of the argument of the parties as to whether the market value should have been shown as at Detroit or as at Eldora presents no decisive or important question. The plaintiff was selling its manufactured product to the defendant as a retailer. They dealt with each other as manufacturer or wholesaler on the one part, and as retailer on the other. Their respective places of business were fixed and understood by each. As between them, therefore, the market value at Detroit, the place of origin, plus the cost of transportation, was presumptively the market value at Eldora, the place of destination. It is alleged, however, by defendant appellee that the plaintiff's witness testified to market value, without fixing it any place. This is technically true upon the record, although possibly a fair inference might be drawn that the witness intended his testimony to refer to the place of manufacture. The question at this point is at least doubtful, and should be solved in support of the order of the trial court granting a new trial.

II. The appellant in argument assigns a number of alleged errors committed upon the trial which it contends were prejudicial [343] to it upon such trial. However, such errors, if any, are not available to the plaintiff as appellant on this appeal. Errors committed against it on the trial of the case were all cured by the verdict in its favor. Having won the verdict, all errors, if any, proved nonprejudicial to it. The only grievance which it now has is the subsequent order of the court granting a new trial. It is from such order alone that it could appeal. The order granting a new trial cannot be assailed by the appellant upon the mere ground that the trial court committed errors against

it upon the trial. For the purpose of sustaining its appeal from the order granting a new trial, the appellant must show, as before indicated, that the record of the trial was free from error as against the appellee. If prejudicial errors were committed against the appellee upon the trial, he was entitled to a new trial. He was none the less entitled to such new trial if errors were also committed as against the plaintiff appellant. The only effect of such errors would be to entitle the plaintiff appellant to a new trial if the verdict had gone against it. If prejudicial errors were committed as against each party, then either would be entitled to a new trial in case of an adverse verdict.

For the reasons indicated, it is manifest that the trial court was clearly within the range of its discretion in ordering a new trial, and such order is therefore

Affirmed.

Ladd, C. J., and Weaver and Preston, JJ., concur.

NOTE.

Admission of Incompetent Evidence as Ground for Granting of New Trial by Trial Court.

It is the purpose of this note to consider the admission of incompetent evidence as constituting grounds for a new trial by the trial court. This obviously will not include any discussion of those cases involving the granting of a new trial by a higher court of appeal because of the introduction of such evidence.

As a general rule the admission of incompetent evidence is ground for the granting of a new trial by the trial court. *Newton Banking Co. v. Hudgins*, 14 Ga. App. 229, 80 S. E. 675; *King v. Chicago*, etc. R. Co. 138 Ia. 625, 116 N. W. 719; *Smith v. Sedalia*, 182 Mo. 1, 81 S. W. 165; *Geissendoerfer v. Western Horseshoe Co.* 131 Mo. App. 534, 110 S. W. 640; *National City Bank v. Pacific Co.* 117 App. Div. 12, 101 N. Y. S. 1098; *Tincknell v. Ketchman*, 78 Misc. 419, 139 N. Y. S. 620; *Cable Piano Co. v. Southern Ry.* 94 S. C. 143, 77 S. E. 868; *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89; *Chesapeake*, etc. R. Co. v. *Parker*, 116 Va. 368, 82 S. E. 183; *Maynes v. Dolan*, 8 N. Bruns. 573. And see the reported case. See also *Park v. Park*, 66 Ga. 543; *Marshall v. Weir Plow Co.* 4 Kan. App. 615, 45 Pac. 621; *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 312.

Thus in *Newton Banking Co. v. Hudgins*, 14 Ga. App. 229, 80 S. E. 675, the court said that the trial judge very properly corrected his error in admitting the testimony of a witness interested in the result of the suit by granting a new trial. And in *Chesapeake*,

etc. R. Co. v. *Parker*, 116 Va. 368, 82 S. E. 183, it was held that there was no error in the court's ruling in setting aside a verdict and granting a new trial, it appearing that the verdict rested on the improper admission of a statement as part of the *res gestae*. Likewise in *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89, holding that the trial court was justified in granting a new trial, the court said: "It being conceded that a serious mistake, for which the plaintiff was in a large measure responsible, occurred at the trial, and it appearing that such mistake resulted in a verdict which would otherwise not have been rendered, the action of the lower court in granting a new trial should be sustained on this appeal, if any valid reasons can be assigned for so doing. Such reasons are easily available."

In *Cable Piano Co. v. Southern Ry.* 94 S. C. 143, 77 S. E. 868, holding that the discretion of the trial judge should ordinarily control in the matter of granting a new trial for the admission of incompetent evidence, the court said: "It certainly will not do to lay down the rule that in every case, where incompetent or irrelevant testimony is admitted, and afterwards stricken out, with proper instructions from the court to the jury to disregard it, a new trial must be granted. On the other hand, it would perhaps be equally unsafe to say that in no such case should a new trial be granted. The character of the testimony, the circumstances under which it was offered and admitted, the nature of the case being tried, the other testimony in the case, and perhaps other matters which might be suggested, should be considered by the court in deciding whether the party against whom such testimony was admitted was so prejudiced thereby as to call for the exercise of the discretion to grant a new trial. In such cases much must necessarily be left to the wise discretion of the trial judge, who is in the atmosphere of the trial, and is therefore most capable of correctly deciding the question; and this court should not interfere, unless it is made to appear that the ruling was manifestly erroneous." So in *King v. Chicago*, etc. R. Co. 138 Ia. 625, 116 N. W. 719, the court said: "The trial court knew better than any one else whether the introduction of the exhibit was prejudicial, and, as it had a large discretion in the matter of setting aside the verdict upon this, as well as other grounds, we should not interfere." In *Smith v. Sedalia*, 182 Mo. 1, 81 S. W. 165, it was held that where certain evidence was admitted on the promise that it would be connected and its relevancy shown later, which was not done, and the verdict of the jury was in favor of the party offering such evidence, the trial court should set the verdict aside and grant a new trial.

LAWRENCE ET AL.

v.

ELLER ET AL.

North Carolina Supreme Court—May 19,
1915.

169 N. Car. 211; 85 S. E. 291.

**Adverse Possession — By Tenant
against Landlord — Necessity of Sur-
render of Leasehold.**

One who enters into possession of land as a tenant cannot, while retaining possession, assert against his lessor an after-acquired title, which he deems superior to that of the lessor.

[See note at end of this case.]

Appeal from Superior Court, Avery county:
WEBB, Judge.

Action by H. L. Lawrence et al., plaintiffs,
against B. F. Eller et al., defendants. Judg-
ment for defendants. Plaintiffs' appeal.
AFFIRMED.

[211] Civil action to establish ownership
and right of possession of a certain tract of
land lying in Avery County.

It was admitted in the pleadings that de-
fendants, B. F. Eller and wife, or B. F. Eller,
as agent of his wife, had rented the tract of
land in controversy to plaintiff for the year
1912 at the contract price of \$25; that the
lessee had entered into possession and occu-
pation of the property under and by virtue
of the contract and had continued such posses-
sion since that time; that in December, 1912,
plaintiff had acquired a deed for the property
from W. P. Eaton and wife, the original own-
ers, and in January, 1913, had instituted the
present action against the lessors, claiming to
be the true owners under said deed and with-
out having surrendered or made any offer to
surrender possession acquired by them under
and by virtue of the lease.

[212] It was further alleged in the plead-
ings that W. P. Eaton and wife had previous-
ly, in 1906, contracted to sell the property to
one D. C. Eller, who had entered under the
contract of purchase, and, after committing
much spoil and injury to the property, had
abandoned his contract to the original own-
ers, and plaintiff had then acquired the title
by purchase and deed, and were the true own-
ers of the property.

Plaintiff further alleged that defendants,
by some fraudulent arrangement or contriv-
ance with D. C. Eller, had obtained possession
of the property, to which they had no right
whatever, and while holding under such claim
had made the lease under which plaintiff
entered.

They alleged further, that while defendant
occupied the property under their pretended
claim, they had procured a deed to be made
them by the sheriff of Watauga County, pur-
porting to convey to them the right of D. C.
Eller in the property, and that this was their
only claim of title; and plaintiffs thereupon
demand judgment that B. F. Eller and wife
be declared the tenants of plaintiff, and that
this pretended deed of the sheriff be declared
fraudulent and void as constituting a cloud
on their title.

Defendants answer, denying the allegations
in impeachment of their title, and setting
forth, also, that D. C. Eller bought the land
originally from Eaton and wife, for \$1,200 to
\$1,300, and took a bond for title to convey
same, which was duly registered in Watauga
County, where the land was then situated;
that some money was paid down and notes
executed for the remainder, to wit, two notes
for \$425 each and one for \$200; that D. C.
Eller paid the \$200 note and one of the notes
for \$425, and, afterwards, in 1908, defend-
ants bought the land from D. C. Eller, pay-
ing in full for his interest, and afterwards
acquired the other note for \$425 by purchas-
ing the same for full value from persons to
whom it had been assigned by Eaton and
wife; that defendant neglected to take a
written assignment from D. C. Eller for his
interest in the property, but, being a man
of no education, he was misled and deceived
in reference thereto by D. C. Eller, but that
present defendants had acquired the title to
said land or the right thereto in the manner
specified, and, being in possession, claiming as
owners under their purchase, as stated, they
had rented to plaintiff for 1912, and plain-
tiff, being fully aware of all the facts and that
the land had been fully paid for, had entered
into a pretended agreement with Eaton and
wife to purchase the land and taken a deed
therefor, to be paid for in case recovery could
be had against these defendants, and ask judg-
ment that defendants be declared the owners
of the property and that the money paid
therefor be declared a lien thereon, etc., and
for general relief.

The court having intimated an opinion that
plaintiffs could not maintain the present
action unless and until possession had been
restored to [213] defendants, in deference to
such intimation plaintiffs submitted to a non-
suit and appealed.

*T. A. Love and J. W. Ragland for appel-
lants.*

L. D. Love for appellees.

HOKE, J. (*after stating the facts*).—It is
recognized as the general rule that a tenant
is not allowed to controvert the title of his
landlord or set up rights adverse to such title
without having first surrendered the pos-

session acquired under and by virtue of the agreement between them.

The position does not usually obtain where, after the renting, the title of the landlord has terminated or has been transferred either to a third person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord, and in courts administering principles of equity the estoppel is not recognized when the tenant has been misled into a recognition of his lessor's title by mistake or fraud and under circumstances which would induce a court of equity to hold the landlord a trustee for the tenant, and there are other exceptions of a restricted nature.

The general rule, however, is as stated, and, while varying at times in its application, has been everywhere recognized as sound in principle and has always been very rigidly enforced in this jurisdiction. *Campbell v. Everhart*, 139 N. C. 503-514, 52 S. E. 201; *Pool v. Lamb*, 128 N. C. 1, 37 S. E. 953; *Springs v. Schenck*, 99 N. C. 552, 6 S. E. 405, 6 Am. St. Rep. 552; *Davis v. Davis*, 83 N. C. 71; *Farmer v. Pickens*, 83 N. C. 550; *Wilson v. James*, 79 N. C. 349; *Abbott v. Cromartie*, 72 N. C. 292, 21 Am. Rep. 457; *Callender v. Sherman*, 27 N. C. 711; *Towne v. Butterfield*, 97 Mass. 105; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258; *Davis v. Williams*, 130 Ala. 530, 30 So. 488, 89 Am. St. Rep. 55, 54 L.R.A. 749; *Rogers v. Boynton*, 57 Ala. 501; *Ward v. Ryan*, 10 Ir. R. 17; *Peyton v. Stith*, 5 Pet. 485, 8 U. S. (L. ed.) 200; 2 *McAdam Landlord and Tenant*, sec. 421; 18 A. and E. (2 ed.) p. 414; 24 Cyc. 946.

In *Davis's Case*, supra, Chief Justice Smith said: "It is well settled doctrine that one who, as tenant, gains possession of the land of another cannot resist an action for its recovery, brought after the termination of the lease, by showing a superior title in another or in himself, acquired before or after the contract. The obligation to surrender becomes absolute and indispensable. 'Honesty forbids,' says *Ruffin, C. J.*, 'that he should obtain possession with that view, or, after getting it, thus use it.' *Smart v. Smith*, 13 N. C. 258. 'Neither tenant nor any one claiming under him,' remarks *Daniel, J.*, 'can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord.' *Callender v. Sherman*, 27 N. C. 711. 'If he entered as tenant, or, after entry, had become such,' is the language of *Rodman, J.*, 'he was estopped from asserting his title until he had restored [214] the possession to the plaintiff.' *Heyer v. Beatty*, 76 N. C. 28. Even a homestead right cannot be asserted in opposition to the recovery. *Abbott v. Cromartie*, 72 N. C. 292, 21 Am. Rep. 457. The rule does not

preclude the tenant from showing an equitable title in himself on such circumstances as under our former system would call for the interposition of a court of equity for his relief, and which relief may now be obtained in the action, as is held in *Turner v. Lowe*, 66 N. C. 413. Yet the force of the general proposition remains unimpaired, that where the simple relation of lessor or lessee exists without other complications, the latter cannot contest the title of the former. *Forsythe v. Bullock*, 74 N. C. 135. The obligation to restore a possession thus obtained, before any inquiry into the title is permitted, although springing from the contract, rests upon the foundation of good faith and honest dealing among men."

In *Farmer v. Pickens*, 83 N. C. 549, *Dillard, J.*, tersely states the position: "It is settled that a person accepting a lease from another is estopped during the continuance of the lease, and afterwards, until he surrenders the possession to the landlord, to dispute his title, being a rule founded on a principle of honesty which does not allow possession to be retained in violation of that faith on which it was obtained or continued."

In *Springs v. Schenck*, supra, the Court held: "A tenant cannot be heard to deny the title of his landlord, nor can he rid himself of this relation, without a complete surrender of the possession of the land."

In *Towne's case*, supra: "A tenant at will is estopped from denying his landlord's title without surrender of the leased premises or eviction by title paramount or its equivalent."

In *Brown v. Keller*: "A tenant must surrender the premises before asserting rights adverse to his landlord which he acquired after renting the premises."

And in *Davis v. Williams*:

"2. A tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy (p. 58).

"3. It is only where there is a change in the condition of the landlord's title for the worse, after a tenant enters into his contract, in the absence of fraud or mistake of fact, that he is permitted to show the change in the condition of the title (p. 58).

"4. A tenant must first surrender the premises to his landlord before assuming an attitude of hostility to the title or claim of title of the latter (p. 58).

"5. An estoppel will be enforced in a court of equity as well as in a court of law (p. 59)."

A correct application of the principle declared and upheld in these [215] cases are in full support of his Honor's ruling, it appearing, from a perusal of the pleadings, that, without any change having taken place

in the title of the lessor since the renting, the plaintiff, after having become defendant's tenant, and during his tenancy, has undertaken to acquire what he considers a superior title to that of his landlord, and, while maintaining the possession acquired under and by virtue of his lease and without surrender, he institutes the present action to have himself declared the true owner, and that defendants are in fact and truth his tenants.

It has been said that the estoppel referred to does not prevail in actions involving an issue as to title, but if such a limitation on the general rule prevails in this jurisdiction, it applies only to actions involving strictly the issue as to title, and does not extend to those where the possession and the right growing out of or incident to it are presented or in any way affected. *Peyton v. Stith*, 5 Pet. 485, 8 U. S. (L. ed.) 200; *Bigelow on Estoppel* (6 Ed.) p. 585; 18 Am. & Eng. Enc. of Law (2d ed.) 419.

While the action seeks also to have a deed, referred to in the pleadings, declared to be a cloud on plaintiff's title, this is only an incident and evidential. The gravamen of the action is to have plaintiff declared the true owner and that defendants are his tenants, and, under the authorities cited, such an action cannot be maintained by plaintiff unless and until he first surrenders the possession to the person from whom he rented.

There is no error, and the judgment of his Honor is

Affirmed.

NOTE.

Necessity that Tenant Surrender Possession before Asserting Title Adverse to Landlord.

General Rule, 548.

Application of Rule, 550.

Exceptions to Rule, 551.

Sufficiency of Surrender, 552.

General Rule.

It is well settled that a tenant cannot, in an action involving the possession of the leased premises, controvert the title of his landlord or assert any rights adverse to that title or set up any inconsistent right to change the relation existing between himself and his landlord without first delivering up to the latter possession of the premises which he has acquired under and by virtue of the agreement between them.

England.—*Atty.-Gen. v. Hotham*, 3 Russ. 415, 27 Rev. Rep. 101, 38 Eng. Rep. (Reprint) 631; *Ajar v. Young, C. & M.* 78, 41 E. C. L. 49; *Doe v. Austin*, 9 Bing. 41, 23 E. C. L.

256, 2 Moo. & S. 107; *Balls v. Westwood*, 2 Campb. 11.

Canada.—*Doe v. Fiffany*, 5 U. C. Q. B. 79; *Fox v. Macaulay*, 12 U. C. C. P. 298; *Couse v. Cline*, 19 U. C. Q. B. 58; *Pyatt v. McKee*, 3 Ont. 151.

United States.—*Peyton v. Stith*, 5 Pet. 485, 8 U. S. (L. ed.) 200; *Woodward v. Brown*, 13 Pet. 1, 10 U. S. (L. ed.) 31; *Rector v. Gibbon*, 111 U. S. 284, 4 S. Ct. 608, 28 U. S. (L. ed.) 427; *Piper v. Caskell*, 122 Fed. 614, 58 C. C. A. 396.

Alabama.—*Shelton v. Doe*, 6 Ala. 230; *Henley v. Branch Bank*, 16 Ala. 552; *Russell v. Irwin*, 38 Ala. 44; *Crawford v. Jones*, 54 Ala. 459; *Rogers v. Boynton*, 57 Ala. 501; *Bishop v. Lalouette*, 67 Ala. 197; *Houston v. Farris*, 71 Ala. 570; *Littleton v. Clayton*, 77 Ala. 571; *Elliott v. Dycke*, 78 Ala. 150; *Crim. v. Nelms*, 78 Ala. 604; *Robinson v. Holt*, 90 Ala. 115, 7 So. 441; *Barlow v. Dahm*, 97 Ala. 414, 12 So. 293, 38 Am. St. Rep. 192; *Davis v. Williams*, 130 Ala. 530, 30 So. 488, 89 Am. St. Rep. 55, 54 L.R.A. 749; *Hammond v. Blue*, 132 Ala. 337, 31 So. 357; *Duncan v. Guy*, 159 Ala. 524, 49 So. 229; *Sayers v. Tallassee Falls Mfg. Co.* 167 Ala. 553, 52 So. 892; *McLeod v. McEachern*, 187 Ala. 230, 65 So. 790; *Salter v. Fox*, 190 Ala. 288, 67 So. 439; *Rhodes v. Downing*, 13 Ala. App. 494, 68 So. 788.

Alaska.—*White v. White Co.* 4 Alaska 317.

Arkansas.—*Miller v. Turney*, 13 Ark. 385; *Clemm v. Wilcox*, 15 Ark. 102; *Hershey v. Clark*, 27 Ark. 527; *Hughes v. Watt*, 28 Ark. 153; *Bryan v. Winburn*, 43 Ark. 28; *James v. Miles*, 54 Ark. 460, 16 S. W. 195; *Washington v. Moore*, 84 Ark. 220, 105 S. W. 253, 120 Am. St. Rep. 29; *Dunlap v. Moose*, 98 Ark. 235, 135 S. W. 824.

California.—*Standley v. Stephens*, 66 Cal. 541, 6 Pac. 420; *Burgess v. Rice*, 74 Cal. 590, 16 Pac. 496; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Sawyer v. Sargent*, 7 Pac. 120; *Ashton v. Golden Gate Lumber Co.* 58 Pac. 1.

Colorado.—*Milsap v. Stone*, 2 Colo. 137; *Arnold v. Woodard*, 4 Colo. 249; *Knowles v. Innman*, 16 Colo. 385, 26 Pac. 823; *Wallbrecht v. Blush*, 43 Colo. 329, 95 Pac. 927.

Connecticut.—*Holmes v. Kennedy*, 1 Root 77; *Camp v. Camp*, 5 Conn. 304, 13 Am. Dec. 60; *Thomas v. Young*, 79 Conn. 493, 65 Atl. 955.

District of Columbia.—*Morris v. Wheat*, 11 App. Cas. 201; *McFarlane v. Kirby*, 28 App. Cas. 391.

Florida.—*Gaines v. Russ*, 60 Fla. 317, 53 So. 113; *Jones v. Allen*, 63 Fla. 204, 58 So. 784.

Georgia.—*Newton v. Roe*, 33 Ga. 163; *Ronaldson v. Tabor*, 43 Ga. 230; *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291; *Dixon v. Patterson*, 135 Ga. 183, 69 S. E. 21.

Illinois.—*Tilghman v. Little*, 13 Ill. 240; *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258;

Lowe v. Emerson, 48 Ill. 160; *Gable v. Wetherholt*, 116 Ill. 313, 6 N. E. 453, 56 Am. Rep. 774; *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428, reversing 70 Ill. App. 546; *Chicago Terminal Transfer R. Co. v. Barrett*, 252 Ill. 86, 96 N. E. 794; *Mackin v. Haven*, 88 Ill. App. 434, affirmed 187 Ill. 480, 58 N. E. 448; *Barkman v. Barkman*, 107 Ill. App. 332; *Merki v. Merki*, 113 Ill. App. 518, affirmed 211 Ill. 121, 72 N. E. 9; *McQuillen v. Mazzone*, 182 Ill. App. 133; *Peter Schoenhofen Brewing Co. v. Pugh*, 183 Ill. App. 22.

Indian Territory.—*Turner v. Gilliland*, 4 Indian Ter. 606, 76 S. W. 253.

Indiana.—*Epstein v. Greer*, 85 Ind. 372; *Pence v. Williams*, 14 Ind. App. 86, 42 N. E. 494.

Iowa.—*Stout v. Merrill*, 35 Ia. 47.

Kentucky.—*Saunders v. Moore*, 14 Bush 97; *Norton v. Doe*, 1 Dana 14; *Hodges v. Shields*, 18 B. Mon. 828; *Trabue v. Ramage*, 80 Ky. 323; *Finlayson v. Cuyuga Coal, etc. Co.* 173 Ky. 763, 191 S. W. 486; *King v. Hill*, 108 S. W. 238, 32 Ky. L. Rep. 1192.

Louisiana.—*Metoyer v. Larenandière*, 6 Rob. 139; *Harvin v. Blackman*, 112 La. 24, 36 So. 213; *Moullierre v. Coco*, 116 La. 840, 41 So. 113; *Davidson v. Fletcher*, 130 La. 668, 58 So. 504; *Hanson v. Allen*, 37 La. Ann. 732.

Maine.—*Moshier v. Reding*, 12 Me. 478; *Longfellow v. Longfellow*, 54 Me. 240.

Massachusetts.—*Towne v. Butterfield*, 97 Mass. 105; *Miller v. Lang*, 99 Mass. 13; *Bailey v. Kilburn*, 10 Metc. 176, 43 Am. Dec. 423; *Cobb v. Arnold*, 12 Metc. 39.

Michigan.—*Ryerson v. Eldred*, 18 Mich. 12; *Bertram v. Cook*, 32 Mich. 518; *Nims v. Sherman*, 43 Mich. 45, 4 N. W. 434; *Hecht v. Ferris*, 45 Mich. 376, 8 N. W. 82; *Smith v. Cole*, 166 Mich. 165, 131 N. W. 567.

Minnesota.—*St. Anthony Falls Water-Power Co. v. Morrison*, 12 Minn. 249; *Morrison v. Bassett*, 26 Minn. 235, 2 N. W. 851.

Mississippi.—*Love v. Law*, 57 Miss. 596.

Nebraska.—*Schields v. Horbach*, 40 Neb. 262, 68 N. W. 524; *Gies v. Storz Brewing Co.* 75 Neb. 698, 106 N. W. 775.

New York.—*Utica Bank v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Willis v. McKinnon*, 165 N. Y. 612, 59 N. E. 1132, reversing 35 App. Div. 131, 54 N. Y. S. 1079; *Baker v. Citizens' Trust Co.* 66 Misc. 622, 187 App. Div. 888, 121 N. Y. S. 767.

North Carolina.—*Freeman v. Hearth*, 35 N. C. 498; *Abbott v. Cromartie*, 72 N. C. 292, 21 Am. Rep. 457; *Wilson v. James*, 79 N. C. 349; *Davis v. Davis*, 83 N. C. 71; *Farmer v. Pickens*, 83 N. C. 549; *Pate v. Turner*, 94 N. C. 47; *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322; *Henning v. Warner*, 109 N. C. 406, 14 S. E. 317; *Pool v. Lamb*, 128 N. C. 1, 37 S. E. 953; *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201. And see the reported case.

Ohio.—*Longworth v. Wolfinger, Wright* 216.

Oklahoma.—*Olds v. Conger*, 1 Okla. 232, 32 Pac. 337; *Indian Land, etc. Co. v. Clement*, 22 Okla. 40, 109 Pac. 1080; *Standifer v. Morris*, 25 Okla. 802, 108 Pac. 413.

Oregon.—*Kiernan v. Terry*, 26 Ore. 494, 38 Pac. 671; *Jones v. California, etc. Land Co.* 52 Ore. 311, 97 Pac. 625; *Treadgold v. Willard*, 81 Ore. 658, 160 Pac. 803.

Pennsylvania.—*Kennedy v. Whalen*, 5 Kulp 36; *Porter v. Mayfield*, 21 Pa. St. 263; *Tatham v. Jones*, 1 Phila. 214, 8 Leg. Int. 124.

South Carolina.—*Weathersby v. Wilson*, 1 Nott & McC. 373; *Milhouse v. Patrick*, 6 Rich. L. 350; *McCutchen v. McCutchen*, 77 S. C. 129, 57 S. E. 678, 12 L.R.A. (N.S.) 1140.

South Dakota.—*McManus v. Maloy*, 30 S. D. 373, 138 N. W. 963.

Tennessee.—*Phillips v. Robertson*, 5 Hayw. 101; *Wilson v. Smith*, 5 Yerg. 379.

Texas.—*Lyles v. Murphy*, 38 Tex. 75; *June-man v. Franklin*, 67 Tex. 411, 3 S. W. 562; *Casey v. Hanriek*, 69 Tex. 44, 6 S. W. 406; *Hulett v. Platt*, 49 Tex. Civ. App. 377, 109 S. W. 207; *Buford v. Wasson*, 49 Tex. Civ. App. 454, 109 S. W. 275.

Vermont.—*Reed v. Shepley*, 6 Vt. 602.

Wisconsin.—*Strain v. Gardner*, 61 Wis. 174, 21 N. W. 31.

Thus in *King v. Hill*, 108 S. W. 239, 32 Ky. L. Rep. 1192, it appeared that a tenant entered under a lease and thereafter on discovering that his landlord had no title to the land attempted to procure a patent therefor. In an action by the landlord, the tenant attempted to assert his title under the patent without having surrendered possession. The court said: "In the case at bar, appellant was not disturbed in his possession by any outstanding claimant or title holder, nor was his occupancy under his lease from appellee in any way interfered with. Holding under these circumstances, the land as the tenant of appellee, he could not, in opposition to the title under which he entered, terminate the tenancy by attempting to obtain himself a patent to the land. A tenant while in possession under a lease, in the procurement of which no fraud was practiced, will not be permitted, before renouncing the tenancy and restoring the premises to the landlord, to set up in himself a title, however it may be acquired, in opposition to or that conflicts with the title of his landlord."

In *Abbott v. Cromartie*, 72 N. C. 292, 21 Am. Rep. 457, it appeared that a tenant was entitled to a homestead in certain lands which were sold under an execution against him and thereafter he accepted a lease from the purchaser. In an action by the landlord to recover the premises, the court said: "We held with the plaintiff that the defendant has shown no defense to this action. No proof of title is required when the action is brought

by a landlord, since if a tenant has once recognized the title of the plaintiff, and treated him as his landlord by accepting a lease from him, he is precluded from showing that the plaintiff had no title at the time the lease was granted; for it is a general rule founded on reasons of public policy, that a tenant shall never be permitted to controvert his landlord's title, or to set up against him, during the tenancy, one which is hostile in its character, to that which he acknowledged in accepting the demise. The possession of the tenant is the possession of the landlord, and so long as the possession subsists, so long does the relation of the landlord and tenant exist. To that extent are all the authorities. Taylor's Landlord and Tenant, 515 and notes. It follows that this relation and the rights growing out of it can be destroyed only by surrendering the possession to the landlord, as it existed prior to the lease. When that is done and not before, the defendant is at arms length and can assert his title by action or otherwise."

It may occur under the operation of the general rule that a person may have to pay rent on his own land. Thus where a tenant enters under a lease at a time when he is in fact the owner of the land leased, but is without knowledge of the fact, and there is no fraud on the part of the lessor the tenant must surrender possession before he can assert his title. *Morrison v. Bassett*, 26 Minn. 235, 2 N. W. 851; *Finlayson v. Cuyuga Coal, etc. Co.* 173 Ky. 763, 191 S. W. 486.

Application of Rule.

The rule that a tenant must surrender possession before asserting a title adverse to his landlord applies even though the term of the tenant's lease has expired. *London, etc. R. Co. v. West*, L. R. 2 C. P. (Eng.) 553, 36 L. J. C. Pl. 245; *Shelton v. Doe*, 6 Ala. 230; *Tewksbury v. Magraff*, 33 Cal. 237; *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729; *Sawyer v. Sargent* (Cal.) 7 Pac. 120; *Miller v. Lang*, 99 Mass. 13; *Phillips v. Robertson*, 5 Hayw. (Tenn.) 101. See also *Cobb v. Arnold*, 12 Metc. (Mass.) 39. Compare *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. 561 (lease of water rights). However, it has been held that a tenant may set up adverse title in himself after the termination of his lease, and need not surrender possession. *Carpenter v. Thompson*, 3 N. H. 204, 14 Am. Dec. 348; *Page v. Kinsman*, 43 N. H. 328.

Courts of equity adopt the same rule as to the right of a tenant to set up an adverse title without surrendering possession as do the courts of law. *Peyton v. Stith*, 5 Pet.

485, 8 U. S. (L. ed.) 200. Thus it has been held that a tenant in possession cannot maintain a bill in equity against the landlord to remove a cloud on the title. *Gaines v. Russ*, 60 Fla. 317, 53 So. 113.

A tenant cannot dispute his landlord's title without surrendering possession, even though the landlord had no title at the time the relationship was created. *Rhodes v. Downing*, 13 Ala. App. 494, 68 So. 788; *Ashton v. Golden Gate Lumber Co.* (Cal.) 58 Pac. 1; *Wallbrecht v. Blush*, 43 Colo. 329, 95 Pac. 927; *Thomas v. Young*, 79 Conn. 493, 65 Atl. 955; *King v. Hill*, 108 S. W. 239, 32 Ky. L. Rep. 1192. Thus it was said in *Thomas v. Young*, supra: "The tenant's duty to surrender possession remains a continuing obligation, and he cannot relieve himself from fulfilling it by the mere claim of paramount title in himself existing prior to the execution of the lease." But see *Dodge v. Phelan*, 2 Tex. Civ. App. 441, 21 S. W. 309.

The rule seems to be the same where the tenant does not enter under the landlord's title but subsequently procures a lease from him of the same premises. *Thomas v. Young*, 81 Conn. 702, 71 Atl. 1100; *Saunders v. Moore*, 14 Bush (Ky.) 97; *Contra Tewksbury v. Magraff*, 33 Cal. 237. See also *Nims v. Sherman*, 43 Mich. 45, 4 N. W. 434.

The principle which forbids a tenant in possession from disputing the title of his landlord applies to any person who may acquire possession through or from the tenant. *Doe v. Mills*, 2 Ad. & El. 17, 29 E. C. L. 17; *London, etc. R. Co. v. West*, L. R. 2 C. P. (Eng.) 553, 36 L. J. C. Pl. 245; *Doe v. Austin*, 9 Bing. 41, 23 E. C. L. 256, 2 Moo. & S. 107; *McWhorter v. Stein* (Ala.) 39 So. 617; *Earle v. Hale*, 31 Ark. 470; *Doty v. Burdick*, 83 Ill. 473; *Sexton v. Carley*, 147 Ill. 269, 35 N. E. 471; *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373; *Belfour v. Davis*, 20 N. C. 443; *McManus v. Maloy*, 30 S. D. 373, 138 N. W. 963; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217; *Genin v. Ingersoll*, 2 W. Va. 558. In an action of ejectment against a tenant who has attorned to a third person, wherein the latter is allowed to come in and defend, he cannot set up any defense different from the tenant's and since the tenant may not dispute the plaintiff's title neither may one claiming in privity with him. *Belfour v. Davis*, 20 N. C. 443; *Tatham v. Jones*, 1 Phila. 214, 8 Leg. Int. 124. And so, where one acquires possession or pretended title by collusive concert with the tenant, he becomes identified with him and will not be allowed to act and assume a relation in hostility to the title under which he goes into possession. He is bound by the same allegiance that the tenant owes to his les-

sor and unless he first surrenders possession he cannot be heard to deny the landlord's title. *Springs v. Schenck*, 99 N. C. 551, 6 S. E. 405, 6 Am. St. Rep. 552; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322; *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373.

Exceptions to Rule.

The general rule that a tenant cannot controvert his landlord's title so long as he retains the possession under which he originally entered, does not preclude him from showing that since the creation of the tenancy the right and title of the landlord has expired or has become extinguished or that he himself has acquired the landlord's title. *Mountnoy v. Collier*, 1 El. & Bl. 630, 72 E. C. L. 630, 17 Jur. 508, 22 L. J. Q. B. 124, 1 W. R. 179; *Robertson v. Bannerman*, 17 U. C. Q. B. 508; *Kelly v. Wolff*, 12 Ont. Pr. 234; *Randolph v. Carlton*, 8 Ala. 606; *Farris v. Houston*, 74 Ala. 162; *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60; *Winn v. Strickland*, 34 Fla. 610, 16 So. 606; *Franklin v. Palmer*, 50 Ill. 202; *St. John v. Quetzow*, 72 Ill. 335; *Hardin v. Forsythe*, 99 Ill. 312; *Ryder v. Mansell*, 66 Me. 167; *Presstman v. Silljacks*, 52 Md. 647; *Harrington v. Sheldon* (Mich.) 163 N. W. 64; *Higgins v. Turner*, 61 Mo. 250; *Lane v. Young*, 66 Hun 563, 21 N. Y. S. 838; *Hetzel v. Barber*, 69 N. Y. 1; *Kibbe v. Crossman*, 139 App. Div. 338, 124 N. Y. S. 3; *Lancashire v. Mason*, 75 N. C. 455; *Welchi v. Johnson*, 27 Okla. 518, 112 Pac. 989; *Koons v. Steele*, 19 Pa. St. 203; *Lang v. Crothers*, 21 Tex. Civ. App. 118, 51 S. W. 271. But see *Balls v. Westwood*, 2 Campb. (Eng.) 11; *Couse v. Cline*, 19 U. C. Q. B. 58. Thus it was said in *Franklin v. Palmer*, supra: "When the landlord conveys his title to his tenant, the latter is not bound to restore possession to his landlord and then resort to an action to regain possession. By receiving a deed from his landlord, the relation of landlord and tenant ceases, and the tenant then is in and holds as grantee, and he is in under the same title under which he entered. When a landlord conveys to a stranger, the tenant is not bound to restore possession to his landlord, but may attorn to his grantee, and in doing so he does not dispute his landlord's title, but fully recognizes and submits to it, and after such a conveyance the tenant may attorn to the grantee, and if sued by his former landlord for possession he may set up his deed to his grantee to defeat a recovery. The landlord becomes as fully estopped by such a conveyance, as was the tenant by receiving the lease under which he entered. Appellant had a right to show that the landlord had conveyed the title under which he entered

to himself or another, and that he, or his grantees, were estopped, to assert the title against him, when he was in under the first grantee of the landlord. It cannot matter whether the landlord makes a voluntary conveyance, or the premises are sold under execution against the land, so that the title is effectually passed."

The estoppel is terminated by the eviction of the tenant or what amounts to eviction by one having a paramount title. Thus where the landlord is divested of his title by the levy of an execution on his premises and the execution creditor enters on the premises and threatens to oust the tenant unless he will attorn to him, the tenant having so attorned is not required to surrender possession in order to assail the landlord's title. *George v. Putney*, 4 Cush. (Mass.) 351, 50 Am. Dec. 788; *Mattis v. Robinson*, 1 Neb. 3; *Treadgold v. Willard*, 81 Ore. 658, 160 Pac. 803.

Where the relationship of landlord and tenant is created or induced by mistake or fraud, the rule does not apply. *Claridge v. Mackenzie*, 11 L. J. C. Pl. 72, 4 M. & G. 143, 43 E. C. L. 82, 4 Scott N. R. 796; *Lynett v. Parkinson*, 1 U. C. C. P. 144; *Farris v. Houston*, 74 Ala. 162; *Anderson v. Smith*, 63 Ill. 126; *Harvin v. Blackman*, 112 La. 24, 36 So. 213; *Schultz v. Arnot*, 33 Mo. 172; *Berridge v. Glassey* (Pa.) 7 Atl. 749; *Shultz v. Elliott*, 11 Humph. (Tenn.) 183. Thus where land is sold by virtue of an execution and thereafter the judgment debtor is induced by the purchaser to take a lease of the land, in an action of ejectment against the lessee he is not estopped from asserting the invalidity of the sale under the execution. *Shultz v. Elliott*, supra. And where one falsely represents himself to be the owner of the premises to one who is in possession without any title thereto, the tenant may thereafter dispute the title of the pretended owner without surrendering possession of the premises. *Lynett v. Parkinson*, 1 U. C. C. P. 144.

The rule that a tenant is estopped to deny his landlord's title until he restores possession is ordinarily limited to suits for possession only and has no application to actions in which the title itself is put in issue. *Beeler v. Elwell*, 92 Kan. 586, 141 Pac. 551; *Jochen v. Tibbells*, 50 Mich. 33, 14 N. W. 690; *McKie v. Anderson*, 78 Tex. 207, 14 S. W. 576; *Stevenson v. Rogers*, 103 Tex. 169, 125 S. W. 1, affirming 117 S. W. 472. See also *Tyler v. Davis*, 61 Tex. 674. When limited to an action for possession alone there is no question of the application of the general rule. But where the object of the suit is not only for the recovery of possession, but to establish the title or to have

partition, so that a decree in favor of either party would settle the question of title between them, the tenant is not estopped from disputing his landlord's title regardless of whether he has surrendered the possession. *Stevenson v. Rogers*, *supra*. Compare the reported case as to actions involving both title and possession.

Sufficiency of Surrender.

The surrender of possession must be distinct and bona fide, in order to place the tenant in a position to dispute his landlord's title. *Littleton v. Clayton*, 77 Ala. 571; *Thomas v. Young*, 79 Conn. 493, 65 Atl. 955; *Dixon v. Patterson*, 135 Ga. 183, 69 S. E. 21; *Mackin v. Haven*, 88 Ill. App. 434, affirmed 187 Ill. 480, 58 N. E. 448; *Baker v. Citizens' Trust Co.* 66 Misc. 622, 137 App. Div. 888, 121 N. Y. S. 767; *Kiernan v. Terry*, 26 Ore. 494, 38 Pac. 671; *Treadgold v. Willard*, 81 Ore. 658, 160 Pac. 803; *Weathersby v. Wilson*, 1 Nott. & M. 373, note; *McCutchen v. McCutchen*, 77 S. C. 129, 57 S. E. 678, 12 L.R.A.(N.S.) 1140; *Juneman v. Franklin*, 67 Tex. 411, 3 S. W. 562; *Hulett v. Platt*, 49 Tex. Civ. App. 377, 109 S. W. 207; *Burford v. Wasson*, 49 Tex. Civ. App. 454, 109 S. W. 275; *Greeno v. Munson*, 9 Vt. 37, 31 Am. Dec. 605. Compare *Voss v. King*, 33 Va. 236, 10 S. E. 402. Thus it was said in *Littleton v. Clayton*, *supra*: "The surrendering of possession without notifying the landlord, and the resuming it shortly afterward, is not sufficient. The tenant must act in good faith and restore the landlord to the same condition in which he was, when he accepted possession from him." And so, in *Baker v. Citizens' Trust Co.* *supra*, it was held that a tenant cannot dispute the title of his landlord by merely abandoning the premises, but that the surrender must be a physical one at the end of the term, or a surrender which will be accepted by the lessor.

The rule is not abrogated by the fact that the tenant surrenders possession to a third person and then receives the possession back from him. There must be a clear disavowal by the tenant of his landlord's title and an assertion of an adverse claim brought home to the landlord. If the tenant acquires a better title during his tenancy, he must first surrender and he may then bring his action of ejectment. *Grizzard v. Roberts*, 110 Ga. 41, 35 S. E. 291; *Lowe v. Emerson*, 48 Ill. 160; *Freeman v. Heath*, 35 N. C. 498; *Pool v. Lamb*, 128 N. C. 1, 37 S. E. 953.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

v.

EARL.

Arkansas Supreme Court—January 3, 1916.

121 Ark. 514; 181 S. W. 925.

Chattel Mortgages — Mortgagor in Possession — Duty to Protect Property.

Although Kirby's Dig. § 5396, makes the filing of a mortgage for record notice to all persons of its existence, and section 5410 provides that the mortgagee shall have the legal title thereto and the right of possession, the mortgagor in possession of mortgaged personal property has the special interest of a bailee, is under the duty of protecting the property, and is liable to the mortgagee if he fails to protect it.

Right of Action against Third Person.

Although the possession by a mortgagor of personal property is permissive only, since Kirby's Dig. § 5410, entitles the mortgagee to possession, the mortgagor has such a special ownership and such duties in regard to the mortgaged property that he can maintain an action for negligent destruction or for conversion of the property.

[See note at end of this case.]

Same.

In such case where a mortgaged horse is killed by a railway company, the mortgagor then in possession may maintain an action against the company for the killing of the horse, under Kirby's Dig. § 6776, providing that any person who has a special ownership in property killed by a train may sue the company for damages for such killing.

[See note at end of this case.]

Effect of Settlement with Mortgagor — Liability to Mortgagee.

Where by statute the mortgagor in possession of a horse may sue the railroad company whose train killed it and the company compromises with the mortgagor, it is not liable for a second payment for the value of the horse to the mortgagee, since the law contemplates but one settlement or satisfaction for the same injury.

Appeal from Circuit Court, Perry county. FULK, Judge.

Action by R. D. Earl, plaintiff, against Chicago, Rock Island and Pacific Railway Company, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[514] This suit was instituted by the appellee to recover damages from appellant for killing appellee's horse. Appellee alleged that he was the owner of the horse by virtue

of a mortgage executed to him by Edmond Person; that his mortgage had been duly recorded before the horse was killed; that the debt of \$150.00 which the mortgage was given to secure was past due and unpaid; that the horse was of the value of \$150.00; that appellant's agents negligently caused a train to strike and kill the horse, to appellee's damage in the above sum, for which appellee prayed judgment.

[515] Appellant answered denying the allegations of negligence and pleading in bar of appellee's action that the horse was in possession of Edmond Person when it was killed and that Person claimed to be the owner thereof; that appellant had settled all damages for the killing of the horse by paying to Edmond Person the sum of \$195.00, and had obtained from him a full release.

The issues were submitted to the court sitting as a jury upon the following agreed statement of facts:

"It was agreed that the property in question was not in possession of the mortgagee at the time it was killed, and that it was in the possession of the mortgagor, personally.

"That the horse in controversy was originally the property of one Edmond Person; that prior to the alleged killing of the horse, said Person had executed a mortgage or deed of trust upon the horse, for the purpose of securing an indebtedness in favor of R. D. Earl, the plaintiff in this case; that said mortgage was duly acknowledged and recorded in the office of the recorder of Perry County, prior to the killing of the horse.

"It is further admitted that the facts of this case entitled the plaintiff to recover as a matter of law, if the settlement alleged in the answer by the defendant with Edmond Person is not a defense to the action, notwithstanding the fact that Person had legally executed a mortgage upon the horse, which was legally recorded prior to the killing of the horse and the settlement of the defendant with Person.

"It is further admitted that the defendant made payment to person of the value of the horse, prior to the institution of this action and prior to presentation by the plaintiff to the defendant of any claim as such mortgagee."

The court rendered judgment in favor of appellee against appellant in the sum of \$150.00, and this appeal was taken.

Thos. S. Buebee, Jno. T. Hicks and H. T. Harrison for appellant.

Sellers & Sellers for appellee.

[516] Wood, J. (after stating the facts).

—(1-2) Under section 5396 of Kirby's Digest, which makes the filing of a mortgage for record notice to all persons of its existence, appellant had notice of appellee's rights

under his mortgage. "In the absence of stipulations to the contrary the mortgagee of personal property shall have the legal title thereto and the right of possession." Section 5410, Kirby's Digest. But until the mortgagee has actually taken possession, and so long as he permits the mortgagor to retain possession the latter occupies the position of a bailee and he has such a special ownership in the property that imposes upon him the duty of protecting it from wrongdoers and that would make him liable to the beneficial owner if he failed to do so.

(3) This permissive possession and special ownership and the duties and responsibilities incident thereto gave to the mortgagor the right to maintain an action against third parties for the negligent destruction or [517] conversion of the property. The authorities as a general rule so hold. *Wilkes v. Southern R. Co.* 85 S. C. 346, 67 S. E. 292, 21 Ann. Cas. 79, 137 Am. St. Rep. 890, and cases in note; 5 Am. & Eng. Enc. of Law (2d ed.) 999, note.

We have a statute that gives any person having a special ownership in live stock killed or wounded by any railroad trains running in this State the right to sue for the damages sustained. Section 6776 Kirby's Digest.

Our decisions recognize the right of one having a special property under the statute to maintain suit for damages against the railway company that killed or wounded the live stock. *St. Louis, etc. R. Co. v. Biggs*, 50 Ark. 169, 179, 6 S. W. 724; *St. Louis, etc. R. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083. Speaking of the right to maintain the suit in *St. Louis, etc. R. Co. v. Biggs*, supra, we said: "And this is declaratory of the common law, according to the principles of which the bailee of a chattel, whose term is unexpired, being answerable over to absolute owner, may sue for its full value, if it is injured or destroyed while in his possession, and if he recover, the action of him who has the reversionary interest is gone." Mr. Jones, after speaking of the right of mortgagee to maintain a suit for damages against a stranger for an injury to mortgaged property, has this to say of the right of the mortgagor:

"But the mortgagor, if in actual possession, has the same right of action against one who wrongfully injures or converts the mortgaged property, unless the mortgagee has intervened for his own protection. In this respect the rule is the same as in the case of a bailment, namely, the joint owner of the property, or one having a special interest in it, can maintain trespass or case for injury to it, or trover for a conversion of it, but a judgment recovered by either is a bar to a suit by the other for the same cause of action, and it would seem that a voluntary

payment of damages by the defendant to one would be a bar to a suit by the other." 1 Jones, Chat. Mort. 447a.

(4) Since the mortgagor in possession has the right to maintain a suit for damages against the wrongdoer for injury to the property, it follows as the logical, if not [518] necessary, corollary of his doctrine that the mortgagor would have the right to settle with the wrongdoer without suit. Also that the wrongdoer, having the right to settle, and having settled with the mortgagor, would not be liable over to the mortgagee. This rule is in accord with the commendable policy of compromising and adjusting differences without going to law.

(5) A wrongdoer who is willing to settle for the injury he has done without litigation, should not be and is not forced to go to law. And when he has settled with either one of two parties who may have the equal right to sue him, he has satisfied the demands of the law. The law contemplates but one settlement or satisfaction for the same injury. *Luse v. Jones*, 39 N. J. L. 707, 708, 712. See also *Wilkes v. Southern R. Co.* supra; *Logan v. Wabash Western R. Co.* 43 Mo. App. 71.

The court therefore erred in rendering judgment in favor of the appellee against appellant and its judgment is reversed and the cause is dismissed.

NOTE.

Right of Action of Chattel Mortgagor against Third Person for Injury, etc., to Chattels.

The purpose of this note is to review the recent cases discussing the right of action of a chattel mortgagor against a third person for an injury to the chattels. The earlier cases on the subject are collected in the notes to *Wilkes v. Southern R. Co.* as reported in 21 Ann. Cas. 79, and 137 Am. St. Rep. 890.

The few cases passing on the question are in accord with the rule laid down in the reported case, that a mortgagor of chattels in possession has a right to protect such possession against third persons by appropriate legal remedies. *Southern R. Co. v. Chambliss*, 10 Ala. App. 326, 65 So. 417-1034; *Gaines v. Briggs*, 9 Ark. 46; *Donnell v. G. G. Deering Co.* (Me.) 97 Atl. 130; *Dahill v. Booker*, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465; *Swan v. Thurman*, 112 Mich. 416, 70 N. W. 1023; *Illinois Cent. R. Co. v. Hawkins*, 65 Miss. 200, 3 So. 410; *Rogers v. King*, 66 Barb. (N. Y.) 495; *Kain v. Garnaas*, 27 N. D. 292, 145 N. W. 825; *Middlesworth v. Robinson*, *Wright* (Ohio) 552. See also *St. Louis, etc. R. Co. v. Taylor*, 57 Ark. 136, 20 S. W. 1083. Thus, in *Illinois Cent. R. Co. v. Hawkins*, supra, an action by the mortgagor of a mule

for damages for the killing of the mule by the defendant's train, the mortgagor having remained in possession after breach of the condition of the mortgage, the defendant attempted to defeat recovery by setting up the mortgage and its forfeiture. The court, stating that by statute a mortgagor before sale is deemed to be the owner of the mortgaged property, further said: "The argument of appellant is that it is liable to respond to the mortgagee for the injury done to him by the destruction of the property to the extent of his mortgage debt, and because of the maxim *memo bis vexari*, it is contended that the plaintiff herein cannot have full recovery. We deem it unnecessary to decide whether the appellant is or is not subject to a suit at the instance of the mortgagee, for if it be true that the mortgagee may recover, that would not affect the right of the plaintiff to have a full recovery in this action by force of the statute. It is more competent for the legislature to abrogate the maxim *memo bis vexari*, than for us to repeal by construction the legislative declaration that the mortgagor in possession is as against the world (other than the mortgagee) the owner at law of the mortgaged property. It may be that there may be cases in which the tortfeasor would be in danger of a suit by the mortgagor and also of one by the mortgagee, but relief if there be any must be had at the hands of a court of equity by a bill of interpleader."

So in *Southern R. Co. v. Chambliss*, 10 Ala. App. 326, 65 So. 417-1034, it appeared that a mortgagor had defaulted in payment, but had been allowed to retain possession of the property after the default. It was held, in an action of trespass brought by the mortgagor and mortgagee jointly, that each of the plaintiffs had a property interest, one as the owner subject to an unexpired mortgage, and the other as mortgagee, and that the defendants could not defeat the action by setting up the existence of the past due mortgage or by alleging that the rights of the plaintiffs were inconsistent.

A mortgagor's possession and control of the property is prima facie evidence of his right to possession, and it is necessary for a third person, if he seeks to impeach that right, to show that the possession by the mortgagor is wrongful or that the right has been divested according to law. *Rogers v. King*, 66 Barb. (N. Y.) 495.

A subsequent right of possession by a third person, based on a subsequent acquisition of the mortgagee's interest, is no defense to a possessory action by the mortgagor. *Kain v. Garnaas*, 27 N. D. 292, 145 N. W. 825. Thus in an action in trover by the administrator of a mortgagor against a third person, it will not avail the defendant that the intestate had mortgaged the property and

that the defendant discharged the mortgage after the conversion. *Gaines v. Briggs*, 9 Ark. 46.

The making of a second mortgage by the owner after his bringing an action of conversion is not inconsistent with the claim of the mortgagor that the property was converted, and it does not operate as an abandonment of the property. *Dahill v. Booker*, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465. And even though a mortgagor after his default surrenders the mortgaged property to the mortgagee on the latter's demand, he may still bring an action on an attachment bond against a third person who wrongfully levies an attachment against the mortgagor's interest. *Jencks v. Murphy*, 15 S. D. 425, 89 N. W. 1121.

But a mortgagor who neither has possession nor is entitled to possession at the time of a conversion by a third person, cannot maintain a possessory action. *Middlesworth v. Sedgwick*, 10 Cal. 393.

MILLER

v.

DILKES ET AL.

Pennsylvania Supreme Court—October 4,
1915.

251 Pa. St. 44; 95 Atl. 935.

Evidence — Corporate Books and Records — As between Stockholders.

A contract for the sale of a large part of the stock of a corporation provided that the corporation's indebtedness should be thereafter ascertained and paid in certain proportions by the buyer and seller. Thereafter the buyer furnished a statement of the corporate indebtedness, which should be paid by the seller, and the seller disputed the statement and refused to pay any part of the indebtedness shown by it. Suit was thereupon brought by the buyer for an accounting and to enforce payment of the balance found to be due. It is held that the corporation's books and vouchers, showing its business while both parties were stockholders, were properly admitted in evidence.

[See note at end of this case.]

Interest — Accrual of Cause of Action — Furnishing Statement Required by Contract.

Where such statement of indebtedness was not furnished to the seller until June 7th, he is liable for interest on his share of the indebtedness only from that date, and not from March 8th, the date of sale.

Contracts — Construction of Terms — "Assets" of Corporation.

In determining the assets of the corporation in such case, a claim for demurrage apparently due the corporation was properly excluded, where it appeared that the corporation's agent had agreed to save the party apparently liable therefor harmless from any claims for demurrage.

Appeal and Error — Scope of Review — Finding by Referee.

A referee's findings of fact, when sustained by the court, cannot be disturbed on appeal, in the absence of manifest error.

Cost — Liability to Full Costs.

Where the defendant in a suit for an accounting had refused to pay any portion of plaintiff's claim, and plaintiff recovered, defendant cannot complain that the entire costs were imposed on him.

Appeal from Court of Common Pleas, No. 3, Philadelphia county.

Action by Harvey C. Miller, plaintiff, against George R. Dilkes et al., defendants. From decree dismissing exceptions to report of referee, defendant Dilkes appeals. The facts are stated in the opinion. **MODIFIED.**

G. W. Pepper, James E. Hood and Biddle, Paul & Jayne for appellant.

M. Hampton Todd for appellee.

[45] *POTTER, J.*—Under the terms of an article of agreement, dated February 7, 1910, Harvey C. Miller, the plaintiff in this case, purchased from George R. Dilkes, the defendant, all the outstanding capital stock of the Southern Steamship Company, with the exception of fifty shares, which plaintiff already owned. The value of the stock was, of course, affected by the indebtedness of the company. There was no difficulty in ascertaining the amount of the mortgage indebtedness. It was stipulated that the [46] stock should be delivered within one month, and that at the date of delivery, all fixed periodical payments, such as interest, taxes, etc., and all similar items accruing to the steamship company should be apportioned and credited between the buyer and seller; that the net indebtedness of the company, over and above the mortgages, should be then ascertained, giving the vendor credit for all valid and collectable notes, accounts and claims receivable held by the company on the date of said delivery. It was agreed that if the net indebtedness so ascertained was over \$55,000, the defendant, George R. Dilkes, should pay the difference to the plaintiff, and that if such indebtedness was found to be less than \$55,000, then the said Harvey C. Miller, the purchaser, should pay the said difference to the said George R. Dilkes. It was further agreed that \$15,000 of the purchase-money

should be deposited in the Land Title and Trust Company, in the joint names of the parties, to support the covenant of the said George R. Dilkes as to the excess indebtedness, which deposit was duly made. Settlement was made on March 8, 1910. On June 7, thereafter, plaintiff furnished to the vendor a statement, showing that the net indebtedness of the company on March 8, 1910, was \$21,578.08 in excess of the amount stipulated, and payment of this excess amount was demanded. Defendant disputed the accuracy of the account, and refused to pay the sum demanded, and the parties being unable to agree upon any definite statement in respect to the matter, on July 27, 1911, the plaintiff filed this bill for an accounting and to secure payment of the balance found to be due him. After the case was at issue, it was sent by agreement to a referee, who stated an account, in which he found there was due by defendant, under the agreement, the sum of \$23,888.89, which he awarded to plaintiff, with interest thereon from March 8, 1910, to the date of filing his report, which amounted to \$5,714.18. Exceptions were filed by both parties, whereupon the referee altered his [47] report somewhat, and awarded a sum total of \$28,058.38. He also recommended that payment of the costs should be divided between the parties, three-fourths to be paid by defendant, and one-fourth by plaintiff. Exceptions to the referee's report were sustained in part by the court below, the total amount to be paid by defendant, being increased to \$31,703.48, on which was to be credited the \$15,000, with accrued interest thereon, which had been deposited with the Land Title and Trust Company. The court also directed that defendant should pay all the costs. From the final decree of the court below, the defendant has appealed.

The principal question raised by the assignments of error, and set forth in appellant's statement of questions involved, is whether the entries in the books of the steamship company were admissible in evidence, for the purpose of showing its indebtedness. The referee held that they were, and based his findings largely upon them. Questions as to the allowance of interest and the imposition of costs are also raised. The plaintiff relied almost entirely upon the books of the Southern Steamship Company to establish the amount of its indebtedness on March 8, 1910. While the referee and the court below based their conclusion in this respect upon somewhat different grounds, yet they agreed that the book entries constituted proper proof of the indebtedness of the company, at least to the extent of establishing a prima facie case. As defendant offered no evidence to rebut that of the book entries,

the referee and the court below held that the amount of the indebtedness was to be regarded as established. This conclusion seems to be soundly buttressed by authority. The dispute in this case is not between strangers, but it is between persons both of whom were stockholders in the corporation, previous to the transaction which gave rise to the inquiry. In *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628, Chief Justice Tilghman said (p. 32): that the books of a corporation "are evidence in disputes between members of the corporation; [48] though not against strangers. The law is so laid down in *Phillips on Evidence*, 319, and I think correctly." In the textbook cited, 2 *Phillips on Evidence* (4th Am. Ed. 1859), 295, it is said: "Corporation books are evidence, by way of admission, between members of the corporation. . . . They cannot, in general, be adduced by a corporation, in support of its own rights or privileges, against strangers." And in a note to the above it is stated: "The general rule is that corporation books are evidence in disputes between members, but not against strangers." The rule that corporation books are evidence against members of the corporation has been steadily followed in our State: *Diehl v. Adams County Mut. Ins. Co.* 58 Pa. St. 443, 98 Am. Dec. 302; *New Era L. Assoc. v. Rossiter*, 132 Pa. St. 314, 19 Atl. 140, and *Moore v. Rohrbacker*, 30 Pa. Super. Ct. 568. In *Montgomery v. Exchange Bank*, 3 Sad. (Pa.) 461, 6 Atl. 133, it was held that (syllabus) "the books of a bank are admissible to charge a defendant who is a stockholder and officer of the bank, having in his power the inspection and supervision of such books." This court said in a per curiam opinion (p. 464): "The books of the bank were properly admitted to charge the defendant. He was not only a stockholder, but an officer of the corporation, having in his power the inspection and supervision of those books; hence, there is as much reason why he should be, prima facie, bound by the entries found in them, as that a partner should be bound by the books of his firm." It is suggested in the argument of counsel for appellant, that after March 8, 1910, when the stock of the Southern Steamship Company was transferred to Miller, and he became president, Dilkes was thereafter to be regarded as a stranger to the corporation, and should not be affected by the entries upon its books. But it must be remembered that the entries were of transactions which occurred before the transfer. They set forth payments of indebtedness incurred before that date. The inquiry was directed to the ascertainment of the condition of [49] the company when the transfer was made, and necessarily involved

all indebtedness of, and all payments due the company at that time. Furthermore, it does not appear that Dilkes became a stranger to the company on March 8, 1910. On the contrary, on that day he became its vice-president and manager, and he continued to hold these offices until December 31, 1910. Up to June, 1910, the steamship company and Dilkes occupied the same office rooms. This covered the period during which the entries were made, from which the accountants calculated the net indebtedness. That period began with March 8, 1910, and ended in May. During all that time, defendant, as was said in *Montgomery v. Exchange Bank of Waynesburg*, supra, "was an officer of the corporation, having in his power the inspection and supervision of those books." It also appears from the testimony that the entries in the account were all based on vouchers and that many of these vouchers were approved by defendant himself. As to these, appellant's counsel concede that they were evidence against their client, being in the nature of admissions. The other items of the account were posted into the books from vouchers signed by other officers of the company whose authority to approve claims and sign vouchers for their payment is not questioned. Mr. Savage, who had been secretary and treasurer of the company since its organization, testified that he opened a ledger account entitled "Business prior to March 8, 1910," because he was instructed by both Mr. Dilkes and Mr. Miller to keep a separate account showing exactly what relation the transactions bore to the business prior to the date of sale, and to that which came afterwards. This account was "opened in view of the contract between Mr. Miller and Mr. Dilkes." It appears to have been in part, the basis of the accountants' calculation of the net indebtedness. We think the referee might have reached without any hesitation whatever the conclusion to which he came, that the book entries were admissible, [50] for the purpose of showing indebtedness. The reasons which influenced him in reaching his conclusion, were indicated, as follows: (1) "the vouchers and entries were made in the regular course of business, and as part of the company's system of keeping its books; the work was done by officers and employees who had long been under defendant's employ, and the vouchers signed by two officers of the company usually other than the plaintiff himself and sometimes one of them defendant's son. If the company had a valid defense to any of these claims, (says the referee) would plaintiff be tempted to pay them and then run the risk of not being able to prove them against defendant, rather than interpose a valid defense in the first instance?" (2)

While the plaintiff was under obligation to pay the undisputed unsecured indebtedness of the company within thirty days after settlement, yet the defendant appears at no time to have indicated to plaintiff, what if any of the claims he disputed. (3) The whole system of bookkeeping entries was inaugurated and followed by defendant while he was president of the company, and it bore the stamp of his approval.

We can find nothing in the record to justify the attitude assumed by defendant. Admittedly there was an indebtedness, considerable in amount. It was estimated at \$55,000, and upon that amount as a basis the agreement for purchase and sale was made. If the actual indebtedness should prove to be more or less than the estimate, an adjustment was to be made accordingly. How could the amount of the indebtedness be ascertained, except by proceeding according to the usual course of business? Nothing occurred to interrupt the current of that business. It ran along in the usual channels. The capital stock of the company changed hands, but the business of the corporation ran on just the same, no matter who owned shares of stock. The accounts were kept by the corporation, as records for its own use, and it is difficult to conceive of any better [51] evidence of valid indebtedness than that furnished by the fact that bills were audited and paid by the officers of the company, whose business it was to do that very thing. If the defendant knew of any better way to ascertain the indebtedness, as a party interested, it was his place to suggest it. When the entries in question were made, he was not a stranger to the company or its affairs. He was an officer, and it appears from the testimony, that he instructed the secretary and treasurer to keep a separate account of settlements made of transactions which occurred prior to March 8, 1910; that he signed numerous vouchers for the payment of claims arising out of such transactions; that other vouchers were signed and claims approved in the usual course of business by other officers and the claims were entered in books to which plaintiff had access, and what is of greater significance than anything else is the fact that defendant has not disputed the correctness of any of these claims.

We are clear that the book entries were properly accepted as evidence to show prima facie indebtedness of the company, as of the date named, and in the absence of contradiction, the amount so shown must be regarded as having been fully established. Whatever amount was due to plaintiff, was, under the terms of the agreement, due and payable when the account showing the net indebtedness was presented by the purchaser

to the vendor. This was upon June 7, 1910. Interest should, therefore, be computed from that date and not from March 8, 1910.

A claim on the books against the American Agricultural Chemical Company for demurrage, amounting to \$1,210.75, was first disallowed as an asset, and afterwards was allowed by the referee, but was finally disallowed by the court. As Dilkes and company, who were at the time acting as agent for the steamship company, had expressly agreed to save the chemical company harmless from any claims for demurrage, it is apparent [52] that no such claim could be maintained, and that the referee in the first instance, and the court below, were right in excluding this item as an asset from the calculation.

There were other rulings on other claims, which were upon questions of fact, in which the findings of the referee were sustained by the court. In the absence of manifest error, which was not shown, these findings will not be disturbed.

We see no reason to differ with the court below as to the disposition it made of the costs. That was a matter within the sound discretion of the chancellor, with which this court will not interfere, in the absence of evidence of an abuse of discretion: *Guckenheimer, etc. Co. v. Kann*, 243 Pa. St. 75, 89 Atl. 807. Defendant here refused to pay any portion of the amount claimed. Had he admitted liability to any extent and tendered payment of the amount admitted, the situation would have been different. Having resisted the entire claim, he cannot fairly complain that the costs were placed upon him.

The assignments of error are overruled; the decree of the court below is affirmed, with the exception that interest upon the amount recovered is to be allowed from June 7, 1910, instead of from March 8, 1910. This appeal is dismissed at the cost of appellant.

NOTE.

Admissibility in Evidence of Books or Records of Corporation in Action between Members or between Corporation and Member.

Action between Corporation and Member:

Generally, 558.

Transaction with Member as Individual, 560.

To Prove Membership, 561.

Action between Members, 563.

Action between Corporation and Member.

GENERALLY.

As between a corporation and its members it is generally held that the books and rec-

ords of the corporation are admissible in evidence to prove the corporate acts and proceedings and financial status of the corporation.

Delaware.—*Jefferson v. Stewart*, 4 Har. (Del.) 82.

Georgia.—*Merchants' Bank v. Rawls*, 21 Ga. 334; *Macon, etc. R. Co. v. Vason*, 57 Ga. 314; *Bridges v. Southern Bell Telephone, etc. Co.* 15 Ga. App. 291, 82 S. E. 925. See also *Lowry Nat. Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396.

Illinois.—*Tomlin v. Tonica, etc. R. Co.* 23 Ill. 429; *Protection L. Ins. Co. v. Dill*, 91 Ill. 174; *Knights and Ladies of America v. Weber*, 101 Ill. App. 488; *Plattdutsche Grot Gilde, etc. v. Ross*, 117 Ill. App. 247.

Indiana.—*Breedlove v. Martinsville, etc. R. Co.* 12 Ind. 114; *Heaston v. Cincinnati, etc. R. Co.* 16 Ind. 275, 79 Am. Dec. 430.

Iowa.—*Iowa, etc. R. Co. v. Perkins*, 28 Ia. 281; *St. Louis, etc. Co. v. Eakins*, 30 Ia. 279; *Colfax Hotel Co. v. Lyon*, 69 Ia. 683, 29 N. W. 780.

Maine.—*Whitman v. Granite Church*, 24 Me. 236; *Long Wharf v. Palmer*, 37 Me. 379; *Penobscot, etc. R. Co. v. Dunn*, 39 Me. 587; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

Maryland.—*Wellersburg, etc. Plank Road Co. v. Young*, 12 Md. 476; *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 Am. Rep. 540.

Massachusetts.—See *Sharon First Baptist Church v. Harper*, 191 Mass. 196, 77 N. E. 778.

Michigan.—*Monroe v. Ft. Wayne, etc. R. Co.* 28 Mich. 272.

Mississippi.—See *Thigpen v. Mississippi Cent. R. Co.* 32 Miss. 347.

New Hampshire.—*White Mountains R. Co. v. Eastman*, 34 N. H. 124.

New Jersey.—*North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Dec. 258.

New York.—*Hamilton, etc. Plank Road Co. v. Rice*, 7 Barb. 157; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Abernethy v. Puritans Church Soc.* 3 Daly 1; *Highland Turnpike Co. v. McKean*, 10 Johns. 154, 6 Am. Dec. 324; *West v. Muckle*, 136 App. Div. 241, 120 N. Y. S. 976; *Poppenhuisen v. Poppenhuisen*, 68 Misc. 548, 125 N. Y. S. 269; *Shelby v. New York Steam Co.* 121 N. Y. S. 619. See also *Francis v. Perry*, 82 Misc. 271, 144 N. Y. S. 167.

Pennsylvania.—*Davis v. Meade*, 13 Serg. & R. 281; *Comfort v. Leland*, 3 Whart. 81; *Fleming v. Wallace*, 2 Yeates 120; *Groff v. Pittsburgh, etc. R. Co.* 31 Pa. St. 489; *Bavington v. Pittsburgh, etc. R. Co.* 34 Pa. St. 358; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Diehl v. Adams County Mut. Ins. Co.* 58 Pa. St. 443, 98 Am. Dec. 302; *Moore v. Rohrbacker*, 30 Pa. Super. Ct. 568.

Rhode Island.—*Olney v. Chadsey*, 7 R. I. 224; *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564.

Texas.—*Guadalupe, etc. Stock Assoc. v. West*, 76 Tex. 461, 13 S. W. 307; *W. R. Case, etc. Cutlery Co. v. Folsom*, 170 S. W. 1066.

Virginia.—*Stuart v. Valley R. Co.* 32 Grat. 146.

In *Hayden v. Williams*, 96 Fed. 279, 37 C. C. A. 479, the court stated and applied the rule as follows: "The rules governing their admission have been tersely and correctly stated by complainant's counsel, substantially as follows: (1) As against a stranger, they are not competent evidence of any fact stated in them; although the entries in them may, like all other entries, be proved to be correct by human testimony. (2) As between a corporation and its members, and as between the members of a corporation, the books are evidence of what is in them, except the dealings of the corporation with that particular member. (3) As to his own dealings with a corporation, a member of the corporation is considered a stranger, and, as to those dealings, the entries in the books are not evidence against him. In the case at bar the entries in the books which were relied upon by complainant (except as to payment of the dividends and transfer of the stock, neither of which was denied) did not relate at all to any dealings with the defendants or either of them, but solely to acts of the corporation, and to its financial condition at stated periods. The books were, therefore, competent evidence to the extent to which they are relied upon to sustain the judgment."

So in *White Mountains R. Co. v. Eastman*, 34 N. H. 124, the court applying the rule as against an admitted stockholder said: "He was one of the original grantees of the charter, one of the directors of the corporation, and claimed to be and exercised the rights of a stockholder from the time of his subscription, in virtue of the thirty shares here in question. The proceeding in ordering the assessments was a strictly corporate act, and one of a character such, if not to render it necessary, yet to make it in the highest degree proper that it should be entered on the corporate records. It was to operate upon all the shares and all the shareholders, and was in its nature essentially such as the acts and doings involving the organization of the corporation; material on the question of user or non-user, and necessary in order to preserve the existence of the corporation. It was totally unlike an entry of any direct matter of contract, or one touching the title to property, not designed to have a general effect upon all the members of the corporation. We think, in relation to such matter, the corporation records are evidence against one situated in relation to the corporation as

was the intestate. . . . It would certainly be attended with great inconvenience, and would result in great mischief, if, when matters of this nature had been entered upon the records of the corporation by a clerk required to act under an official oath, and there were no circumstances of suspicion connected with the records, they were to be thrown aside in every suit in which the corporation was a party, and parol testimony substituted."

In an action by a trustee in bankruptcy to recover dividends alleged to have been paid out illegally, the account books of the corporation were held to be properly admitted in evidence for the purpose of showing the financial status of the corporation when the several dividends were declared and paid. *Wesp v. Muckle*, 136 App. Div. 241, 120 N. Y. S. 976, wherein the court said: "It is the financial standing of the company which is always involved when a dividend is declared, and it is upon that standing that the vote of the directors is founded. It is a different situation where a corporation is suing a stranger or one of its members to recover an indebtedness, or charging him with holding its property. It cannot establish its debt or title to its property by an entry in the corporate books, unless the defendant assented to the entry. The crux of the litigation in this case is the financial condition of the corporation, and the books of the company disclose that condition. It is obliged by statute to keep 'correct books of account of all its business and transactions.' Section 32, Stock Corporation Law. It is in those books that the affairs and transactions of the company are supposed to be found."

In *Chenango Bridge Co. v. Lewis*, 63 Barb. (N. Y.) 111, it was held that the books of a bridge company, proved by its treasurer to have been received by him on his accession to the office, containing an account of the tolls received from the bridge for several years previous to that time, were not admissible as against a stockholder of the company, to prove the amount of tolls received during that period, without the necessary and preliminary proof as to such tolls; but it was held that such books proved by its treasurer to have been kept by him and to contain correct entries of tolls as given to him by the toll gatherer, coupled with proof by the toll gatherer that he had made correct returns of the tolls received by him, were admissible.

In *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194, affirming 58 App. Div. 436, 69 N. Y. S. 295, the court, after stating the rule applicable in an action between a corporation and a member where it is sought to introduce the books of the corporation to prove corporate acts, stated the doctrine as

applied to foreign corporations as follows: "Moreover, section 929 of the Code of Civil Procedure provides: 'Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose, as presumptive evidence, whether any or all of the parties are or are not members of the corporation.' The next section provides for securing a copy of such book or books, states how it shall be verified, that it may be used with like effect as the original book if a specified notice shall be given, and then provides that that and the following section do not apply where the foreign corporation is a party. When the sections are read together it becomes evident, we think, that the books of such a corporation may be used to prove its corporate acts or transactions and that they are presumptive evidence for that purpose even where the corporation is a party."

TRANSACTION WITH MEMBER AS INDIVIDUAL.

However, the rule as to the admissibility of the books and records of a corporation in a dispute between the corporation and a member is limited to evidence of purely corporate acts and proceedings, and where the matter in dispute relates to private dealings or contracts with a member in his individual capacity they are generally held to be inadmissible. *Carey v. Williams*, 79 Fed. 906, 25 C. C. A. 227; *Trainor v. German-American Sav. etc. Assoc.* 204 Ill. 616, 68 N. E. 650; *Haynes v. Brown*, 36 N. H. 545; *South Hampton v. Fowler*, 52 N. H. 225; *Pearsall v. Western Union Tel. Co.* 124 N. Y. 256, 66 N. E. 535, 21 Am. St. Rep. 662; *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046, 22 Am. St. Rep. 816, 12 L.R.A. 473; *Powell v. Conover*, 75 Hun 11, 26 N. Y. S. 1028; *Hill v. Manchester, etc. Water Works Co.* 5 B. & Ad. 866, 27 E. C. L. 219, 3 L. J. K. B. 19, 2 N. & M. 573. See also *Oregon, etc. R. Co. v. Grubissich*, 206 Fed. 577, 124 C. C. A. 375.

In *Carey v. Williams*, *supra*, the rule was stated as follows: "The books and records of corporations, when properly kept, are evidence of the acts and proceedings of the corporate body, but cannot be used to establish claims or rights of the corporation against third persons, unless pursuant to the sanction of some statute. . . . And they are not evidence against a stockholder in respect to a contract entered into by him with the corporation, notwithstanding he has access to them, because, as to such a contract, he is regarded, not as a stockholder, but as a stranger."

So in *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046, 22 Am. St. Rep. 816, 12 L.R.A. 473, wherein it was sought to show by entries in the books of an express company

that the defendant was a stockholder and therefore liable for an unpaid balance due on the stock, the court said: "The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors and its financial condition when its solvency comes in question. But we have not been able, after a careful examination of the authorities cited by the counsel for the plaintiff, and many others, to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation; and it has been repeatedly said by judges and text writers that they are not competent for that purpose. . . . The officers and book-keepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility therefor; and in making the entries they do not, in any legal sense, represent or bind him."

In *Pearsall v. Western Union Tel. Co.* 124 N. Y. 256, 66 N. E. 534, 21 Am. St. Rep. 662, an action by a stockholder of a telegraph company for damages for negligence in transmitting a telegram, it was held that a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and when contracting with the corporation as a customer his contract with respect to the transmission of the message is in no wise limited by regulations or by-laws of the corporation not brought to his knowledge.

In *Hill v. Manchester, etc. Water Works Co.* 5 B. & Ad. 866, 27 E. C. L. 219, 3 L. J. K. B. 19, 2 N. & M. 573, it appeared that by a clause in the charter of a corporation it was enacted that its clerks should, in a book provided by the company, keep an account of all acts, proceedings and transactions of the company, and that every proprietor should have liberty to inspect the same and take copies of the entries. In answer to the contention that entries thus kept were admissible in evidence on behalf of the company against one of its members, the court held that a proprietor entering into a contract with the company must be deemed a stranger,

and could not be affected by any entry made under orders from the entire company.

It has been held that with respect to the competency of the books of a corporation as evidence, directors and stockholders stand on the same footing. *Rudd v. Robinson*, 126 N. Y. 113, 28 N. E. 1046, 22 Am. St. Rep. 816, 12 L.R.A. 473, wherein it was said: "It is quite true that a director stands in a more favorable position to know what is going on within the corporation and to be more familiar with its books in some cases than a stockholder. He has the right to inspect the books of the corporation, and so has a stockholder. A stockholder having the ability is just as able to become familiar with the contents of the books of a corporation to which he belongs as a director; and there is no principle of law by which a director can be charged with knowledge of the entries in the books of a corporation which is not equally applicable to its stockholders. It is frequently easier to charge a director with knowledge of the books than it is to charge a stockholder, because he usually has an active part in the management of the corporation; but, as a general rule, many directors in corporations are just as ignorant, and necessarily so, of the particular accounts contained in its books as stockholders are. It would be quite a dangerous and, we think, startling proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against a defendant."

However, even in the case of a private transaction with a corporate member, where it appears that the member authorized certain entries or acquiesced and accepted them without objection they may properly be admitted in evidence against him. Thus it has been held that books of a corporation containing evidence of a contract of sale of realty made to its president, and which consisted of a copy of notes or minutes kept and furnished by him, were properly admitted in an action against him. *Brower v. East Rome Town Co.* 84 Ga. 219, 10 S. E. 629.

In *Booth v. Dexter Steam F. Engine Co.* 118 Ala. 369, 24 So. 405, it was held that in an action on a note given by the treasurer

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of a corporation to cover a loss of funds in his custody, the minutes of a meeting of the corporation at which the stockholder was present showing the action taken with regard to the settlement against him by accepting his note were held to be admissible in evidence.

So an account standing on the books of a bank against its president has been held to be competent evidence against him. *Olney v. Chadsey*, 7 R. I. 224, wherein it was said: "The account of the bank against the defendant, as it stood upon the bank books during his presidency, accompanied by the proof that the books were regularly kept, and open to his inspection, and were probably examined by him, was proper evidence to pass to the jury, not, as an ordinary book account, in direct proof of the charges in the account, but as an implied admission of them by the defendant; since he did not object to them when he might be presumed to know what they were, and was in a position in which he might object to them with effect. The evidence stands, in principle, upon the same footing with an account rendered, which, if not objected to within a reasonable time, is presumed to be admitted, and is treated as an account stated. It affords a presumption against the defendant, not indeed from his declaration, but from his silence and acquiescence; belonging to a class of evidence which declines by gradual shades from the most express and solemn admissions, down to expressions and acts which afford but remote and weak presumptions as to the particular fact in question."

In *Whitehall First Nat. Bank v. Tisdale*, 84 N. Y. 655, wherein it appeared that a stockholder who was also a director and vice-president of the bank, and who had access to and had examined the books of the bank, gave his note to the bank for the alleged purpose of swelling its assets in anticipation of a visit from the bank examiner, it was held that the books were admissible to show whether the note had been given for the purpose alleged or in the ordinary course of business.

TO PROVE MEMBERSHIP.

The rule has been sometimes stated to be that where the name of an individual appears on the stock book of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder or of rebutting that presumption is cast on the defendant. *Lehman v. Glenn*, 87 Ala. 618, 6 So. 44; *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265,

24 Am. St. Rep. 894; Lexington, etc. R. Co. v. Chandler, 13 Metc. (Mass.) 311; Fisk v. Sampson, 118 Minn. 525, 136 N. W. 315, 761; Ontario Invest. Assoc. v. Leys, 23 Ont. 496. In *Lehman v. Glenn*, supra, which was an action to recover an unpaid balance due on a stock subscription, the court stated the rule as follows: "The books of the corporation were admissible, as prima facie evidence of the correctness of the subscriptions, as to all whose names there appear as owners of stock, especially in view of the fact that the defendants in this case interpose no plea denying the genuineness of their original subscription, and are shown to have paid one assessment made on their stock by decree of the court in 1880, which was an admission by them of their status as stockholders. There is no presumption that these names have been fraudulently inserted on the corporate books by an act of forgery."

So in *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894, it was said: "It may be difficult, on principle, or well recognized rules of evidence, to maintain the proposition, that when the name of an individual appears on the books of a corporation as a stockholder, the presumption is, that he is the owner of the stock, and casts on him, in a suit against him as a stockholder, the burden of rebutting the presumption, without showing that it was placed there by his authority, express or implied, or that he had any notice of his name appearing on the books; but the proposition is upheld by the great weight of authority, and should now be regarded as placed beyond the pale of discussion."

In *Rockville, etc. Turnpike Road Co. v. Van Ness*, 2 Cranch C. C. 449, 20 Fed. Cas. No. 11,986, the question was whether a sufficient amount of stock had been subscribed by other persons to make the defendant's subscription binding. The court held that for this purpose, and as between the corporation and the defendant, a book containing subscriptions which he had himself received when acting as a commissioner to receive subscriptions was prima facie evidence that the subscriptions were genuine.

The better doctrine would seem to be, however, that the books of a corporation are not admissible in evidence to prove the membership of a person unless accompanied by proof of authorization, assent, knowledge, or other confirmatory conduct making the person privy to the entries, in which case the books become admissible to aid in determining when the relation of stockholder commenced, and what, if anything, has been paid on the shares. *Matter of Joint Stock Co.'s Acts*, 3 DeG. J. & S. (Eng.) 465; *Carey v. Williams*, 79 Fed. 906, 25 C. C. A. 227; *Signa Iron*

Co. v. Greene, 104 Fed. 854, 44 C. C. A. 221, 88 Fed. 207, 59 U. S. App. 555, 31 C. C. A. 477; *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; *National Express, etc. Co. v. Morris*, 15 App. Cas. (D. C.) 262; *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233; *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156; *Girard L. Ins. Annuity, etc. Co. v. Loving*, 71 Kan. 558, 81 Pac. 200; *Comfort v. Leland*, 3 Whart. (Pa.) 81; *New Era L. Assoc. v. Rossiter*, 132 Pa. St. 314, 19 Atl. 140. In *National Express, etc. Co. v. Morris*, supra, the rule was stated as follows: "If it be established that the party charged is a member of the corporation, the entries in the books of the corporation, made in the regular course of the business of the company, would be admissible against the member to show the amount of stock subscribed for, the amount due thereon, and when the calls were made for payments; yet such entries are not, per se, evidence sufficient to establish the fact of membership, and to charge the party as a stockholder of the corporation. But if such books and entries were accompanied with other proof, such as that the alleged subscriber to the stock attended the meetings of stockholders or otherwise participated in organizing the company; or applied for, or received the certificate of stock of the National Express and Transportation Company after it was organized, or had paid assessments upon the stock of the company, then the books of the company and the entries therein, made in due course of business, would have been evidence upon which the jury could have found that the alleged subscriber to the stock was a member of the corporation." So in *Comfort v. Leland*, 3 Whart. (Pa.) 81, the court said: "It is easy to conceive that the books might have shown that he was recognized by the company as a corporator, but it is not quite so easy to imagine how they alone would have shown that he had acted as such, without other proof. Entries made therein by him, upon their being proved to be in his handwriting, might have shown the fact. But entries made by the company in their books, without his knowledge and consent, could not per se be received in evidence, as it appears to me, to prove that he acted as a corporator, or was such. It is clear that he could not be made a member of the corporation without his consent; and it would therefore be unreasonable to receive as evidence of the fact things of which it was not made to appear, that he had any previous knowledge and given his assent to." And in *Carey v. Williams*, 79 Fed. 906, 25 C. C. A. 227, the reason for the rule was stated as follows: "The true ground upon which the books of a corporation, showing who are

shareholders, are admissible in evidence, is that they are the best evidence of the assent of the corporation to the contract of membership. Until that assent is proved, the contract is not complete, and no person who has bought shares of stock can be subjected to the liability of a stockholder. When it appears that a person has subscribed for or purchased shares, has voted upon them, has received dividends upon them, or in any other way has consented to occupy the relation of a stockholder, the contract of membership on his part is shown; and the stock books become competent evidence, because they show that the corporation has likewise consented."

Action between Members.

Books of a corporation as between the members thereof partake of the nature of public records and so are admissible in evidence in an action between the members. *Brown v. Ellis*, 103 Fed. 834; *Smith v. Moore*, 199 Fed. 689, 118 C. C. A. 127; *Chase v. Sycamore*, etc. R. Co. 38 Ill. 215; *Hatch v. City Bank*, 1 Rob. (La.) 470; *Black v. Lamb*, 12 N. J. Eq. 108; *Hubbell v. Meigs*, 50 N. Y. 480; *Gilboa v. Kimball* (R. I.) 69 Atl. 765. And see the reported case. See also *Strong v. Smith*, 15 Hun (N. Y.) 222.

The rule and the reason therefor was stated in *Rogers v. Rosenfeld*, 158 Wis. 285, 149 N. W. 33, as follows: "The relation between members of a corporation and the corporate books and records relating to proper objects of corporate concern and the relation between ordinary citizens and public records are quite similar. In each case an officer having authority in law makes a record of transactions permitted or required by law to be recorded. In the former case the member by joining the corporation has brought himself within the corporate regulations. In the latter the general rules of law bring the citizen in the same relation to the public records. Therefore, as between the members of a private corporation, the corporate books relating to the assets, organization, liabilities, and business affairs of the corporation are treated as a public record and have the same competency as evidence."

In an action between members of a corporation, a book of minutes of a railroad company in which were recorded the meetings of the stockholders called for the purpose of arranging a loan, with which an indemnity bond in question was immediately connected, was held to be admissible as containing the agreement of the parties, reduced to writing by the corporation secretary, who was mutually chosen for the purpose. *Black v. Lamb*, 12 N. J. Eq. 108.

In *Smith v. Moore*, 199 Fed. 689, 118 C. C. A. 127, which was an action for an accounting between members of a corporation, it appeared that the member from whom the accounting was sought was not only a director of the company, but also its president, general manager, and in control of all its operations, financial and otherwise. It was held, under the Montana code (Rev. Code, § 3902) requiring all corporations for profit to keep a record of all their business transactions, that under the circumstances the books were admissible in evidence, and that no presumption could be indulged that any entry made in them against the member in question was erroneous.

HUBERT

v.

GRANZOW ET AL.

Minnesota Supreme Court—December 17, 1915.

131 Minn. 361; 155 N. W. 204.

Streets and Highways — Speed Regulation — Application to Fire Department.

The fire apparatus of a city, while on its way to a fire, is excepted from the speed restrictions imposed by the Motor Vehicle Act (Gen. St. 1913, § 2619), although the fire be outside the city limits.

[See note at end of this case.]

Same.

An instruction to the effect that firemen on their way to a fire outside the city were subject to the speed restrictions imposed by that act was error.

[See note at end of this case.]

Evidence — Fact of Receiving Instructions by Telephone.

The testimony of a fireman that he was proceeding to a fire pursuant to instructions received by telephone from the operator at headquarters was competent to prove such fact.

(Syllabus by court.)

Appeal from District Court, St. Louis county: ENSIGN, Judge.

Action by Leander Hubert, plaintiff, against Fred E. Granzow et al. defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. **REVERSED.**

Henry F. Greene and John B. Samuelson for appellants.

Andrew Nelson for respondent.

[362] TAYLOR, C.—The defendants are members of the fire department of the city of Duluth. Defendant Granzow is first assistant chief of this department, and is furnished an automobile by the city for use in performing his duties as such officer. Defendant Black is the driver of this machine, and is subject to the orders of Granzow. On May 18, 1914, the machine carrying Granzow and driven by Black, while proceeding east along West Third street in the city of Duluth, struck and killed Alida Hubert, the four-year old daughter of plaintiff, at a street crossing. Plaintiff as administrator of his daughter's estate brought suit against both Granzow and Black, and recovered a verdict. The defendants made an alternative motion for judgment notwithstanding the verdict or for a new trial, and appealed from the denial of this motion.

The negligence charged was excessive speed; failure to give proper warning of the approach of the machine; failure to have it under control at the street crossing, and failure to exercise proper care to avert the collision after it became imminent. The defendants denied any negligence on their part, and asserted that, in the performance of their official duties, they were proceeding carefully and at a reasonable rate of speed to a fire to which they had been summoned.

The error urged upon this appeal is the giving to the jury of the following instructions requested by plaintiff: "If you find [from the evidence] that this accident occurred in a closely built up portion of the city of Duluth, and that defendants were not responding to an alarm of fire *in said city*, then it was not lawful for the defendants to propel their automobile at a higher rate of speed than ten miles an hour, and if they exceeded such rate of speed for a distance of one-eighth of a mile or more, such rate of speed is *prima facie* evidence that the defendants were operating such motor vehicle at a rate of speed [363] greater than was reasonable and proper, and so as to endanger the life and limb of persons who might be on the thoroughfare in question.

"If you find from the evidence that the accident here in question occurred in a residence portion of the city of Duluth, and that defendants were not responding to an alarm of fire *in said city*, then it was not lawful for the defendants to propel their automobile at a higher rate of speed than fifteen miles an hour, and if they exceeded such rate of speed for a distance of one-eighth of a mile or more, such rate of speed is *prima facie* evidence that the defendants were operating such motor vehicle at a rate of speed greater than was reasonable and proper, and so as to endanger the life and limb of persons who might be on the thoroughfare in question."

It is conceded that defendants exceeded the speed limits above prescribed, and that the fire in question was outside the city of Duluth. The above instructions embody provisions of the motor vehicle law, but that law expressly excepts "fire wagons and engines" from such restrictions. G. S. 1913, § 2619.

It is the general and perhaps universal rule that regulations governing the rate of speed upon public streets and highways do not apply to fire apparatus on the way to a fire. *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62, 36 L.R.A. 305; *Warren v. Mendenhall*, 77 Minn. 145, 79 N. W. 661; *Farley v. New York*, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; *Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L.R.A. 429. Plaintiff does not contend that the rules stated in the above instructions would apply to defendants, if they had been responding to an alarm of fire within the city of Duluth. But the fire in question was outside the city limits, and plaintiff contends that the city fire department is not required to go to fires outside the city; that, if they do so, the wagons and engines used for such purpose cease to be "fire wagons" and "fire engines," within the meaning of the motor-vehicle act, while so employed, and that the rules prescribed by that act applied to defendants for that reason.

It is probably true that no legal duty is imposed upon a city fire department to assist in extinguishing fires outside the city, but it is a matter of common knowledge that such departments almost invariably respond when called upon in such cases. Actuated by motives of humanity [364] rather than by the mandate of strict legal duty, they seldom refuse to give their services to their neighbors in case of need. While the law may not impose a legal duty upon them to assist in extinguishing fires outside the city, it certainly does not forbid them from doing so.

If they respond to a call without the city, the same need for haste exists as when they respond to a call within the city; and for the same reasons they should not be required to observe the speed regulations in the one case more than in the other, unless the law expressly so provides. The statute in question contains no such provision. On the contrary, it expressly excepts "fire wagons and engines" from the vehicles to which it applies, and this exception is absolute and unconditional. If defendants had been using the machine solely for their own personal purposes, and not for the purpose of conveying themselves to a fire, it may be that the provisions of the statute would apply, but that question is not before us. Under the evidence in this case, the giving of the instructions complained of was clearly error. They were based upon the conceded fact that the

fire was outside the city. The attention of the jury having been called to that fact and to the fact that the fire department was maintained for the benefit of the city and was not required to aid in subduing fires outside the city, it cannot be held that the error was cured by a subsequent statement that "those driving fire wagons in answer to an alarm of fire need not abide by the regulations of the statute in regard to speed, but may drive with all possible dispatch consistent with safety of life and limb of the firemen and of the public using the streets." That this statement did not cure the error is obvious in view of the fact that the jury were told specifically that the rule first given applied to defendants in case they "were not responding to an alarm of fire *in said city*," and were nowhere told specifically that the rule last given would apply to defendants in case they were responding to an alarm of fire outside the city. The jury might naturally infer that the last rule applied only where the fire was within the city.

Plaintiff questions the sufficiency of the evidence to establish that defendants were responding to an alarm of fire. Granzow testified that he was proceeding to the fire pursuant to instructions received by him over the telephone from the operator at headquarters. We cannot [365] concur in plaintiff's contention to the effect that this testimony was not admissible without the production of the operator or the official record kept of such calls. Firemen necessarily act upon such orders and are justified in doing so. Plaintiff made no attempt to show that the order had not in fact been given, and the testimony of Granzow was competent to show that he had received it and was acting upon it.

For the error in the instructions, a new trial must be granted.

Order reversed.

NOTE.

Speed or Other Highway Restriction as Applicable to Fire Apparatus.

The present note deals with the question whether fire apparatus is subject to general regulations affecting travel on highways. It does not include those cases wherein it appears that the regulation expressly favors the fire apparatus. For a discussion of the validity of a statute giving particular vehicles the right of way in streets, see the note to *Louisville R. Co. v. Louisville Fire*, etc. Protective Assoc. Ann. Cas. 1915A 89. And for a discussion of the care required of the driver of a fire apparatus to avoid a collision, see the note to *Spellman v. Metropolitan St. R. Co.* Ann. Cas. 1913E 230.

As is stated in the reported case, it is generally held that regulations governing the rate of speed of vehicles on public streets and highways are not applicable to fire apparatus on its way to a fire. *Devine v. Chicago*, 172 Ill. App. 246 (*distinguishing* *Morse v. Sweeney*, 15 Ill. App. 486, and *Illinois Cent. R. Co. v. Scheevers*, 134 Ill. App. 514); *Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L.R.A. 429; *Farley v. New York*, 162 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511; *Toledo R. etc. Co. v. Ward*, 25 Ohio Cir. Ct. Rep. 399. Thus in *Farley v. New York*, *supra*, it was said: "The safety of property and the protection of life may and often do depend upon celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 was intended to regulate the speed of horses traveling on the streets and using them for the ordinary purposes of travel, and from the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires."

So in *Kansas City v. McDonald*, 60 Kan. 481, 57 Pac. 123, 45 L.R.A. 429, the court said: "We do not think that the ordinance was intended to govern the actions of firemen or regulate the speed of fire engines or trucks. Such an intention is nowhere expressed, and if it had been the ordinance would have been unreasonable. Cities do not provide horses of high mettle, trained to propel speedily apparatus for the extinguishment of fires, and then impede them in their progress by a requirement that they shall not be driven faster than an ordinary traveling gait. Various appliances have been devised by which such horses are harnessed with incredible speed that no time may be lost in reaching the fire with hose and other aids to prevent the destruction of property. It is of first importance that a fire be reached in its incipency, and, to accomplish this purpose, the utmost haste is necessary. A compliance with this ordinance by the firemen and the enforced delay required by its terms would convert the fire department into a purely ornamental adjunct to the city government, proficient only on parade."

In *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62, 36 L.R.A. 305, wherein it was held that an ordinance limiting travel to a speed of six miles an hour was not reasonable when applied to members of a salvage corps responding to a fire alarm and that such members were not subject to the ordinance, the court said: "Upon its face, and as respects the ordinary traveler or driver upon the public ways, this provision is reasonable and enforceable. But if it is to be applied and enforced with strictness and literally, without any exceptions of any kind, it is unreason-

able, and cannot be upheld. To sustain it as within the authority given by charter, there must be some implied exceptions. Take, for illustration, the city fire department. Under its rules the fire apparatus must be driven to the scene with all possible dispatch consistent with safety. Careful and capable drivers of fire trucks and steamers make frequent and rapid runs through crowded streets with such rare skill that an accident is almost unheard of. Can they be accused of immoderate driving—that is, excessive, extravagant, unreasonable driving—under the circumstances, if they disregard the six-mile-an-hour provision, and proceed more rapidly, but in fact, not immoderately, not failing to observe ordinary care, and not in a manner calculated to endanger the safety of persons and property on the street? We think not. Counsel for the prosecution have cited *Morse v. Sweeney*, 15 Ill. App. 486, in support of their contention that even the members of the fire department are subject to prosecution if they violate this ordinance. An examination of that case will show its inapplicability, for it was there contended, and the trial court charged, that the defendant fire marshal had the right of way when he was responding to a fire alarm, and, in substance, had the power to run people down with his own team if the exigencies of the situation demanded. It is hardly necessary to state that the appellate court did not indorse this view of the law."

But the language used by the court in *Carswell v. Wilmington*, 2 Marv. (Del.) 360, 43 Atl. 169, would seem to indicate that fire apparatus was subject to a speed ordinance. In that case it was said: "If Courtney was racing with the driver of the Friendship engine, or was driving at an immoderate gait at the time of the accident, he was thereby violating ordinances of the city, and was guilty of negligence per se; and if his death resulted from such racing or immoderate gait, the plaintiff cannot recover. We cannot charge you, as requested by counsel for plaintiff, that the driver of the fire engine is governed by other rules, than an ordinary traveler on the highway, as to racing or going at an immoderate gait. Under the ordinance he has the right of way, but in other respects he is subject to precisely the same rules as other travelers, that is, in driving on the street he must use his senses, and take reasonable care and caution to avoid danger, and to prevent injury to himself and to others."

It has been held that fire apparatus while driving to a fire is subject to the rule that where two vehicles approach a street crossing the first to reach the crossing has the right to pass first, in the absence of a custom or an express regulation giving superior rights to

the fire truck. *Knox v. North Jersey St. R. Co.* 70 N. J. L. 347, 1 Ann. Cas. 164, 57 Atl. 423. The facts in that case were stated by the court as follows: "The accident occurred at the intersection of Plane and State streets. The car was moving along State street, and reached the crossing first. As it approached Plane street it was slowed down almost to a stop, and then proceeded over the crossing at a slightly increased speed. The truck was proceeding along Plane street and as it drew near to the crossing was moving about four or five miles an hour, the horses being on a slow trot. The plaintiff, when he saw that the car was proceeding over the point of intersection of the two streets, endeavored to avoid a collision by swinging his horses to the right, but on account of the length of the truck was unable to turn sharply enough to clear the car, and struck it at the rear platform." The action was brought by the driver of the fire truck, and in affirming a judgment of nonsuit the court said: "The rule of the road, with relation to vehicles approaching a street crossing, is that the first to reach the crossing, traveling at a reasonable rate of speed, has the right to pass over first. *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423; *Earle v. Consolidated Traction Co.* 64 N. J. L. 573. This rule is a part of the common law of the state and applies to vehicles of every character. It may be conceded that the importance of having a fire engine or truck reach its destination as speedily as possible makes it advisable that it should be given superior rights in the public streets, and that trolley cars and other vehicles should be required to yield it the right of way at street crossings. Such a right may be granted by legislative enactment, and, to some extent at least, by municipal regulation. It may also, perhaps (although this we do not decide), grow out of a custom existing in the particular locality where it is sought to be exercised. It is not within the power of the courts to confer it by judicial decision."

BANK OF CORNING

v.

NIMNICH ET AL.

Arkansas Supreme Court—January 31, 1916.

122 Ark. 316; 183 S. W. 756.

Bills and Notes — Parties — Person Signing as Officer of Corporation.

Where a note is signed with the name of a corporation, followed by the names of officers,

giving their official title, indicating that they are signing in their official capacity, the corporation alone is bound.

[See note at end of this case.]

Same.

A note of a corporation was signed by the corporation per secretary and treasurer, and then followed the signature of eight persons, each of whose signature was followed by the word "director." It is held that, as the name of the corporation was attested by the secretary and treasurer, it cannot be assumed that those who signed as directors did so for the purpose of attesting the signature of the corporation, and it must be assumed that they were individually liable as makers, the word director being mere description.

[See note at end of this case.]

Appeal from Circuit Court, Clay county:
Darves, Judge.

Action by Bank of Corning, plaintiff, against Joseph Nimnich et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

J. N. Moore for appellant.

C. T. Bloodworth for appellees.

[317] McCULLOCH, C. J.—Appellant sued appellees Joseph Nimnich and E. Hartwig for an amount alleged to be the balance due on a promissory note in the following form:

\$5,000.00 Corning, Ark., Sept. 27th, 1911.

Six months after date for value received, we promise to pay to the order of the Bank of Corning, Corning, Ark., Five Thousand Dollars.

[318] With interest at ten per cent per annum from date until paid. The makers and endorsers of this note hereby severally waive presentment and payment, notice of non-payment, protest, and consent that time of payment may be extended without notice thereof.

Payable at Bank of Corning, Corning, Ark.

Farmers Union Gin & W. H. Co.,

Per Henry Brown, Sec. & Treas.

Henry Brown, Director.

W. T. Griffith, Director.

Earnest Hartwig, Director.

Porter Larkins, Director.

G. A. Hoffman, Director.

J. T. Montgomery, Director.

H. D. Chappell, Director.

Joseph Nimnich, Director.

Appellees, Nimnich and Hartwig, answered separately, denying that they had executed the note individually or that they were personally liable thereon. In other words, the answer of appellees raised the question of

whether the note was the joint and several obligation of the Farmers Gin & Warehouse Company and the individuals who signed the note, or whether it was the sole obligation of the corporation itself. Appellant introduced testimony showing the circumstances under which the note was executed, but appellees introduced no testimony and based their defense entirely on the face of the instrument sued on. The court gave a peremptory instruction in favor of appellees and judgment was accordingly rendered in their favor.

(1) There is much conflict in the authorities as to the question of liability on written obligations similar to the one now in suit, where the obligation is signed by officers of a corporation, but the rule is established by what appears to us to be the weight of authority that where the name of the corporation itself is signed and followed by the names of officers, giving their official title, indicating that they are signing in their official capacity for the purpose of attesting the signature of the corporation, [319] the instrument constitutes the obligation of the corporation alone. English, etc. American Mortg. etc. Co. v. Globe Loan, etc. Co. 70 Neb. 435, 6 Ann. Cas. 999, 97 N. W. 612; Hitchcock v. Buchanan, 105 U. S. 416, 26 U. S. (L. ed.) 1078; Falk v. Moebis, 127 U. S. 597, 8 S. Ct. 1319, 32 U. S. (L. ed.) 266; Liebscher v. Kraus, 74 Wis. 387, 43 N. W. 166, 17 Am. St. Rep. 171, 5 L.R.A. 496; Castle v. Belfast Foundry Co. 72 Me. 167; Draper v. Massachusetts Steam Heating Co. 5 Allen (Mass.) 338; Reeve v. Glassboro First Nat. Bank, 54 N. J. L. 208, 23 Atl. 853, 33 Am. St. Rep. 675, 16 L.R.A. 143; Miller v. Roach, 150 Mass. 140, 22 N. E. 634, 6 L.R.A. 71; Bean v. Pioneer Min. Co. 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106.

(2) Instruments of that kind are held to be the promise of the corporation and the signatures of the officers to be official and not individual. The authorities are, as before stated, not harmonious on this subject, and appellant cites on its brief, cases which hold to the contrary. The real question in the present case is whether or not the established rule is applicable to the instrument involved in this controversy. An inspection of the instrument, as it appears in the records, shows that the name of the corporation was attested by Henry Brown, the secretary and treasurer. The additional signature of Henry Brown follows his signature as secretary and treasurer, and after it is written the word "director," and all of the other names are followed by the same word. We do not think that it can be said from the face of the instrument that those who signed as directors did so for the purpose of officially attesting the signature of the corporation, which had

already been attested by the secretary and treasurer. The form of the signatures evidences an intention to add something more than a mere certification of the corporate name, and the addition of the word "director" is merely descriptive of the person who signed. *Daniel on Negotiable Instruments*, Sec. 415. There was no attempt to plead or establish any facts or circumstances which would warrant a reformation of the instrument so as to exclude personal liability on the part of the directors, as was done in the case of *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052.

[320] It follows, therefore, that the court erred in directing a verdict in favor of appellees. The judgment of the circuit court is reversed and the cause is remanded for a new trial.

NOTE.

Liability of Person Signing Negotiable Paper as Officer of Corporation.

This note collates the recent cases on the liability of a person signing negotiable paper as an officer of a corporation, the earlier cases being reviewed in the notes to English, etc. *American Mortg. etc. Co. v. Globe Loan*, etc. Co. 6 Ann. Cas. 999, and *Greenberg v. Whitcomb Lumber Co.* 48 Am. St. Rep. 911.

Where a negotiable instrument is signed in the name of a corporation "by" an individual to whose name is appended an official designation, the obligation is plainly that of the corporation only. *International Trust Co. v. Caroline*, 78 Misc. 179, 137 N. Y. S. 932. And see the reported case. The same is true of an instrument signed in the corporate name followed by that of an individual to which an official designation is added though the word "by" or "per" is not used and though the body of the instrument reads "we" promise to pay, etc. *Peabody School Furniture Co. v. Whitman*, 6 Ala. App. 182, 60 So. 470; *New England Electric Co. v. Shook*, 27 Colo. App. 30, 145 Pac. 1002; *Spiller-Beall Co. v. Hirsch*, 18 Ga. App. 450, 89 S. E. 587; *Thompson v. Hasselman*, 131 Ill. App. 257; *Derby v. Gustafson*, 131 Ill. App. 281; *Northwestern Coal Co. v. Tyrrell*, 133 Ill. App. 472. Compare *Myers v. Chesley*, 190 Mo. App. 371, 177 S. W. 326, wherein a signature in similar form was held to present a patent obligation admitting parol evidence as to the intent of the parties. In *New England Electric Co. v. Shook*, supra, the court said: "Immediately following the context of the note is the full name of the corporation, 'The Akron Gas & Electric Company,' directly under which is signed the names 'R. A. Shook, President,' and 'H. C.

Black, Secretary,' with the corporate seal attached, opposite their names, to the left. A corporation, as such, cannot write a word or do any other physical act. When business necessity requires its name to be subscribed on paper, it can only be placed there by and through its officers or representatives. It is a custom of universal practice in the present day for those who sign the name of a corporation to any business or other document, with the intent to bind the corporation only, to append to the corporate signature their own names, or initials, with their official titles, intending thereby to characterize such signing as an act of the corporation only. Such is the common understanding throughout the business and commercial world, and it would seem reasonable for a judicial tribunal, when called upon to interpret a note or other written document so signed, to recognize such custom and give it full force and effect. In the instant case we have no hesitancy in saying that the note, with the impression of the corporate seal, when considered as a whole, is free from ambiguity, and shows upon its face that it is the note of the corporation only; and that neither Shook nor Black had any intention, in subscribing their names thereto, other than to do so as officers of the company, with the sole purpose of binding it alone to the payment thereof. From what standard of reason or common sense can it be maintained that because the word 'By,' 'Per,' or some similar term, is not written before the names of Shook and Black, or because of the existence of the phrase above quoted, the plain intention of the signers of the note, as appears from the whole context and form of the signatures, should be ignored and held for naught, when it is manifest that the obligation was solely that of the company? Nor do we see any force or reason in the suggestion that, because of the absence of the word 'By,' etc., or because of the existence of such phrase in the body of the note, the words president and secretary, following the names of Shook and Black, should be held as *descriptio personae*. It is the common custom, and so understood, at least in this country, that if a person intends to execute a promissory note in his individual capacity, and thereby binds himself personally, he simply signs his name, and that is the end of it. We venture the statement that it would be a positive curiosity, in this day and age, to find a promissory note, signed by individuals, as individuals only, with descriptive words, such as appear on the note before us, appended to the signatures. In the early practice of the common law in England there was a general custom in vogue for individuals signing written documents to add to their signatures some title, or abbre-

viation, which indicated their social or political standing; but no such custom appears to have ever prevailed in this country."

Where a negotiable instrument is signed in the name of a corporation and thereunder is the name of an individual with no form of official designation appended thereto the individual signer is personally liable though he is in fact an officer of the corporation. *Belmont Dairy Co. v. Thrasher*, 124 Md. 320, 92 Atl. 766. So in *Exchange Bank v. Schultz*, 167 Ia. 136, 149 N. W. 99, a note signed "Glendell Dairy Company by Henry O. Harstad, President. J. E. Schultz" was held to impose a personal liability on Schultz though he was secretary of the corporation.

Where a promissory note in no manner disclosing that it is a corporate obligation is signed by an individual, he is personally liable though he appends to his signature the name of a corporate office. *Decowski v. Grabarski*, 181 Ill. App. 279; *Rudolph Wurlitzer Co. v. Rossmann (Mo.)* 190 S. W. 636. In *Saul v. Southern Seating, etc. Co.* 6 Ga. App. 843, 65 S. E. 1065, the court while following the foregoing rule criticised it severely, saying: "Since the notes are under seal, and since they do not on their faces disclose any principal for whom the signers could be construed to be acting as agents, they are to be taken as the individual act and deed of Saul and Wolfe, and the words 'pres.' and 'secy.' following their respective names will be looked upon as mere descriptio personae. May we say, in passing, that the principle of construing as mere descriptio personae such words as 'agent,' 'administrator,' 'president,' 'secretary,' 'trustee,' 'director,' 'manager,' etc., when appended to signatures to instruments not plainly disclosing another as principal, and of refusing to hear parol as to the true capacity in which the signers acted, is a rule which long since has outlived the reason back of it? There was a day when but few men were able to identify themselves as the makers of contracts by the handwriting of the signatures—a day also when surnames, in the manner to which we are now accustomed, were a rarity, and John, the smith (from whom the many Smiths have since descended), was spoken of in the community and was described in contracts as 'John the Smith,' or as 'John Smith,' to distinguish him from John who ran the mill (ancestor of the Miller family), and was described in his contracts as 'John the Miller,' or John Miller, or from John who lived in the Glen, and was described as 'John Glen.' In those days, when one of the Johns added the words, 'agent,' 'administrator,' 'overseer,' 'trustee,' 'rector,' or some similar designation, after his name in a contract, there was a reason for the inference that he himself

was personally contracting, and that the words appended were intended to describe him and to identify him—just as much so as there was for inferring that John who signed his name 'John Williamson' intended to bind himself, and not his father William, whose name he also used in the signature as descriptio personae. But that day has passed. The reason has expired, but the rule persists through juridic pertinacity. If we had the power, we would hasten the day when the courts would relinquish this senseless adherence to precedents which have lost their point, but we have no authority in that direction. Under the constitutional organization of this court, our task is to find the old precedents and to follow them; we are to blaze no new trail, so long as there is an old one." In *Ocilla Southern R. Co. v. Morton*, 13 Ga. App. 504, 79 S. E. 480, it was held that the rule just stated is prima facie only and does not apply where it is shown that a corporate obligation was intended.

Indorsements of a corporate note have been held to impose a personal liability though to the signatures of the indorsers were attached the abbreviations "Treas." and "V. P." respectively. *Morris v. Reed*, 14 Ga. App. 729, 82 S. E. 314. But an indorsement by the vice-president of a corporation "As Agt" for the corporation has been held to create no personal liability. *LaNormandie Hotel Co. v. Security Trust Co.* 38 App. Cas. (D. C.) 187.

SELLING ET AL.

v.

RADFORD.

United States Supreme Court—March 6, 1917.

243 U. S. 46; 37 S. Ct. 377.

Attorneys — Disbarment — Ground — Loss of Character.

The loss by a member of the Bar of the Supreme Court of the United States of his fair private and professional character by wrongful personal and professional conduct, no matter where committed, furnishes adequate reason for taking away his right to continue to be a member of such Bar in good standing.

Effect of Disbarment — Standing in Other Courts.

The want of fair private and professional character in a member of the Bar of the Supreme Court of the United States, inherently arising as the result of the act of the highest court of a state, disbarring him from practicing in the courts of that state, for

personal and professional misconduct amounting to moral wrong, should be recognized by the Federal Supreme Court on motion to disbar unless, from an intrinsic consideration of the record of the state court, it appears (1) that the state procedure, from want of notice or opportunity to be heard, was wanting in due process, or (2) that there was such an infirmity of proof as to give rise to a clear conviction that the conclusion as to the want of fair private and professional character should not be accepted as final, or (3) that some other grave reason exists, impelling the conviction that to allow the natural consequences of the judgment to have their effect would conflict with the duty not to disbar unless constrained to do so by principles of right and justice.

[See note at end of this case.]

Same.

An opportunity should be afforded to a member of the Bar of the Supreme Court of the United States, where his disbarment is sought on the ground of a previous disbarment by a state court, to file the record of the state court, and by printed brief, considering the record intrinsically, to point out any ground within the limitations prescribed by the Federal Supreme Court which should prevent that court from giving effect to the finding of the state court establishing the want of fair private and professional character.

[See note at end of this case.]

Petition to disbar member of Bar of Supreme Court of United States on ground of his previous disbarment by state court for personal and professional misconduct. The facts are stated in the opinion. Leave granted to respondent to file record of state court, accompanied by printed brief.

Solicitor General Davis for petitioners.

Thomas A. E. Weadock and Harrison Geer for respondent.

[47] WHITE, C. J.—George W. Radford was admitted to practice in the Supreme Court of the State of Michigan on the fifteenth day of June, 1876. About ten years thereafter, on March 18, 1886, upon the representation that he had been for the three years preceding a member of the Bar of the highest court of the State of Michigan and upon the further assurance, both conformably with Rule 2 of this court, that his private and professional character appeared to be fair, he was permitted to become a member of the Bar of this court.

Represented by the Solicitor General of the United States, the petitioners as a committee of the Association of the Bar of the City of Detroit, specially appointed for that purpose, seek to procure an order striking Radford from the roll of the members of the Bar of this court on the ground of his personal

unworthiness to continue as a member of such Bar. And in coming to consider their request, we understand their sense of pain at being called on to discharge the duty which they unselfishly perform. The original petition filed for that purpose alleged that in a suit brought in a designated court of original jurisdiction in Michigan for the purpose of disbaring Radford for professional misconduct amounting to moral wrong, he had, after notice and full hearing, been found to have committed the wrongful acts complained of and had been disbarred and that such judgment had been approved by [48] the Supreme Court of Michigan in a proceeding by certiorari taken to consider the same. Annexed to the petition was a copy of the opinion and order of disbarment entered by the court of original jurisdiction, as well as a copy of the opinion and order of the Supreme Court of the State in the certiorari proceeding, the same being reported in 168 Mich. 474, 134 N. W. 472.

It was alleged in the petition that notwithstanding the fact that Radford had by the final action of the Supreme Court of the State of Michigan been stricken from the rolls of the courts in that State for the reasons previously stated, he had continued in the City of Detroit to hold himself out as a practicing lawyer entitled to respect and confidence as such because of the fact that he continued to be a member of the Bar of this court, unaffected by the order of disbarment by the courts of the State. After reciting the unseemly condition produced by these circumstances and the disrespect for the state courts which was naturally implied, the prayer was for a rule to show cause and for the awarding, on the return to such rule, of the order of disbarment which was sought.

An answer was made to the rule to show cause and a brief filed in support of the same, as to which we think it suffices to say for our present purposes that both the answer and the brief take a much wider range than is permissible and rely upon much that is here irrelevant, not to say in some respects improper to be considered, as the prayer for the enforcement of the judgment of the court of last resort of Michigan is not to be converted into a trial of the courts of that State or of the members of the Detroit Bar Association on behalf of which the petition was filed.

Beyond all question, when admission to the Bar of this court is secured, that right may not be taken away except by the action of this court. While this is true, it is also true that the character and scope of the investigation to [49] be made on a prayer for disbarment, before sanction is given to it, must depend upon the character of the acts of misconduct and wrong relied upon, of the place of their com-

mission and the nature of the proof relied upon to establish their existence.

While, moreover, it is true that the two conditions, membership of the Bar of the court of last resort of a State and fair private and professional character, are prerequisites to admission here, there is a wide difference in the nature and effect of the two requirements. This follows, because the first, although a prerequisite to admission here, is ephemeral in its operation since its effect is exhausted upon admission of this Bar which it has served to secure,—a result which becomes manifest by the consideration that although the membership of the Bar of the court of last resort of a State after admission here might be lost by change of domicile from one State to another, if so provided by the state law or rule of court, or by any other cause not involving unworthiness, such loss would be wholly negligible upon the right to continue to be a member of the Bar of this court. The second exaction, on the contrary, is not ephemeral and its influence is not exhausted when the admission based upon it is secured since the continued possession of a fair private and professional character is essential to the right to be a member of this Bar. It follows, therefore, that the personality of the member and these inherent and prerequisite qualifications for membership of this Bar are indivisible, that is, inseparable. They must, if they exist, follow the personality of one who is a member of the Bar and hence their loss by wrongful personal and professional conduct, wherever committed, operates everywhere and must in the nature of things furnish adequate reason in every jurisdiction for taking away the right to continue to be a member of the Bar in good standing.

In the light of these conclusions, the question is: What, [50] consistently with the duty which rests upon us, is exacted in dealing with the situation now presented?

In coming to solve that question three things are patent: (a) That we have no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the Bar of the courts of that State for personal and professional misconduct; (b) that the order of disbarment is not binding upon us as the thing adjudged in a technical sense; and (c) that, albeit this is the case, yet as we have previously shown, the necessary effect of the action of the Supreme Court of Michigan as long as it stands unreversed, unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could

be no possible right to continue to be a member of this Bar.

Meeting this situation, we are of opinion that on the case presented our duty is not to review the action of the state court of last resort—a power which we do not possess,—not wholly to abdicate our own functions by treating its judgment as the thing adjudged excluding all inquiry on our part, and yet not, in considering the right of one to continue to be a member of the Bar of this court, to shut our eyes to the status, as it were, of unworthiness to be such a member which the judgment must be treated as having established, unless for some reason we deem that consequence should not now be accepted. In other words, in passing upon the question of the right to continue to be a member of the Bar of this court, we think we should recognize the absence of fair private and professional character inherently arising as the result of the action of the Supreme Court of Michigan so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar. That is to say, we are of opinion [51] that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

In concluding that our duty is to give effect to the finding of the state court establishing the want of fair private and professional character subject to the limitations stated, we confine ourselves to the case before us and therefore do not in the slightest degree call in question the ruling in *Ex p. Tillinghast*, 4 Pet. 108, 7 U. S. (L. ed.) 798, that a mere punishment for contempt by an inferior federal court was not a sufficient ground for preventing admission to the Bar of this court, there being nothing to indicate that the action of the inferior court was based upon the doing of acts which inherently and necessarily deprived the applicant of

the fair private and professional character essential to admission.

Thus defining what is open to our consideration, we think we ought not to foreclose the subject on the answer made to the rule to show cause in the proceeding which is now before us, but that an opportunity should be afforded the respondent, confining himself to the propositions stated, if he is so advised, to file the record or records of the state court within thirty days from this date with [52] permission by printed brief, considering the record intrinsically, to point out any ground within the limitations stated which should prevent us from giving effect to the conclusions established by the action of the Supreme Court of Michigan which is now before us, as we have seen, as part of the petition we are now considering.

It is so ordered.

NOTE.

Disbarment in One Court as Affecting Status of Attorney in Another Court.

As between Courts of Same State, 572.

As between Courts of Different States, 572.

As between State and Federal Courts, 573.

As between Federal Courts, 573.

Rule in England, 573.

As between Courts of Same State.

The decisions passing on the operation and effect in one state court of disbarment in another court of the same state are not uniform. Some of the authorities are to the effect that where an attorney is disbarred in one court it will operate to disbar him from all other courts of the state. *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859, 12 Ky. L. Rep. 904; *Matter of Peterson*, 3 Paige (N. Y.) 510; *Danforth v. Egan*, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030; *Brooks v. Fleming*, 6 Baxt. (Tenn.) 331; *In re Evans*, 22 Utah 388, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952.

Thus in *Matter of Peterson*, supra, the chancellor in disbaring a solicitor said: "The party who has been guilty of this forgery and deceit must therefore be removed from his office as a solicitor of this court; the legal effect of which removal will be to deprive of the power to practice as a solicitor, attorney or counsel, in any other court."

In *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859, 12 Ky. L. Rep. 904, it was said: "It is urged that the statute, by providing that the court may suspend the attorney from practice 'in any court' means a single court

of the state; that otherwise it would have said 'all courts.' The latter, however, is what it means, and is what it substantially says in our opinion. If this were not the intention and its proper construction, it would avail but little. The duty of enforcing this statute is a delicate one; so much so that it is perhaps not done in some proper cases; and while it should be discreetly exercised, because it involves the professional existence of the attorney, yet, as has been said, not only individual interest, but that of the public, demand a fearless exercise of the power whenever a proper case is presented."

However, in *Delaware*, where an attorney's status in a court of law is independent of his position as a solicitor in chancery, it has been held that the disbarment of a solicitor from the court of chancery does not preclude him from practicing in the courts of law. *In re Hoffecker*, 60 Atl. 981.

In *Illinois* where the power to disbar is regulated by statute, it has been held that the fair and reasonable intent of the statute as indicated by its words, is that the power to suspend an attorney from practice is limited to the particular court in which the judge is presiding at the time he makes the order, and does not extend to other courts. *Winkelman v. People*, 50 Ill. 449; *Moutray v. People*, 162 Ill. 194, 44 N. E. 496.

As between Courts of Different States.

The courts of one state will ordinarily refuse to admit to practice an attorney who has been disbarred in a court of another state. *In re Lowenthal's*, 61 Cal. 122; *In re Crum*, 72 Minn. 401, 75 N. W. 385, 79 N. W. 967. See also *In re Baum*, 10 Mont. 223, 25 Pac. 99.

Thus in the case of *In re Lowenthal's*, supra, wherein it appeared that an attorney was disbarred in the state of New York, and was thereafter admitted to practice in California on production of his license to practice in New York, the fact of his disbarment in the latter state not being disclosed, the court in setting aside the order admitting him to practice in the courts of California said: "Section 279 of the Code of Civil Procedure provides that any person 'who has been admitted to practice law in the highest court of a sister state,' may be admitted to practice here 'upon production of his license,' etc. If upon the production of such license it should be made to appear that the license had been revoked and the applicant disbarred, the fact would be evidence, not only that the applicant was not of good moral character, but also evidence that the judgment admitting him had been reversed and annulled. The section of the code means, not only that the applicant shall present a 'license' showing that he had

at a certain time been admitted to another state, but requires that this court shall be satisfied that he has continued to be a member of the bar of such state, in good standing, up to the time of his application. Such has been the construction given the section; and where an applicant concealed the fact that he had been disbarred in the state from whence he came, the order of this court admitting him was set aside. . . . Unless, therefore, the order of admission by which defendant acquired the right to practice in New York was in full force and effect when he was admitted here, we will be justified by principle and precedent in setting aside the order of admission."

As between State and Federal Courts.

Disbarment by the supreme court of a state does not necessarily affect the status of an attorney before a federal court. *Bradley v. Fisher*, 13 Wall. 335, 20 U. S. (L. ed.) 646; *In re Thatcher*, 190 Fed. 999, *affirmed* 212 Fed. 801, 129 C. C. A. 255. And see the reported case. Thus it was said in the case of *In re Thatcher*, *supra*: "Disbarment in one court will not affect the right to appear before an independent tribunal. *Bradley v. Fisher*, *supra*; *Ex parte Tillinghast*, 4 Pet. 108, 7 U. S. (L. ed.) 798. These authorities control us, and no authority from any state jurisdiction which depends upon constitutional or legislative provisions is of value. Early in the matter the court took the position, following *Ex parte Tillinghast*, *supra*, and *Bradley v. Fisher*, *supra*, that a formal showing in this court of respondent's disbarment in the state supreme court would not ipso facto remove him from our rolls, but that this court reserved the right to determine for itself whether the facts found against him by that court, although it was with competent jurisdiction and acted in a formal inquiry, constituted 'malpractice or other sufficient cause' requiring that the court's confidence in him, as one of its officers, should be removed, and the committee was directed to present certain charges against him on the findings of fact in the supreme court of Ohio, that a proper inquiry might be had concerning the application of the court's rules to such facts. . . . We can conceive of no function served by respondent's demurrer than to question whether an adjudication of the respondent's guilt of certain lines of conduct, by a court whose jurisdiction to try such a case is not open to question, may be accepted, not as conclusive, but as establishing *prima facie*, that respondent did in fact commit the acts imputed to him for malpractice by the state court in its judgment upon its findings of fact. On the hearing this court took that view of the record of the

state court, and permitted the committee to rest its case on the first charge upon the facts, after the introduction of a certified record of the supreme court's findings."

But see *U. S. v. Green*, 85 Fed. 857, wherein the court said that it ought to follow as a matter of course that the disbarment of an attorney in the highest court of a state should operate to disbar him from practice in the federal courts of that state.

Suspension of an attorney by a court of commissioners of Alabama claims authorized by the act of Congress creating it to make its own rules as to the admission and disbarment of attorneys, has been held not to affect his status before any other court. *Manning v. French*, 149 Mass. 391, 21 N. E. 945, 4 L.R.A. 339.

As between Federal Courts.

It has been held that the mere fact of an attorney having been disbarred for contempt by the United States district court was not a sufficient ground for preventing his admission to the bar of the United States Supreme Court, there being nothing to indicate that the action of the inferior court was based on acts which inherently deprived the applicant of his fair private and professional character essential to admission. *Ex p. Tillinghast*, 4 Pet. 108, 7 U. S. (L. ed.) 798.

So where an attorney was indefinitely suspended from practice in the circuit court of appeals, in discharging a petition of the bar association for his disbarment in the federal court for another district, the court said, in the case of *In re Watt*, 149 Fed. 1009: "I heartily approve of the action of the court of appeals of the second circuit in suspending indefinitely the respondents from practice before that court. The brief which they filed was scandalous and insulting, and richly deserved the punishment that was inflicted; but I have serious doubts whether the circuit court for the eastern district of Pennsylvania, to which they have been admitted to practice, ought to punish them again for this single fault, aggravated though it was. It is quite clear that, while this example of their professional delinquency was aggravated, it falls short of criminal conduct, and I think, therefore, that I should resolve the doubt in their favor concerning the propriety of striking their names from the roll of attorneys of this court, and should merely leave them to feel the well-deserved punishment that was inflicted upon them by the court of appeals for the second circuit."

Rule in England.

In England, the rule that disbarment in one court excludes an attorney from practice

ing in any other court in the kingdom is established by statute (23 & 24 Vict. 1860). In *re Whytehead*, 4 M. & G. 768, 43 E. C. L. 396; *Matter of Collins*, 18 C. B. 272, 86 E. C. L. 272; In *re Smith*, 4 Moo. 319, 16 E. C. L. 374, 1 Brod. & B. 522, 5 E. C. L. 172; *Ex p. Yates*, 9 Bing. 455, 23 E. C. L. 331. See also *Ex p. Hague*, 3 Brod. & B. 257. Thus it was held in the case of *In re Whytehead*, supra, that where a solicitor was struck from the rolls of the Court of Queen's Bench it operated to disbar him from practicing in the common pleas.

On the reinstatement of a disbarred attorney by the court which disbarred him he will be reinstated in the other courts. *Ex p. Yates*, 9 Bing. 455, 23 E. C. L. 331.

However, it has been held that where a solicitor was struck from the roll of the supreme court of a colony the Court of Queen's Bench would deny an application to disbar him from practicing before its bar, in the absence of direct evidence as to the nature of the offense for which he was disbarred in the colonial court. *Ex p. Incorporated Law Soc.* [1898] 1 Q. B. 331, 46 W. R. 303, 77 L. T. N. S. 661, 14 Times L. Rep. 159, 87 L. J. Q. B. 245.

CRYSTAL RIVER LUMBER COMPANY

v.

KNIGHT TURPENTINE COMPANY ET AL.

Florida Supreme Court—March 4, 1915.

69 Fla. 288; 67 So. 974.

Foreclosure of Mortgages — Invalid Sale — Subrogation of Purchaser to Rights of Mortgagee.

When, for any reason, foreclosure proceedings are imperfect, irregular, or void, the purchaser at the sale becomes subrogated to all the rights of the mortgagee in and to the mortgage and the indebtedness that it secured, and becomes thereby virtually an equitable assignee of such mortgage and of the debt that it secured, with all the rights of the original mortgagee, and becomes entitled to an action *de novo* for the foreclosure of such mortgage against all parties holding junior incumbrances or the legal title, who had been omitted as parties to such original foreclosure proceedings under which he bought.

[See note at end of this case.]

Second Foreclosure — Parties Not Joined in First.

Though, in enforcing a mortgage lien upon lands, the existence of contract rights in the land acquired subsequent to the mortgage is known to the mortgagee, and such contract

holders are not made parties to the foreclosure proceedings, a subsequent foreclosure of such contract rights may be had upon equitable principles.

(Syllabus by court.)

Appeal from Circuit Court, Citrus county: BULLOCK, Judge.

Action by Knight Turpentine Company et al., plaintiffs, against Crystal River Lumber Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Anderson & Anderson for appellant.

H. M. Hampton and *Hooker & Martin* for appellees.

[289] WHITFIELD, J.—This appeal is from an order overruling a demurrer to a bill of complaint, and from an order denying a petition for a rehearing upon the demurrer. The bill of complaint in effect alleges that R. J. Knight executed mortgages on certain lands to secure an indebtedness; that subsequent to the execution of the mortgages, the mortgagor executed to the Crystal River Lumber Company a contract to convey the timber on the land with the right to take the timber from the land during a long term of years; that the mortgage liens were held by the Consolidated [290] Naval Stores Company and were enforced by foreclosure proceedings in which a decree for \$18,270.46 was rendered, but the Crystal River Lumber Company who was the holder of the contract for the conveyance of the timber and incidental rights in the land, was not made a party to the foreclosure proceedings for the reason that said Crystal River Lumber Company had "ceased sawmill operations and having dismantled its mill and moved away" "it was the belief of all parties connected with the transaction that said company would not thereafter make any claim under said contract;" that the lands were bought at foreclosure sale for \$15,000.00 by the mortgagee who "sold and conveyed all of the said property, and all of its rights under the said mortgage . . . which it acquired by and through said sale," to the appellee Knight Turpentine Company; that the mortgagee purchaser at the sale "has transferred, assigned, set over and sold to . . . Knight Turpentine Company, all of its rights therein, both under the said purchase at said master's sale and under the said mortgages;" that the Knight Turpentine Company sold and conveyed to the appellee, the Pine Lumber Company, the lands in controversy, reserving all the timber upon the lands; that a deficiency decree against Knight the mortgagor would be of no value because said Knight was and is utterly insolvent; that the premises pur-

chased at the foreclosure sale was not of the value bid therefor if the contract right of the defendant is valid; that the Crystal River Lumber Company is making some claim of title or right to the timber on the land, which asserted claim is inferior to the complainants' rights acquired under the mortgage foreclosure. The Knight Turpentine Company and the Pine Lumber Company brought this suit against the Crystal River Lumber Company, [291] to subject the contract held by the latter company for the conveyance of the timber rights and giving other incidental rights in the lands, to the payment "of the sums of money remaining due upon the mortgages." A demurrer to the bill of complaint was overruled, and complainants appealed.

The rights of the appellant Crystal River Lumber Company in the lands were acquired subsequent to the mortgage liens, and as the appellant was not a party to the proceedings to enforce the liens, its rights were not affected thereby. Such contract holder had a right to pay off the mortgage debts and redeem the land itself. See *Dundee Naval Stores Co. v. McDowell*, 65 Fla. 15, Ann. Cas. 1915A 387, 61 So. 108; *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157.

The purchaser of property at a foreclosure sale for the full amount due on the decree of foreclosure, when, for any reason the foreclosure proceedings are imperfect, irregular or void, becomes subrogated to all the rights of the mortgagee in and to such mortgage and the indebtedness that it secured, and becomes thereby virtually an equitable assignee of such mortgage and of the debt that it secured, with all the rights of the original mortgagee, and becomes entitled to an action *de novo* for the foreclosure of such mortgage against all parties holding junior encumbrances or the legal title, who had been omitted as parties to such original foreclosure proceedings under which he bought. *Key West Wharf, etc. Co. v. Porter*, 63 Fla. 448, Ann. Cas. 1914A 173, 58 So. 599; *Jordan v. Sayre*, 29 Fla. 100, 10 So. 823.

In this case the purchaser at the foreclosure sale was the mortgagee, and it did not bid the full amount decreed [292] to be due on the mortgages, but this does not alter its rights as a mortgagee purchaser at the sale with reference to junior encumbrances; particularly when as alleged the land is not worth the purchase price if the contract right in the land is valid. The rights of the appellant under its contract do not amount to the legal title, but such rights do constitute a right in the land in the nature of a junior encumbrance covering rights in the growing timber and in the use of the land for a period of years in cutting and moving the timber, and the mortgagee or its legal or equitable

assignee, is entitled to maintain a suit *de novo* for the enforcement of the mortgage lien against the contract rights of the appellant in the lands, the holder of the junior encumbrance having its reciprocal rights when the suit to repurchase is instituted. See *Georgia Pac. R. Co. v. Walker*, 61 Miss. 481; *Shaw v. Heisey*, 48 Ia. 468; *Morey v. Duluth*, 69 Minn. 5, 71 N. W. 694; *Cooke v. Cooper*, 18 Ore. 142, 22 Pac. 945, 17 Am. St. Rep. 709, 7 L.R.A. 273; *Johns v. Wilson*, 180 U. S. 440, 21 S. Ct. 445, 45 U. S. (L. ed.) 613; *Foster v. Johnson*, 44 Minn. 290, 46 N. W. 350; *Brown v. San Francisco*, 16 Cal. 452, text 461; *Shirk v. Andrews*, 92 Ind. 509. The fact that the mortgagee purchaser and the appellees, its successors in title, knew of the appellant's contract rights in the land and that the appellant was not made a party to the first foreclosure proceedings, do not affect the appellees, having all the rights of the mortgagee, to enforce the mortgage liens, any more than the failure to make the appellant a party to the first proceedings, affects the right of the appellant to redeem its contract right in the land from the mortgage lien and to maintain the contract right by paying the balance due on the debt when the mortgage or its legal or equitable assigns undertake to enforce the mortgage lien [293] against the appellant's contract rights in the land. The appellant may be able to show a right to redeem or take a conveyance of the land upon payment of the entire debt for which the mortgages were given.

As there is equity alleged in the bill of complaint upon which appropriate orders and decrees may be made in adjudging the rights and equities of the parties in the premises, the demurrer was properly overruled. Additional costs that may accrue because of the failure to make the appellant a party to the first foreclosure proceedings may be equitably adjusted. See 2 *Jones on Mortg.* sec. 1679, 1680; *State Bank v. Abbott*, 20 Wis. 570.

The orders appealed from are affirmed.

Taylor, C. J., and Shackleford and Ellis, JJ., concur.

Cockrell, J., dissents.

ON REHEARING.

PER CURIAM.—A petition for rehearing suggests that the court omitted to consider the circumstance that the complainants, appellees here, are not the purchasers at the foreclosure sale, but claim through a conveyance from the mortgagee purchaser. The opinion expressly refers to the appellees as being the successors in title to the mortgagee purchaser and to the rights of the legal or equitable assigns of such mortgagee.

As shown by the opinion, the bill alleges that the mortgagee [294] purchaser sold and conveyed the property to one of the appellees,

and also transferred to such appellee all of its rights both under the purchase and under the mortgage. If the appellant's contract rights in the property were in fact subject to the mortgage, such rights cannot be made superior to the rights growing out of the mortgage by mere failure to make the appellant a party to the foreclosure proceeding, where it is alleged that appellant had ceased operations under its contract rights and it was the belief of all parties that appellants "would not thereafter make any claim under said contract," no estoppel of appellees appearing.

Even if appellant was not a *necessary* party to the foreclosure proceedings, the right of appellees to reforeclose is not thereby affected. Nor does this right of appellees prolong the life of the mortgage. If a foreclosure proceeding is not complete it can be made complete by appropriate proceedings in the absence of controlling equities forbidding it.

Rehearing denied.

Taylor, C.J., and Shackleford, Whitfield and Ellis, JJ., concur.

Cockrell, J., dissents.

NOTE.

Subrogation of Purchaser at Invalid Foreclosure Sale to Rights of Mortgagee or Other Claimant.

General Rule, 576.

Application of Rule, 578.

Qualifications of Rule, 579.

General Rule.

It is established by the great weight of authority that where purchase money, paid over on a judicial sale that turns out to be void, is applied to the extinguishment of liens or incumbrances on the property sold or to the payment of claims that are not secured by specific liens but were enforceable against the assets of an estate and for the payment of which the property might have been sold, the purchaser is entitled to be subrogated to the rights and securities of the creditors whose claims were so discharged, against the property sold or its proceeds. 16 R. C. L. tit. *Judicial Sales*. And it is generally conceded that a sale of mortgaged property in a proceeding for the foreclosure of the mortgage is a judicial sale. *Blossom v. Milwaukee*, etc. R. Co. 3 Wall. 196, 18 U. S. (L. ed.) 43; *Sessions v. Peay*, 23 Ark. 39. See also *Sturdevant v. Norris*, 30 Ia. 65; *Alexander v. Howe*, 85 Va. 198, 7 S. E. 248. Hence a purchaser at an invalid foreclosure sale is entitled to be subrogated to the rights of the mortgagee, the sale oper-

ating as an equitable assignment of the rights of the mortgagee to the purchaser.

United States.—*Brobst v. Brock*, 10 Wall. 534, 19 U. S. (L. ed.) 1002; *Moulton v. Leighton*, 33 Fed. 143. See also *Wright v. Harris*, 221 Fed. 736, *affirmed* 228 Fed. 1021, 142 C. C. A. 654.

Alabama.—*Shearer v. City Nat. Bank*, 115 Ala. 352, 22 So. 151.

Arkansas.—*Littell v. Grady*, 38 Ark. 584; *Meher v. Cole*, 50 Ark. 361, 7 S. W. 451, 7 Am. St. Rep. 101; *Turman v. Bell*, 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35.

California.—*Boggs v. Fowler*, 18 Cal. 559, 76 Am. Dec. 561; *Burton v. Lies*, 21 Cal. 87. See also *Seccombe v. Roe*, 22 Cal. App. 139, 133 Pac. 507.

Florida.—*Jordan v. Sayre*, 29 Fla. 100, 10 So. 823. And see the reported case.

Georgia.—*Dutcher v. Hobby*, 86 Ga. 198, 12 S. E. 356, 22 Am. St. Rep. 444, 10 L.R.A. 472; *Ashley v. Cook*, 109 Ga. 653, 35 S. E. 89 (construing statute).

Illinois.—*Bruschke v. Wright*, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125.

Indiana.—*Muir v. Berkshire*, 52 Ind. 149; *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625; *Bunting v. Gilmore*, 124 Ind. 113, 24 N. E. 583.

Iowa.—*Brown v. Brown*, 73 Ia. 430, 35 N. W. 507.

Kansas.—*Equitable Mortg. Co. v. Gray*, 68 Kan. 100, 74 Pac. 614; *Capell v. Dill*, 82 Kan. 652, 109 Pac. 286.

Maryland.—*Johnson v. Robertson*, 34 Md. 165. See also *Stump v. Warfield*, 104 Md. 530, 10 Ann. Cas. 249, 65 Atl. 346, 118 Am. St. Rep. 434.

Michigan.—*Gilbert v. Cooley*, Walk. Ch. 494; *Hoffman v. Harrington*, 33 Mich. 392; *Morse v. Byam*, 55 Mich. 594, 22 N. W. 54; *Larivierre v. Rains*, 112 Mich. 276, 70 N. W. 583, 4 Detroit Leg. N. 1; *Walker v. Schultz*, 175 Mich. 280, 141 N. W. 543.

Mississippi.—*Clark v. Wilson*, 56 Miss. 753; *Martin v. Kelly*, 59 Miss. 652; *Bonner v. Lessley*, 61 Miss. 392.

Missouri.—*Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Lanier v. McIntosh*, 117 Mo. 608, 23 S. W. 787, 38 Am. St. Rep. 676; *Ailey v. Burnett*, 134 Mo. 313, 33 S. W. 1122, 35 S. W. 1137; *Long v. Long*, 141 Mo. 352, 44 S. W. 341; *Wells v. Lincoln County*, 10 Mo. App. 588, *affirmed* 80 Mo. 424.

Nebraska.—*Milligan v. Gallen*, 64 Neb. 561; *McCague v. Eller*, 110 N. W. 318.

New York.—*Duncan v. Dodd*, 2 Paige 99; *Miner v. Beekman*, 50 N. Y. 337; *Townshend v. Thomson*, 139 N. Y. 152, 34 N. E. 891; *Ketcham v. Deutsch*, 211 N. Y. 85, 105 N. E. 85, *reversing* 152 App. Div. 904, 137 N. Y. S. 402; *Varick v. Higgins*, 99 Misc. 292, 163 N. Y. S. 673. See also *Winslow v. Clark*, 47 N. Y. 261.

North Carolina.—Morton v. Blades Lumber Co. 154 N. C. 336, 70 S. E. 623. See also McFarland v. Cornwell, 151 N. C. 428, 66 S. E. 454.

North Dakota.—Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; D. S. B. Johnston Land Co. v. Mitchell, 29 N. D. 510, 151 N. W. 23.

Ohio.—Mill Creek Valley St. R. Co. v. Carthage, 9 Ohio Cir. Dec. 833, 18 Ohio Cir. Ct. Rep. 216; McMahan v. Davis, 10 Ohio Cir. Dec. 467, 19 Ohio Cir. Ct. 242.

Oklahoma.—Harrill v. Weer, 26 Okla. 313, 109 Pac. 539.

Rhode Island.—Brewer v. Nash, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749.

South Carolina.—Bailey v. Bailey, 41 S. C. 337, 19 S. E. 669, 728, 44 Am. St. Rep. 713.

Texas.—Davis v. Roosevelt, 53 Tex. 305.

West Virginia.—Copelan v. Sohn, 91 S. E. 456.

In *Brewer v. Nash*, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749, the court, after citing a number of cases in support of the doctrine that the purchaser at a void foreclosure sale who has paid the purchase money is entitled to be regarded in equity as if he were the assignee of the mortgage, discussed the basis of the doctrine, saying: "The grounds of decision are not very fully developed in these cases, but it seems to us that the true ground is this, that, while ordinarily a stranger to the estate who voluntarily pays off a mortgage thereon is not entitled to subrogation to the rights of the mortgagee, a purchaser at the mortgagee's sale, even when the sale is void, is not to be regarded as a mere stranger; but that, having bid off the estate in good faith on the invitation of the mortgagee to do so, when, supposing his bid to have been effectual to invest him with the equitable or executory title, he pays the amount of his bid and the same is applied to the mortgage debt, he has a most persuasive equity to be subrogated to at least the rights of the mortgagee who invited his confidence. In such a case the court does simply what the mortgagee would be bound in conscience to do himself, if he could, when it treats the purchaser as the assignee of the mortgage."

So in *Willson v. Brown*, 82 Ind. 471, it was said: "A sound public policy forbids that a purchaser at a public sale, who has in good faith paid the amount of his bid, in discharge of the decree, judgment or other lien by virtue of which the sale was made, should be deemed a mere volunteer and should be denied any equitable relief in case the sale proved to be invalid, merely because he had no personal interest to protect and made the purchase for the sake of the investment only. Bidding should be encouraged, to the end that property may not

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be sacrificed for less than its worth. As was said in *Muir v. Berkshire* [52 Ind. 149] so it may be said in this case: "The sale under the mortgage having judicially been held void, the relation of the land to the mortgage remains the same as if no sale had been made. The question, then, in the case is, who stands in the place of the mortgagee?" And as in that case, so in this, it cannot be the mortgagee, because, as to the state or the school fund, the mortgage was paid by the proceeds of the invalid sale. Justice and good conscience declare in favor of the appellants, who made the payment, and must otherwise lose their money."

The right of subrogation heretofore stated passes to the grantee of the purchaser at an invalid foreclosure sale. *Bryan v. Kales*, 162 U. S. 411, 16 S. Ct. 802, 40 U. S. (L. ed.) 1020; *Bryan v. Brasius*, 162 U. S. 415, 16 S. Ct. 803, 40 U. S. (L. ed.) 1022; *Bryan v. Pinney*, 162 U. S. 419, 16 S. Ct. 804, 40 U. S. (L. ed.) 1023; *Romig v. Gillett*, 187 U. S. 111, 23 S. Ct. 40, 47 U. S. (L. ed.) 97 (construing Oklahoma statute); *Jordan v. Sayre*, 29 Fla. 100, 10 So. 823; *Harper v. Ely*, 70 Ill. 581; *Bruschke v. Wright*, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125; *Curtis v. Gooding*, 99 Ind. 45; *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889; *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; *Jellison v. Halloran*, 44 Minn. 199, 46 N. W. 332; *Ketcham v. Deutsch*, 211 N. Y. 85, 103 N. E. 85, reversing 152 App. Div. 904, 137 N. Y. S. 402; *Gillett v. Romig*, 17 Okla. 324, 87 Pac. 325; *Babcock v. Orcutt* (Okla.) 160 Pac. 729; *Givens v. Carroll*, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889; *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

In *Babcock v. Orcutt* (Ore.) 160 Pac. 729, it was held that the grantee of the purchaser at a void foreclosure sale who assumed a prior mortgage which he paid when it was due was entitled to be subrogated not only to the rights of the mortgagee in the foreclosed mortgage but also to the rights of the mortgagee in the prior mortgage.

In *Harper v. Ely*, 70 Ill. 581, it appeared that a sale in foreclosure proceedings was void because the mortgagee became the purchaser. He conveyed the premises to one having notice of the defect, and the latter took possession. It was held that the grantee was entitled to be subrogated to the rights of the mortgagee claimant, and also entitled to be reimbursed for the amount advanced for the removal of a prior incumbrance.

It seems that the purchase money must be applied to the satisfaction of the mortgage debt to entitle the purchaser to the right of subrogation. *Clark v. Wilson*, 56

Miss. 753; *Bonner v. Lessley*, 61 Miss. 392; *Honaker v. Shough*, 55 Mo. 472; *Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Lanier v. McIntosh*, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676.

Application of Rule.

It makes no difference whether the foreclosure proceedings are merely voidable on account of some irregularity in the procedure, or whether they are entirely void. In either case the purchaser is subrogated to the rights of the lienholder. *Key West Wharf, etc. Co. v. Porter*, 63 Fla. 448, Ann. Cas. 1914A 173, 58 So. 599; *Gillett v. Romig*, 17 Okla. 324, 87 Pac. 325; *Harding v. Gillett*, 25 Okla. 199, 107 Pac. 665. And see the reported case. Neither does it affect the purchaser's right to subrogation that the mortgage is discharged of record, the discharge being made on the assumption that the title to the estate has vested in the purchaser. *Brewer v. Nash*, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749.

The rule that a purchaser at an invalid foreclosure sale is subrogated to the rights of the mortgagee has been applied where there was an invalid exercise of the power of sale contained in the mortgage. *Taylor v. Agricultural, etc. Assoc.* 68 Ala. 229; *Ess v. Griffith*, 128 Mo. 50, 30 S. W. 343; *Williams v. Washington*, 40 S. C. 457, 19 S. E. 1; *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677; *Griffin v. Griffin*, 75 S. C. 249, 55 S. E. 317, 117 Am. St. Rep. 899. Likewise the right has been upheld as to the purchaser at an invalid foreclosure sale under a purchase money lien. *Jones v. McKenna*, 4 Lea (Tenn.) 630; *Elam v. Donald*, 58 Tex. 316; *Haymond v. Camden*, 22 W. Va. 180. Similarly the rule has been applied with respect to the purchaser at an invalid sale under a deed of trust. *Ashley v. Cook*, 109 Ga. 653, 35 S. E. 89 (construing statute); *Wolff v. Ward*, 104 Mo. 127, 16 S. W. 161; *Copelan v. Sohn* (W. Va.) 91 S. E. 456. In *Mill Creek St. R. Co. v. Carthage*, 9 Ohio Cir. Dec. 833, 18 Ohio Cir. Ct. 216, it was said that the purchaser at an invalid sale under the foreclosure of a mortgage or any other lien was entitled to the right of subrogation.

The rule has been applied in the case of an invalid foreclosure sale under a mortgage of lands securing a loan from public school funds, the purchaser being subrogated to the rights of the owner of the funds. *Muir v. Berkshire*, 52 Ind. 149; *Willson v. Brown*, 82 Ind. 471; *Shannon v. Hay*, 106 Ind. 589, 7 N. E. 376; *Jones v. Mack*, 53 Mo. 147; *Honaker v. Shough*, 55 Mo. 472; *Wilcoxon v. Osborn*, 77 Mo. 621; *Wells v. Lincoln County*, 80 Mo. 429, *affirming* 10 Mo. App. 588. So the purchaser at an in-

valid foreclosure sale under a lien for drainage assessments has been held to be entitled to subrogation to the assessment lien. *Reed v. Kalfsbeck*, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466.

Where occasion requires it there will be another foreclosure of the mortgage and a resale thereunder in order to protect a purchaser in good faith. *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Burton v. Lies*, 21 Cal. 87; *Dutcher v. Hobby*, 86 Ga. 198, 12 S. E. 356, 22 Am. St. Rep. 444, 10 L.R.A. 472; *Morse v. Byam*, 55 Mich. 594, 22 N. W. 54; *Varick v. Higgins*, 99 Misc. 292, 163 N. Y. S. 673; *McMahan v. Davis*, 10 Ohio Cir. Dec. 467, 19 Ohio Cir. Ct. 242. And see the reported case. And in protection of the purchaser's right it has been held that his possession cannot be disturbed until the mortgage debt is paid. *Haggart v. Wilczynski*, 143 Fed. 22, 74 C. C. A. 176; *Wright v. Harris*, 221 Fed. 736, *affirming* *Deere v. Wright*, 228 Fed. 1021, 142 C. C. A. 654; *Equitable Mortg. Co. v. Gray*, 68 Kan. 100, 74 Pac. 614; *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 104 Am. St. Rep. 396, 64 L.R.A. 320; *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; *Jellison v. Halloran*, 44 Minn. 199, 46 N. W. 332; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Robinson v. Ryan*, 25 N. Y. 320; *Finlayson v. Peterson*, 11 N. D. 45, 89 N. W. 856; *Frische v. Kramer*, 16 Ohio 125, 47 Am. Dec. 368. *Compare* *Herrmann v. Cabinet Land Co.* 217 N. Y. 526, 112 N. E. 476, *reversing* 161 App. Div. 489, 146 N. Y. S. 777, and *reargument denied* 218 N. Y. 701, 113 N. E. 1057.

The right of a purchaser at a foreclosure sale to subrogation has been upheld where the proceeding turned out to be invalid because of a defect of parties. *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *McCague v. Eller*, 77 Neb. 531, 110 N. W. 318, 124 Am. St. Rep. 863; *Varick v. Higgins*, 99 Misc. 292, 163 N. Y. S. 673; *Frische v. Kramer*, 16 Ohio 125, 47 Am. Dec. 368; *Jones v. McKenna*, 4 Lea (Tenn.) 630; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762. And see the reported case.

In *Moore v. Lindsey*, 52 Mo. App. 474, it was held that one who furnished the money to pay the price of property bought at an invalid foreclosure sale and took a mortgage therefor on the property was entitled to be subrogated to the rights of the mortgagee of the foreclosed mortgage.

In *Tualatin Academy v. Keene*, 59 Ore. 496, 117 Pac. 424, it appeared that a mortgagor devised mortgaged land to the plaintiff subject to the life estate of his wife. After the mortgagor's death the mortgage was foreclosed, the widow only being made a party, and it being alleged that she was the sole heir at law of the mortgagor. In an action brought by the plaintiff to redeem

the land it was held that the purchaser at the foreclosure sale became subrogated to all the rights of the mortgagee and could obtain relief only by paying the sum remaining due on the mortgage after its foreclosure.

In *Bryan v. Kales*, 162 U. S. 411, 16 S. Ct. 802, 40 U. S. (L. ed.) 1020, it appeared that a mortgagee was also the administrator of the estate to which the mortgaged premises belonged, and in his right as mortgagee he brought a suit against himself as administrator to foreclose the mortgage and at the sale became the purchaser of the property. It was held that he was entitled to be subrogated to the mortgage. In *Bryan v. Brasius*, 162 U. S. 415, 16 S. Ct. 803, 40 U. S. (L. ed.) 1020, a grantee of one who purchased under the circumstances stated in *Bryan v. Kales*, supra, was held to be entitled to subrogation. To the same effect see *Bryan v. Pinney*, 162 U. S. 419, 16 S. Ct. 804, 40 U. S. (L. ed.) 1023.

In *Timmerman v. Howell*, 1 Ohio Cir. Dec. 342, 2 Ohio Cir. Ct. 27, it was held that the purchaser at a foreclosure sale could maintain an action to reform the foreclosed mortgage so as to describe properly the land mortgaged.

In *Home Invest. Co. v. Clarson*, 21 S. D. 72, 109 N. W. 507, it appeared that a second mortgage was foreclosed, a third mortgagee being made a party to the action. The decree of foreclosure contained a recital that the third mortgagee was not served with summons. The purchaser at the foreclosure sale was not aware of this recital but he paid off the first mortgage and caused it to be released. In the meantime the third mortgagee brought an action to foreclose his mortgage and obtained a certificate of sale to the property. It was held that the purchaser at the sale under the foreclosure of the second mortgage could maintain a suit for subrogation to the rights of the first and second mortgagees and have the mortgages restored of record. To the same effect see *Home Invest. Co. v. Clarson*, 15 S. D. 513, 90 N. W. 153.

In *Doyle v. Breneman*, 4 Ohio Dec. 22, 2 Ohio N. P. 415, it appeared that on the foreclosure of a mortgage after the death of the mortgagor, the mortgaged property did not sell for an amount sufficient to discharge the mortgage debt. By virtue of an execution a sale of other lands belonging to the mortgagor's estate was then made to cover the deficiency, which sale was invalid because no judgment was obtained for the balance due on the mortgage. A statute provided for the subrogation of a purchaser at a sale of property on execution when his title was invalid by reason of a defect in the proceedings. It was held that a purchaser at the execution sale was entitled to subro-

gation, and a lien was declared on the land bought by him for the repayment of so much of the purchase money as was applied to the mortgage debt subject to the dower rights of the mortgagor's widow.

Qualifications of Rule.

Where there is no enforceable lien against the property which is attempted to be sold, the purchaser is not entitled to subrogation, there being nothing on which his right can be based. *Meher v. Cole*, 50 Ark. 361, 7 S. W. 451, 7 Am. St. Rep. 101; *Miller v. Kelsay*, 114 Mo. App. 598, 90 S. W. 395; *Campbell v. Elliott*, 52 Tex. 151. Thus in the case last cited it was held that the purchaser at a foreclosure sale was not entitled to be subrogated to the rights of the mortgagee where it appeared that the mortgage was not one for which an incumbrance could attach to a homestead under the constitution of the state. So in *Miller v. Kelsay*, supra, it appeared that after a bank had obtained a judgment against the defendant it purchased two notes which were secured by deeds of trust on the defendant's homestead, which was not exempt from judgment liens. The bank then caused the land to be sold under the deeds of trust by the sheriff, although the trustee of the deeds of trust did not refuse to act and was not disqualified. The land was bought by the plaintiffs, who had notice of the invalidity of the proceedings. The purchase price was paid to the sheriff who at once levied on the proceeds by virtue of the bank's judgment and a judgment held by another person against the defendant. Subsequently the sale was set aside because of the fraud of the bank and the plaintiffs in conspiring to defraud the defendant of his homestead. It was held that the plaintiffs could not maintain an action to be subrogated to the rights of the judgment creditor.

It has been held that where the amount paid by the purchaser at an invalid foreclosure sale is insufficient to satisfy the mortgage debt, he will not be entitled to subrogation for the entire amount of the debt. *Wells v. Lincoln County*, 10 Mo. App. 588, affirmed 80 Mo. 424; *Givins v. Carroll*, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889; *Griffin v. Griffin*, 75 S. C. 249, 55 S. E. 317, 117 Am. St. Rep. 899. See also *Jordan v. Sayre*, 29 Fla. 100, 10 So. 823. Thus in *Wells v. Lincoln County*, supra, it was said: "When the mortgagor redeems he does not pay the purchaser money to the original mortgagee, but to the purchaser at the foreclosure sale, who has succeeded to the mortgagee's dominion. It is by this means that, in equity, the purchaser becomes the assignee of the mortgage debt, and not otherwise. But it does not follow that because the sale

turns out to be irregular, especially while the purchaser is undisturbed in his possession, that he can both hold the land and claim the balance of the unpaid debt. If so, the condition of the purchaser, who should fail to acquire the legal title, would be better than that of him who should get a complete title. For there could be no pretense that, if a purchaser under a foreclosure should obtain the title of the mortgagor, so that the equity of redemption was gone, he would acquire any sort of claim to the mortgage debt unsatisfied. All he would acquire by his purchase would be the right, title and interest of the mortgagor in and to the land vested in him at the time of the execution of the mortgage. But under the logic of plaintiff's proposition, if the mortgage debt was \$5,000, consisting of the school moneys, held in trust by the county, and the real estate security was of the value only of \$1,000, in the event the sale was irregularly conducted, the purchaser without surrendering even the land might enjoy it and recover the remaining \$4,000 from the mortgagor. The practical working of such a principle of law demonstrates the absurdity of plaintiff's contention. . . . In the case at bar the plaintiff, so far as shown by the agreed statement, holds all he thought he was buying. His possession has not been disturbed. The equitable title has, doubtless, by lapse of time, ripened into a perfect legal title. The purchaser obtained over 600 acres of land for the inconsiderable sum of \$200. His assignee now seeks to take out of the treasury of Lincoln county the balance of the money rightfully coming to it in trust for the school fund, without ever having paid this money to the county or any person. Equity, while subrogating a party to the rights of a mortgagee, will not aid him in despoiling the mortgagee of that which honestly belongs to the latter."

It seems that where a foreclosure sale is invalid because of fraud, and the purchaser has knowledge of or participates in the fraud, he will not be subrogated to the rights of the lienholder. *Cheney v. Murto*, 17 Colo. App. 149, 67 Pac. 340; *King v. Huni*, 118 Ky. 450, 81 S. W. 254, 85 S. W. 723, 25 Ky. L. Rep. 2266, 27 Ky. L. Rep. 528. *Compare Harper v. Ely*, 70 Ill. 581.

The voluntary grantee of a purchaser at an invalid foreclosure sale is not entitled to subrogation. *Mohr v. Tulip*, 40 Wis. 66.

COOPER

v.

DEMBY.

Arkansas Supreme Court—February 7, 1916.

122 Ark. 266; 183 S. W. 185.

Assault — Evidence of Self-defense — Reputation of Plaintiff.

In a civil action for assault, in which defendant claims that he used only such force as appeared to him reasonably necessary to protect himself from the threatened assault, evidence for defendant that plaintiff had the reputation of being a quarrelsome and dangerous man who went armed, and was known as a gun fighter, is admissible.

[See 2 R. C. L. tit. *Assault and Battery*, p. 567.]

Mitigation of Damages — Provocation.

If defendant had a reasonable excuse arising from the provocation or fault of plaintiff, but not sufficient entirely to justify the assault, damages ought not to be assessed by way of punishment.

[See note at end of this case.]

Same.

The extent to which punitive damages may be mitigated is a question of fact for the jury in each particular case, and depends on the nature and character of the provocation.

[See note at end of this case.]

Same.

In a civil action for assault and battery, provocation of such a character as to make the impulse irresistible and to be solely responsible for the assault will not affect the compensatory damages.

[See note at end of this case.]

Elements of Damages Recoverable.

In a civil action for assault and battery, the compensatory damages include such items as loss of time, bodily suffering, impaired physical and mental powers, mutilation, disfigurement, expense of attendance, etc.

[See 2 R. C. L. tit. *Assault and Battery*, p. 579.]

Appeal from Circuit Court, Garland county: SCOTT WOOD, Judge.

Action by Jeremiah W. Demby, plaintiff, against Simon Cooper, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Appellant, *pro se*.

A. J. Murphy for appellee.

[267] SMITH, J.—Appellee sued for and recovered damages, both compensatory and punitive, on account of an assault alleged to have been committed upon him by appellant.

According to the evidence of appellee and of the witnesses who testified in his behalf, the circumstances of the assault were such that damages, both compensatory and punitive, were properly assessed. According [268] to the evidence of appellant, however, and of his witnesses, the facts were that appellee grossly and wantonly insulted appellant while employed about his own business and at his own place of business, and appellant used only force as appeared to him reasonably necessary to protect himself from a threatened assault and violence.

Appellant was not permitted to testify that appellee had the reputation of being a quarrelsome and dangerous man, and one who went armed and was known as a gun fighter, and the court refused to permit other witnesses to so testify, who were offered in appellant's behalf, and exceptions were duly saved to its ruling.

Instructions were given declaring the law applicable to appellee's right to recover compensatory damages, and no objections are now urged to these instructions.

On the question of punitive damages appellant requested an instruction numbered 4 as follows:

"You are instructed that, although you may believe the defendant was not acting in necessary self-defense, if, making due allowance for the infirmities of human temper, the defendant had a reasonable excuse arising from the provocation or fault of the plaintiff, but not sufficient to justify entirely the act done, then damages ought not to be assessed by way of punishment, and the circumstances of mitigation should be considered."

The court refused to give this instruction, but gave it in the following modified form, to which appellant duly excepted:

"If the defendant acting as a reasonable man had a reasonable excuse, arising from the provocation or fault of the plaintiff, at or immediately before the assault, then damages ought not to be assessed by way of punishment, and the circumstances of mitigation should be considered."

(1) We think the court should have permitted appellant to prove the general reputation of appellee for peace and quietude. Such evidence was competent in determining who was probably the aggressor, and the [269] state of mind under which appellant committed the assault.

We think, too, appellant's instruction numbered 4 should have been given in substantially the form in which it was asked. The law in regard to the mitigation of punitive damages by provocation is stated in 8 R. C. L. p. 551, as follows:

"Provocation may be shown in mitigation of punitive damages, even to the extent of entirely excluding such damages, and limit-

ing recovery to compensatory damages only. But provocation does not necessarily defeat exemplary damages, the better rule being that the conduct of both parties should be passed upon by the jury. There is a conflict of authority as to whether provocation may be shown in mitigation of compensatory damages, the better rule and the weight of authority supporting the rule that actual or compensatory damages are not in any case subject to mitigation by proof of mere provocation or of malice. Where proof of provocation is admissible in mitigation, generally the provocation must have been immediate, or so recent as to constitute a part of the *res gestae*."

In support of this text the case of *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41, is cited, and that case appears to give full support to the text quoted.

The law of this question was discussed by Mr. Justice Riddick in the case of *LeLaurin v. Murray*, 75 Ark. 232, 87 S. W. 131, in which case it was said:

"Now, it is a well settled rule of law that mere words never justify an assault, though, when they are such as to naturally arouse the resentment of those to whom they are addressed, they may go in mitigation of damages resulting from an assault provoked by them; but to do this they must have been uttered at the time of the assault, or so recently before that the provocation and the assault may be considered as parts of the same transaction. If sufficient time has intervened for reflection, and for reason to regain control, words, however provocative, do not in law mitigate such damages, for only provocation that is so recent as not to allow cooling [270] time is competent to mitigate damages; and even then such mitigation extends only to exemplary damages. Damages for pecuniary losses actually sustained from a wrongful assault can never be mitigated below adequate compensation. *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41; *Goldsmith v. Joy*, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L.R.A. 500; *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Millard v. Truax*, 84 Mich. 517; *Hale on Torts*, 262.

"Provocation, so recent and immediate as to induce a presumption that the violence done was committed under the immediate and continuing influence of the feelings and passions excited thereby, may be shown in mitigation of damages. *Mowry v. Smith*, 91 Mass. (9 Allen) 67; *Millard v. Truax*, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705, 3 Cyc. 1096."

In the case of *St. Louis Southwestern R. Co. v. Myzell*, 87 Ark. 123, 112 S. W. 203, punitive damages were recovered. The evidence there was that when the passenger

got off the train the auditor grabbed him by the arm and told the town marshal that he wanted him to take charge of Myzell being drunk and disorderly on the train. The marshal asked the auditor if he had a warrant and, when told that he did not have, the matter was ended. It was shown that Myzell was drunk and had been guilty of very irritating conduct, and in holding that he could not recover punitive damages under the circumstances stated it was there said:

"The auditor's conduct was the natural, although improper, result of Myzell's insulting and inebriate behavior, but fell short of containing those elements of wantonness or wilfulness from which malice is inferred which constitutes the basis of an action for exemplary damages."

The case of *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio St. 179, 1 Ann. Cas. 896, 71 N. E. 633, 65 L.R.A. 860, contains an extended case note in which many cases are cited, the result of these cases being summed up in the following note:

"In civil actions for damages for assault, evidence that the injuries complained of were inflicted under provocation offered by the plaintiff is admissible upon the question of the defendant's motive and the presence [271] of malice. The effect of the evidence may be to show that conduct on the part of the defendant, which in the absence of provocation would seem malicious, was not malicious in view of the provocation under which he acted, and in this way to mitigate or to defeat altogether the recovery of exemplary damages."

(2) The extent to which punitive damages may be mitigated by provocation is a question of fact to be passed upon by the jury in each particular case, and depends upon the nature and character of the provocation. If the provocation was of such a character as to make the passion irresistible and to be solely responsible for the assault, then no punitive damages should be assessed, but under the rule as stated in the case of *Le-Laurin v. Murray*, supra, such provocation would not affect the compensatory damages, which damages include such items as loss of time, bodily suffering, impaired physical and mental powers, mutilation, disfigurement, expense of attendance, and the like.

In the case of *Morely v. Dunbar*, 24 Wis. 183, it was said:

"Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If malice in the defendant is to be punished by the imposition of additional damages, or smart money, then malice on the part of the plaintiff, by which he pro-

voked the injury complained of, should be subject to like punishment, which, in his case can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so one-sided as to scrutinize the motives and punish one party to the transaction for his malicious conduct, and not to punish the other for the same thing; nor so unwise as not to make allowance for the infirmities of men, when smarting under the sting of gross and immediate provocation. If it were, then, as has been well said, it would frequently happen that the plaintiff would get full compensation for damages [272] occasioned by himself—a result which would be contrary to every principle of reason and justice."

For the errors indicated the judgment will be reversed and the cause remanded.

NOTE

Provocation in Mitigation of Damages for Assault.

In *Mahoning Valley R. Co. v. De Pascale*, 70 Ohio St. 179, 1 Ann. Cas. 896, and in *Stockham v. Malcolm*, 111 Md. 615, 19 Ann. Cas. 759, 74 Atl. 569, it was held that acts of provocation on the part of the plaintiff in a civil action for assault may be considered by the jury in mitigation of exemplary or punitive damages. The few recent cases in point affirm that rule and also are in accord with the weight of authority in holding that provocation cannot be considered in mitigation of actual or compensatory damages. *Webb v. Brown*, 63 Fla. 306, 58 So. 27; *Housman v. Peterson*, 76 Ore. 556, 149 Pac. 538. And see the reported case. In *Housman v. Peterson*, supra, the court said: "There is some divergence of judicial expression as to whether or not provocation can be considered by a jury in mitigation of compensatory damages. However, we think that the weight of authority and the better reasoning support the doctrine announced in the cases of *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501, and *Osler v. Walton*, 67 N. J. L. 63, 50 Atl. 590, in the latter of which it is briefly stated thus: 'A provocation that will not justify an assault should not excuse making compensation for the injury inflicted. It is enough that it may save or reduce a penalty quasi criminal, which is the foundation of punitive damages.'"

In *Newton v. Hawks*, 113 Me. 44, 92 Atl. 936, it was held that in an action to recover damages for assault and battery, if the plaintiff claims punitive damages, or damages for his injured feelings, his previous conduct and the provocation by him, if any, may be inquired into to mitigate the damages.

In *Kentucky*, a statute authorizes the defendant in a civil action for assault to plead as a defense to a claim for punitive damages any provocation which preceded the assault. *Roberson v. Woodfork*, 155 Ky. 206, 159 S. W. 793; *Louisville R. Co. v. Frick*, 158 Ky. 450, 165 S. W. 649. See also *Shields v. Rowland*, 151 Ky. 136, 151 S. W. 408.

In two recent cases the courts have declared that provocation might be considered in mitigation of damages for assault, without referring to any distinction in the application of the rule to punitive or compensatory damages. *Fagg v. Minneapolis, etc. R. Co.* 175 Ia. 459, 157 N. W. 148; *Gungrich v. Anderson*, 189 Mich. 144, 155 N. W. 379. See also *Jones v. Bynum*, 189 Ala. 677, 66 So. 639, wherein the court said: "The court properly instructed the jury that, if the defendant assaulted the plaintiff because of 'words only' used by the plaintiff to the defendant, they must find for the plaintiff. In civil actions, the abusive or offensive language of the plaintiff at or about the time may mitigate the fault of the defendant, but it cannot justify or excuse it so as to prevent some recovery of damages, albeit only nominal."

However, in order that provocation may be shown in mitigation of damages it must be so immediate as to induce a presumption that the assault was committed under the immediate influence of the passions thus excited. *Finn v. Stoddard* (Ia.), 162 N. W. 1; *Mills v. Warner*, 167 Mich. 619, 133 N. W. 494. See also *Ritter v. Griswold*, 2 Ala. App. 618, 56 So. 860. In *Finn v. Stoddard*, supra, the court said: "It is contended by appellee that under the undisputed evidence the evidence clearly shows that the assault was the result of anger and revenge, and that it was premeditated. Of course, there is a time in some transactions of this kind when the court may say as a matter of law that the proffered evidence is too remote. . . . From the circumstances enumerated, and others in the record, it is quite clear to our minds, and we think the jury could not have found otherwise, that the assault was premeditated and the result of anger and revenge. Under the circumstances here shown, we think the details of the conversation between defendant and his wife some twelve hours before the assault was not so connected with the assault as to be substantially a part of it, and that it was too remote." But see *Newton v. Hawks*, 113 Me. 44, 92 Atl. 936, wherein it was held that statements by the plaintiff made two days before the assault by the defendant should have been admitted in mitigation of damages.

LUFKIN

v.

HARVEY ET AL.

Minnesota Supreme Court—December 3, 1915.

131 Minn. 238; 154 N. W. 1097.

Parent and Child — Liability of Parent — Necessaries Furnished Child.

Parents are bound to provide a minor child with necessaries. If they neglect to so provide, they may become liable to a third person who furnishes necessaries even without their consent. Where they are ready to so provide, a third person can claim liability only on ground of contract, express or implied. This action is for necessaries supplied to a minor son, and it is based upon an implied contract.

Emancipation — Sufficiency of Evidence.

Defendants rely on a claim that their son had been emancipated, and hence a contract on their part to pay should not be implied. Emancipation may be complete, in which case it relieves the minor from custody and control of the parents and destroys the filial relation, or it may be partial. The evidence shows no more than a gift to the son of his earnings and the right to make contracts of employment. Complete emancipation cannot be inferred from such evidence. If the earnings given are sufficient to supply the son with all necessaries, the parents are under no further liability; if not, the parents remain liable for any necessaries which the wages are not sufficient to supply.

[See note at end of this case.]

Same.

There was no evidence in the case that plaintiff was employed by parties other than defendants, and a submission of that question to the jury was error.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Municipal Court of St. Paul:
FINEHOUT, Judge.

Action by H. M. Lufkin, plaintiff, against W. J. Harvey et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

E. O. Wergedahl and *John R. Donohue* for appellant.

Wickersham & Churchill for respondents.

[239] HALLAM, J.—This case was before this court on a former appeal. 125 Minn. 458, 147 N. W. 444. The action was brought to charge defendants with liability for medical and surgical services furnished to a minor son. On the former trial, the trial court, try-

ing the case without a jury, held that plaintiff had pleaded only an express contract, and that no express contract was proven, and on this ground decided the case for defendants. This court held that the complaint pleaded also an implied contract and that there was evidence of an implied contract, and remanded the case to be tried on all the evidence. The case was retried before the court and a jury. The jury found for defendants and plaintiff appeals.

1. Plaintiff again relied upon an implied contract. The evidence, from which it is claimed a promise of defendants to pay should be implied, is, in brief, that their son had been injured in the yards of the Union Depot Company, where he was employed, and was taken to a hospital; that plaintiff was called by a friend and repaired to the hospital. An immediate operation was necessary. He performed this operation, and later a second operation, and continued to treat the son for a period of nine months, all with the knowledge and acquiescence of defendants. The necessary character of the services is admitted.

In general parents are bound to supply a minor child with the necessities of life. They may be held to pay for necessities furnished by a third person to a minor child without their contract or consent where there is an omission of duty on their part to furnish necessities, as where the need exists and the parents refuse or neglect to act (29 Cyc. 1609 (6, 7); *Brown v. Deloach*, 28 Ga. 486; *Farmington v. Jones*, 36 N. H. 271; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Clinton v. Rowland*, 24 Barb. (N. Y.) 634); or in case of some special exigency rendering the interference of the third person reasonable and proper, as in case of illness at a distance from the parental home. *Keaton v. Davis*, 18 Ga. 457; *Porter v. Powell*, 79 Ia. 151, 44 N. W. 295, 7 L.R.A. 176, 18 Am. St. Rep. 353. Where, however, the minor is provided for by his [240] parents, there is no occasion for third persons to interfere, and in such case the parents are not liable for articles of the necessary class which a third person may furnish to their child, unless they agree to pay therefor. Such agreement may be implied from the existence of the parents' duty to provide for their child and their knowledge that a third person is furnishing necessities with the expectation that they will pay therefor. *Lufkin v. Harvey*, 125 Minn. 458, 147 N. W. 444. It is on this ground that liability is claimed in this action.

2. Defendants seek to avoid liability on the ground that they had emancipated their son, claiming that they were for that reason not liable under any circumstances for necessities furnished to him. It may be conceded that no implied contract could arise under the facts of this case, unless there existed a duty

on the part of the defendants to provide their son with necessities. In other words, a contract would not be implied from the facts in this case if the son had been of full age; but, if defendants were under obligation to provide their son with necessary surgical care, an obligation to pay might well arise from the facts in evidence.

The evidence as to emancipation on which defendants rely is as follows: The son was at the time of his injury about 18 years old. He was living at home with his parents. For about two years he had worked out, and for about one year had worked for the Union Depot Company. He secured that job himself; made his own contract; collected his own wages; kept or spent his own money as he pleased, and paid for his board at home.

Under the English common law, emancipation of children by their parents as we now understand the term was quite unknown. *Schouler*, Dom. Rel. (5th Ed.) § 267; *Rex v. Roach*, 6 T. R. 247; *Rex v. Wilmington*, 5 B. & Ald. 525, 7 E. C. L. 180. In the United States the doctrine of emancipation has been applied with some liberality. Emancipation is not, however, to be presumed. It must be proved. *Sumner v. Sebec*, 3 Greenl. (Me.) 223; *Lishon v. Lyman*, 49 N. H. 553. A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties. *Clay v. Shirley*, 65 N. H. 644, 23 Atl. 521. There may be complete emancipation, even though the minor continues [241] to reside with his parents. 29 Cyc. 1674; *Taubert v. Taubert*, 103 Minn. 247, 114 N. W. 763; *Donegan v. Davis*, 66 Ala. 362; *Dierker v. Hess*, 54 Mo. 246, 250; *McClockey v. Cyphert*, 27 Pa. St. 220; *Beaver v. Bare*, 104 Pa. St. 58, 62, 49 Am. Rep. 567.

Complete emancipation gives to the minor his time and earnings and gives up the parents' custody and control, and in fact works an absolute destruction of the filial relation. *Lowell v. Newport*, 66 Me. 78. Emancipation may, however, be partial. A minor may be emancipated for some purposes and not for others. The parent may authorize his minor child to make contracts of employment and collect and spend the money earned and still not emancipate him from parental custody and control. *Porter v. Powell*, 79 Ia. 151, 44 N. W. 295, 7 L.R.A. 176, 18 Am. St. Rep. 353; *Hunycutt v. Thompson*, 159 N. C. 29, 74 S. E. 628, 40 L.R.A. (N.S.) 488, Ann. Cas. 1913E 928.

There is some authority for the proposition that complete emancipation of a minor relieves the parent of all duty of support, and that the mutual rights and obligations of parent and child are then the same as though the child were of lawful age. *Schouler*, Dom. Rel. (5th Ed.) § 268. We are not confronted with that question here, since

we consider the evidence insufficient to show a complete emancipation. It shows no more than an assent on the part of the parents that the boy should hire out and collect and spend what he earned. Complete emancipation cannot be inferred from these facts alone. *Dunks v. Grey*, 8 Fed. 862; *Searmont v. Thorndike*, 77 Me. 504, 1 Atl. 448; *Nicolaus v. Synder*, 56 Neb. 531, 76 N. W. 1083.

Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763, is cited as establishing a contrary rule. We do not think that decision can be so construed. In that case a widowed mother conducted a tanning and fur dyeing business. She employed a minor son to work for her in the factory for the stipulated compensation of six dollars a week and board and lodging in her home. It was held that the evidence was sufficient to justify submission to the jury of the question whether she freed him from her parental custody and control. The opinion in the case does not purport to state all the evidence upon which the finding of emancipation was sustained. The record contains some showing that [242] the mother not only gave her son his earnings, but that she told him that he might go to work and "take care of himself," and do what he wanted to, and that he assented thereto.

When we consider that complete emancipation involves an absolute destruction of the filial relation, it is quite clear that it should not be inferred from the fact alone that the parent gives the child the right to hire out and collect and disburse his earnings. It is matter of common knowledge that, in very many, if not most, cases where such right is given to minor children living at home there is no thought of destruction of the filial relation.

We think a gift to the son of his wages has about the same bearing upon the liability of the parent for necessities that a gift of any other money would have. If it is sufficient to supply the son with all necessities, he may not pledge his parents' credit and the parents are not chargeable therewith. If it is not sufficient, the parents remain liable for any necessities which the wages are not sufficient to supply. This is the substance of the rule of many cases where recovery has been sustained against a parent for necessities furnished to a minor child, notwithstanding such minor has been given his earnings. *Porter v. Powell*, 79 Ia. 151, 155, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L.R.A. 176; *Cooper v. McNamara*, 92 Ia. 243, 60 N. W. 522; *DeWane v. Hansow*, 56 Ill. App. 575; *Hunycutt v. Thompson*, 159 N. C. 29, 74 S. E. 628, 40 L.R.A.(N.S.) 488, Ann. Cas. 1913E 928. See also *Swain v. Tyler*, 26 Vt. 9. We have not attempted to harmon-

ize all the cases bearing upon this question. Some contain language not consistent with this decision. *Giovagnoli v. Ft. Orange Constr. Co.* 148 App. Div. 489, 133 N. Y. S. 92; *Johnson v. Gibson*, 4 E. D. Smith (N. Y.) 231. Some even hold that a parent is under no obligation to support his minor children. *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499; *Raymond v. Loyl*, 10 Barb. (N. Y.) 483; *Gordon v. Potter*, 17 Vt. 348. The principles we have stated appear to us just, and are, we believe, well sustained by authority.

Our conclusion is that there is ample evidence of an implied contract on the part of these defendants to pay for plaintiff's services, and that the defense of emancipation is not made out. We do not consider the case one where we can order judgment for the plaintiff notwithstanding the verdict, and new trial must be granted.

[243] 3. For purposes of a new trial, reference should be made to another portion of the charge. During the trial defendants made persistent effort to elicit from plaintiff some evidence that he was in fact employed by the Union Depot Company and that he looked to that company for payment. The attempt as such proof wholly failed. Nevertheless, the court instructed the jury as follows:

"There has been some testimony here on the part of the defendants that the plaintiff looked to the Union Depot Company for the payment of the bill, which plaintiff denies. But if you find that the plaintiff in the first instance attempted to collect his bill from the Depot Company, that he looked to them for the payment of the same, that he considered the Depot Company responsible for the payment of the bill, he could not hold the defendants liable, then in that case your verdict will be for the defendants."

There was no evidence as to any of these matters. By giving this instruction, the court submitted to the jury an issue upon which there was no evidence. This was error. *Reed v. Lammel*, 40 Minn. 397, 42 N. W. 202; *Rugland v. Tollefsen*, 53 Minn. 267, 55 N. W. 123; *Van Doren v. Wright*, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22; *Anderson v. Wormser*, 129 Minn. 8, 151 N. W. 423.

Order reversed and new trial granted.

NOTE.

Sufficiency of Evidence to Show Emancipation of Infant.

General Rule, 585.

Application of Rule, 586.

Limitation of Rule, 588.

General Rule.

The sufficiency of the evidence to show the emancipation of an infant must be deter-

mined largely on the peculiar facts and circumstances of each case; but as a general rule the fact that an infant has contracted a relation which is inconsistent with the idea of his being in a subordinate situation in his parent's family is sufficient evidence to warrant the finding of an emancipation.

United States.—Thompson v. Chicago, etc. R. Co. 104 Fed. 845; Swift v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L.R.A.(N.S.) 1161.

Alabama.—Donegan v. Davis, 66 Ala. 362.

California.—Lackman v. Wood, 25 Cal. 147.

Delaware.—Farrell v. Farrell, 3 Houst. 633.

Indiana.—Robinson v. Hathaway, 150 Ind. 679, 50 N. E. 883. See also Wright v. Dean, 79 Ind. 407.

Iowa.—Jacobs v. Jacobs, 130 Ia. 10, 104 N. W. 489, 114 Am. St. Rep. 402.

Kansas.—Longhofer v. Herbel, 83 Kan. 278, 111 Pac. 483.

Kentucky.—Mauck v. Southern R. Co. 148 Ky. 122, 146 S. W. 28; Chesapeake, etc. R. Co. v. De Atley, 151 Ky. 109, 151 S. W. 363; Louisville, etc. R. Co. v. Davis, 105 S. W. 455, 32 Ky. L. Rep. 306; Rounds v. McDaniel, 133 Ky. 669, 19 Ann. Cas. 326, 118 S. W. 956, 134 Am. St. Rep. 482.

Maine.—Portland v. New Gloucester, 16 Me. 427; Dennysville v. Trescott, 30 Me. 470; Carthage v. Canton, 97 Me. 473, 54 Atl. 1104.

Massachusetts.—Wodell v. Coggeshall, 2 Metc. 89, 35 Am. Dec. 391; Whiting v. Earle, 3 Pick. 201, 15 Am. Dec. 207; Jenny v. Alden, 12 Mass. 375; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; McCarthy v. Boston, etc. R. Corp. 148 Mass. 550, 20 N. E. 182, 2 L.R.A. 608.

Michigan.—Sword v. Keith, 31 Mich. 247; Fox v. Schumann, 191 Mich. 331, 158 N. W. 168.

Missouri.—Dierker v. Hess, 54 Mo. 246; McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728.

New Jersey.—Berla v. Meisel, 52 Atl. 999.

New York.—Canovar v. Cooper, 3 Barb. 115; Giovagnoli v. Ft. Orange Constr. Co. 148 App. Div. 489, 133 N. Y. S. 92.

North Carolina.—Ingram v. Southern R. Co. 152 N. C. 762, 67 S. E. 926; Lowrie v. Oxendine, 153 N. C. 267, 69 S. E. 131; Holland v. Hartley, 171 N. C. 376, 88 S. E. 507.

Ohio.—Geringer v. Heinlein, 11 Ohio Dec. (Reprint) 787, 29 Wkly. L. Bul. 339, 6 Ohio Dec. 26.

Oklahoma.—Webb v. Harris, 32 Okla. 491, Ann. Cas. 1914A 602, 121 Pac. 1082.

Pennsylvania.—McCloskey v. Cyphert, 27 Pa. St. 220.

Rhode Island.—Pardey v. American Ship Windlass Co. 19 R. I. 461, 34 Atl. 737.

Texas.—Granrud v. Rea, 24 Tex. Civ. App. 299, 59 S. W. 841; Gulf Cooperage Co. v.

Abernathy, 54 Tex. Civ. App. 137, 116 S. W. 869.

West Virginia.—Halliday v. Miller, 29 W. Va. 424, 1 S. E. 821, 6 Am. St. Rep. 653; Weese v. Yokum, 82 W. Va. 550, 59 S. E. 514.

The emancipation of a minor is not presumed but must be proved, and the burden of proof is on the parent claiming it. Lowell v. Newport, 66 Me. 78; Searsmont v. Thorndike, 77 Me. 504, 1 Atl. 448; Wallace v. Cox, 136 Tenn. 69, 188 S. W. 611, L.R.A.1917B 690.

A litigant cannot testify to the conclusion that he has been emancipated when the result of a suit depends on the direct issue of emancipation. That fact must be proved by competent evidence. George Adams, etc. Co. v. Cook, 82 Neb. 684, 118 N. W. 662. See also Lisbon v. Lyman, 49 N. H. 553.

For the purpose of determining whether a parent has renounced all parental obligations to his infant "it is frequently of the greatest importance to ascertain the subsequent conduct of the parent and child, as this may throw great light upon the intention of the parent at the time of the claimed emancipation." Carthage v. Canton, 97 Me. 473, 54 Atl. 1104.

Where the question whether an infant has been emancipated depends on circumstances and on inferences about which intelligent persons may honestly differ, it is a question of fact which should be determined by the jury. Jackson v. Citizens' Bank, etc. Co. 53 Fla. 265, 44 So. 516; Haugh, etc. Iron-Works v. Duncan, 2 Ind. App. 264, 28 N. E. 334; Kubic v. Zemke, 105 Ia. 269, 74 N. W. 748; Bristol v. Chicago, etc. R. Co. 128 Ia. 479, 104 N. W. 487; Lewis v. Missouri, etc. R. Co. 82 Kan. 351, 108 Pac. 95; Fox v. Schumann, 191 Mich. 331, 158 N. W. 168; Taubert v. Taubert, 103 Minn. 247, 114 N. W. 763; Brosius v. Barker, 154 Mo. App. 657, 136 S. W. 18; Nicolaus v. Synder, 56 Neb. 531, 76 N. W. 1083; Delaware County Nat. Bank v. Headley (Pa.) 4 Atl. 464.

Application of Rule.

In Chesapeake, etc. R. Co. v. De Atley, 151 Ky. 109, 151 S. W. 363, an action by a parent for injuries sustained by his minor son who was employed by the defendant, it appeared that the parent having knowledge of the employment neither made any effort to reclaim his son's services nor did anything to indicate that he desired to exert any further parental control over him. The court said: "This course of conduct on the part of the father amounted to an implied, if not an express, emancipation of his son. A father who voluntarily permits his grown son to work for himself in a neighboring county, and who knows where his son

is employed, or at least knows that he is employed, can easily ascertain the character of his employment, and who permits him to remain away from home more than a year without making any effort to control his conduct or his employment, and the son receives and spends his own wages, in short, acts in all respects as if he had reached his majority the father cannot, when the son receives some injury, assert claim of parental authority and recover from the employer of the son compensation."

In *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101, it was said: "Where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle, but that of slavery, which will continue his rights to receive the earnings of the child's labor. Thus, if the father should refuse to support a son, should deny him a home, and force him to labor abroad for his own living,—or should give or sell him his time, as is sometimes done in the country (although this latter practice is certainly questionable, as to any promise made in consideration of it),—the law will imply an emancipation of the son; and, although it will not enable him to contract to his prejudice, it will give him the benefit of such contracts as are made with him for his services; and a payment made to the son, in such circumstances, will be a good discharge of such contract."

In *Canovar v. Cooper*, 3 Barb. (N. Y.) 116, an action by a minor for services performed by him for the defendant, the evidence adduced showed the plaintiff was in the habit of working for others and receiving the pay himself without his parent's objection and that his father had been absent for several years leaving his son to shift for himself. It was held that emancipation might be presumed. The court said: "The reason why parents are entitled to the services of their minor children, usually given, is that which I have already mentioned—the liability to support them. But in my opinion a much stronger reason, and one much more consonant with the feelings and obligations of parent and child, is, that it gives the parent the control over the actions of his children when they are incapable of judging for themselves, and thus has a tendency to save them from the effects of idleness or imprudence. But when a parent, from confidence in his minor child, or, as is sometimes, although I hope not often, the case, from indifference as to his welfare, allows the child to manage for himself, and to obtain his support from his own industry, the reasons for the rule fail, and the rule falls with them. The conclusion to which the referees in this cause came, that the par-

ent had in effect manumitted the plaintiff, was one of fact, and, in our opinion, was warranted by the evidence."

In *Swift v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L.R.A.(N.S.) 1161, it appeared that a father had wilfully abandoned his family when his son was nine years of age and thus obliged the son to obtain employment and assist in the support of himself and his sister. In an action for injuries resulting in the death of the minor son, it was held that no other conclusion was permissible under the evidence than that there had been an emancipation of the son, and that the father had forfeited the right which otherwise he would have had to the son's services and earnings during his minority.

In an action for damages by a parent for loss of services of his minor son in consequence of injuries received by him and caused by the defendant's negligence, where the evidence disclosed that the plaintiff had driven his infant son from the house and turned him on the world to shift for himself, the court in affirming a judgment for the defendant held that the father had forfeited his rights by his acts; that his conduct was sufficient to justify a conclusion that he had emancipated his infant son, and his contention that in his own mind he did not intend to emancipate him would not avail him. *McCarthy v. Boston, etc. R. Corp.* 148 Mass. 550, 20 N. E. 182, 2 L.R.A. 608.

In *Dierker v. Hess*, 54 Mo. 246, the action was by a creditor of the parent who levied on property part of which was claimed by the infant son. Evidence was submitted that the parent had given his son the privilege of appropriating his earnings to his own use, that the son devoted those earnings to the purchase of some of the property which was the basis of the litigation, and that the son always claimed and the parent always recognized the property as belonging to his son. The jury found that emancipation had taken place. On appeal by the creditor on the ground that emancipation to be effective must be complete and notorious, and not evidenced by occasional manifestations, the court in discussing the question said: "The doctrine contended for by appellant's counsel is, although supported by several authorities, peculiarly abhorrent to my mind. It is not necessary that the father, in order to give his minor son the privilege of receiving the fruits of his own labor, should proclaim that fact from the housetops, or accompany it by some token or ceremonial, as open and as odious as that which formerly attended the manumission of a slave; nor is it necessary to accomplish that end, that the son should cease to be a member of his father's family; that the dearest domestic ties should be rudely sundered, and he

driven like some alien and outcast from beneath the paternal roof. The fact, that the father has thus relinquished his claims to the son's earnings, may be established either by direct evidence or be implied from circumstances; and, where such relinquishment has been bona fide effectuated, it does not lie in the power of some prowling creditor to wrest from the son the gains he has achieved by honest industry, under the specious and covetous pretext that the property belongs to the father." To the same effect see *Jenney v. Alden*, 12 Mass. 375; *McCloskey v. Cyphert*, 27 Pa. St. 220.

An emancipation of the infant is not the less effectual because he remains under his father's roof. A disruption of the family is not necessary. The failure to turn the child out of doors does not render the mutual renunciation any less effectual; and so where the children contract for, collect and use their own earnings, a home purchased therewith in the parent's name cannot be subjected to levy by a creditor of the parent, as emancipation will be inferred. *Donegan v. Davis*, 66 Ala. 362; *Gerlinger v. Heinlein*, 11 Ohio Dec. (Reprint) 787, 29 Wkly. Law Bul. 339, 6 Ohio Dec. 26. But see *Godfrey v. Hays*, 6 Ala. 501, 41 Am. Dec. 58 (*infra*.)

Where a minor was employed by a railroad company with the knowledge of his parent who merely received a portion of the son's wages, it was held to be a practical manumission of him; and in an action by the parent against the railroad company for the loss of his son's services, the latter having been injured in his employment, the court said that the foregoing facts were sufficient to warrant a peremptory instruction for the defendant at the close of plaintiff's evidence. *Louisville, etc. R. Co. v. Davis*, 105 S. W. 455, 32 Ky. L. Rep. 306. To the same effect see *Mauck v. Southern R. Co.* 148 Ky. 122, 146 S. W. 28.

In *Bristol v. Chicago, etc. R. Co.* 128 Ia. 479, 104 N. W. 487, an action by a parent to recover the value of horses killed in transportation, wherein the plaintiff's minor son claimed some of the horses as his own, having purchased them with his own earnings, the court said: "The son was nearly of age. He had been allowed to work and collect wages as his own, and with them to purchase these horses. He had used them in farming on his own account. The father's oversight doubtless was exercised in the paternal spirit for the protection of the son's interest, and not because of any claim to the property or the earnings of the son with or without its use. True, the plaintiff's answers are not as definite as they might have been concerning his intention, for he refers to the horses as belonging to his son, and yet repeatedly states somewhat equivocally that he allowed him to claim them. But the names of

both were attached to the shipping contract, and the son handled them as his own property. We think the evidence such that the issue as to whether the son had been emancipated with respect to his earnings and acquired this property as his own should have been submitted to the jury."

In an action by a person after he had attained his majority for services rendered during a brief period of his minority, the court said in *Nicolaus v. Synder*, 56 Neb. 531, 76 N. W. 1083: "There was evidence from which it is claimed the jury might have concluded that plaintiff was specially authorized by his mother to collect wages for these particular services, and perhaps some others named, but there was no general emancipation. . . . The question presented by the proofs on this point was narrowed down to the claim that there was special leave given plaintiff, who was then in his eighteenth year, to hire himself to the defendant and from him to collect his wages. The stepfather is not shown to have done otherwise than to acquiesce in this arrangement, and whether the evidence warranted a finding of the existence of such authority was a question of fact to be determined by the jury, provided there was evidence from which different persons might draw different conclusions."

In *Kubic v. Zemke*, 105 Ia. 269, 74 N. W. 748, the evidence adduced as to the issue of emancipation was that the infant lived with his father for a short time when he was fifteen years old, during which time he worked for his father, and thereafter left without giving any reason for doing so, except that he did not want to stay. It was held, the action being against the parent for necessities furnished to the infant, that it was error for the trial court to direct a verdict for the plaintiff, the question of emancipation being for the jury. See also *Ream v. Watkins*, 27 Mo. 516, 72 Am. Dec. 283.

Where it appeared that a minor was employed by a firm of which his father was a member and treated in all respects similar to all other employees, receiving his wages which his parent permitted him to invest, it was held that the facts were ample to submit to the jury on the issue of emancipation. *Delaware County Nat. Bank v. Headley* (Pa.) 4 Atl. 464. To the same effect see *Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567.

Limitation of Rule.

Emancipation, however, is not to be implied from the mere fact that an infant is under the temporary control of a person other than the parent. *Rex v. Twambrookes*, 3 T. R. (Eng.) 355; *Rex v. Woburn*, 8 T. R. (Eng.) 479; *Dunks v. Grey*, 3 Fed. 862; *Farrar v. Wheeler*, 145 Fed. 482, 75 C. C. A. 386; In re

Reff, 205 Fed. 406; Godfrey v. Hays, 6 Ala. 501, 41 Am. Dec. 58; Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115, 8 L.R.A.(N.S.) 1098. Torrington v. Norwich, 21 Conn. 543; Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788; Lockerby v. O'Gara Coal Co. 147 Ill. App. 311; Porter v. Powell, 79 Ia. 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L.R.A. 176; Interstate Coal Co. v. Trivett, 155 Ky. 795, 160 S. W. 731; Sumner v. Sebec, 3 Greenl. (Me.) 223; Clinton v. York, 26 Me. 167; Searsmont v. Thorndike, 77 Me. 504, 1 Atl. 448; Stiles v. Granville, 6 Cush. (Mass.) 458; Hardy v. Eagle, 25 Misc. 471, 54 N. Y. S. 1045, affirming 23 Misc. 441, 51 N. Y. S. 501; Daniel v. Atlantic Coast Line R. Co. 171 N. C. 23, 86 S. E. 174; U. S. v. Mertz, 2 Watts (Pa.) 406; Blivin v. Wheeler, 25 R. I. 313, 55 Atl. 760; Wallace v. Cox, 136 Tenn. 69, 188 S. W. 611, L.R.A.1917B 690. And see the reported case.

In Porter v. Powell, 79 Ia. 151, 44 N. W. 295, 18 Am. St. Rep. 353, 7 L.R.A. 176, an action by a physician for services rendered to an infant daughter who had left home and remained away for three years, contracted for, earned and controlled her own wages, with her parent's consent, and while thus absent was taken sick and at her request was treated by the plaintiff, it was held that while the infant was emancipated from the duty of service to the parent, there was no such emancipation as would release the latter from liability for necessities furnished to her. The court said: "In our view, there was, at most, but a partial emancipation—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control and support. There was no such an emancipation as exempted the father from liability for actual necessities furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease, or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessities furnished to her. As already stated, what are necessities must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to any one who did furnish it in his absence." Under similar circumstances the court said

in Wallace v. Cox, 136 Tenn. 69, 188 S. W. 611, L.R.A.1917B 690: "'Emancipation' of a child is the relinquishment by the parent of control and authority over the child, conferring on him the right to his earnings and terminating the parent's legal duty to support the child. It may be express, as by voluntary agreement of parent and child, or implied from such acts and conduct as import consent; it may be conditional or absolute, complete or partial. . . . The emancipation of a minor is not to be presumed, and must be proved; and the burden of proof is on the father claiming immunity because of it. . . . In our opinion defendant Cox did not successfully carry that burden. Any emancipation indicated by the proof was limited or partial, not general or complete. The effort of the daughter to earn her own support was praiseworthy and tended to lift a burden that rested on the father himself, and the courts should be slow to permit the fact to become a shield for his protection, at least where a full emancipation is not shown. The restoration of the daughter in consequence of the surgical operation was itself beneficial to the father, since it gave the daughter ability to further relieve him, unless we are to assume to his and the law's discredit that he no longer owed the duty to receive and provide for her as an invalid in his home." See also Brosius v. Barker, 154 Mo. App. 657, 136 S. W. 18.

It has been said that the fact that a minor daughter is away from home for temporary employment, leaving part of her personal effects at home, even though she receives wages for her labor for her own use, is not so uncommon an occurrence as to authorize an inference of such a change in the parental and filial ties as to constitute emancipation. Searsmont v. Thorndike, 77 Me. 504, 1 Atl. 448. And so the mere fact that a parent makes weekly payments of five dollars to his child does not constitute emancipation and will not exempt him from liability for necessities furnished to the child. Hardy v. Eagle, 25 Misc. 471, 54 N. Y. S. 1045, 23 Misc. 441, 51 N. Y. S. 501.

The employment of a minor son by his parent, the son paying a small portion of his salary to his mother for board but living with his father as a member of his family, has been held to be insufficient to show such emancipation as would entitle the son to prove his claim for unpaid wages against his father's estate in bankruptcy. In re Reff, 205 Fed. 406. But under similar circumstances it has been held that the evidence was sufficient to warrant the submission of the question of the infant son's emancipation to the jury. Jackson v. Citizens' Bank, etc. Co. 53 Fla. 265, 44 So. 516.

In *Smith v. Gilbert*, 80 Ark. 525, 98 S. W. 115, 8 L.R.A. (N.S.) 1098, which was an action by a parent for his son's services, an instruction that the parent, by offering his minor son a share in the crop that he might raise on the farm, waived his right to claim the earnings of the son under a subsequent hiring to the defendant without the parent's consent, was held to be erroneous, the court declaring that the offer of a parent to give his child a part or all of his earnings, while working for him, does not operate as an emancipation of the child.

As to the effect of an agreement between a parent and his infant son that the latter might leave the services of his parent, appropriate his earnings and be free from parental control, the court said in *Torrington v. Norwich*, 21 Conn. 543: "Whatever might be the effect of such an agreement, as between the son on the one part, and the parent, or another person, on the other, respecting the personal right of the son to retain or recover his earnings, in his own name, and for his own benefit, it does not release a child from the authority and control of the parent, nor the parent from the duty of maintaining and protecting the child. It neither destroys nor impairs the previous subordinate relation which the child sustained towards the parent, as a member of the family. The duties and legal relations of minor children and their parents towards each other are imposed by the law, not merely in accordance with the mutual obligation, but from considerations of high public policy and the general welfare of the community; and cannot be divested or varied by any private agreement between them."

In *Rex v. Woburn*, 8 T. R. (Eng.) 479, the question arose whether a pauper took a derivative settlement through his father in view of the fact that the son had entered the army as a drummer, the parent receiving his pay and the infant living with him as part of his family. It was held that no emancipation had taken place so as to deprive the son of the father's settlement.

In *Clinton v. York*, 26 Me. 167, it was held that there was no emancipation though it appeared that the infant lived away from home, and there was evidence that the parent stated that he would not have her at his house, whereupon she left and went to live with a brother. To the same effect, see *Sumner v. Sebec*, 3 Greenl. (Me.) 223.

In *Godfrey v. Hays*, 6 Ala. 501, 41 Am. Dec. 58, it appeared that a parent entered into an agreement with his minor son, then living with him, that he would give him a slave in consideration of his performing certain work for him. The work was done and the slave was conveyed to him. It was held that the facts did not constitute evidence of

an emancipation, and that the slave so conveyed could be taken on execution in an action by a creditor of the parent.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

v.

CELLA.

Connecticut Supreme Court of Errors—
October 8, 1914.

88 Conn. 515; 91 Atl. 972.

Evidence — Hearsay — Ancient Transaction.

In an action by a railroad company to recover possession of land condemned by it in 1833, in which defendant claimed that the company had abandoned its easement therein, conveyances of the land and distributions of it as a part of the estates of deceased owners, most of which were made more than thirty years prior to the trial, and none of which recognized any title in the railroad company, are admissible to prove possession by those claiming under the former owner, since a party will be required, and within the limits of sound reasoning permitted, to present the best and fullest case within his power to offer, and where the fact in question comes from a time beyond living memory placed at thirty years, there is an exception to the rule rejecting hearsay evidence allowed in cases of ancient possession and in favor of the admission of ancient documents in support thereof.

Easements — Forfeiture — Nonuser.

Mere nonuser and lapse of time do not constitute abandonment of an easement, but abandonment may be inferred from circumstances or presumed from long-continued neglect, and lapse of time and nonuser are competent evidence of an intent to abandon, and entitled to great weight when considered with other circumstances.

[See note at end of this case.]

Same.

In an action by a railroad company to recover possession of land condemned in 1833, the evidence is held to be sufficient, in connection with the company's long-continued neglect, to assert any claim to the party to support a finding that it had abandoned its rights.

[See note at end of this case.]

Adverse User — Notice — Admissibility of Evidence.

In an action by a railroad company to recover possession of land condemned by it in which defendant claimed that the company had abandoned its easement, a letter written by the company by a person acting for the then owner of the property offering it for sale to the company is admissible in connec-

tion with the company's reply asking for a sketch of the property to show notice to the company that a third party was then claiming the property.

Evidence — Presumptions — Authority to Answer Letter.

Where a letter was addressed to the land agent of a railroad company and was answered the following day by a person assuming to act for the company, it should be presumed that the answer was made by one whose duty it was to act in the matter until the contrary appeared.

Appeal and Error — Necessity of Objection Below — Secondary Evidence.

An alleged error in admitting in evidence the contents of a letter, the loss of which it was claimed was not sufficiently proved, cannot be reviewed where the finding did not disclose that any claim was made in the trial court as to the insufficiency of the proof of loss, since, had such claim been made, other evidence would undoubtedly have been required.

Improvements — Recovery by Occupying Claimant — Pleading.

Where, in a suit to recover the possession of land condemned by a railroad company, defendant in addition to pleading an abandonment of the railroad company's easement also made claim for improvements made upon the property in good faith, believing that he had an absolute title, evidence as to the length of time that defendant was engaged in constructing a building on the property and the amount expended in its erection is admissible under the claim for improvements.

Appeal from Superior Court, New London county: CURTIS, Judge.

Action of ejectment. New York, New Haven and Hartford Railroad Company, plaintiff, and Louis Cella, defendant. Judgment for defendant. Plaintiff appeals. **AFFIRMED.**

[516] The land in controversy, with the buildings thereon, is situated in the village of Pawcatuck, in the town of Stonington, county of New London, and is bounded northerly by West Broad Street, easterly by Mechanic Street, and southerly and westerly by the railroad tracks and abutments of a bridge belonging to the plaintiff company.

The plaintiff alleged in its complaint that this land was a portion of its right of way which had been condemned for railroad purposes.

The defendant's answer, in addition to a general denial, contained two special defenses: first, that he and his predecessors in title had acquired title to the property by adverse user; second, that if any right of entry and possession ever belonged to the plaintiff, it had abandoned it. The defendant, pursuant to § 4052 of the General Stat-

utes, also claimed to recover for improvements he had made in good faith upon the property before the commencement of this action, believing that he had an absolute title to the property.

The Superior Court found for the defendant upon the question of adverse user and abandonment.

The finding states that the New York and Stonington Railroad Company (the plaintiff's predecessor in title) in 1833 condemned for railroad purposes a strip of land six rods in width through property then belonging to Thomas Noyes in the town of Stonington; that in addition to the strip six rods in width, the railroad company also took from Thomas Noyes a strip of land two rods wide adjoining the six-rod strip on the east. This two-rod strip was taken in order to give an outlet to West Broad Street from the property of one S. Dickinson, lying southerly of the Noyes tract, which, without this driftway, so-called, would be isolated by the [517] railroad embankment. This driftway later became the westerly part of Mechanic Street, a public highway now paralleling the railroad embankment. This land was purchased by Thomas Noyes in 1800.

The condemnation proceedings were completed on November 11th, 1833, by the acceptance by Thomas Noyes at the amount of the award of the commissioners in the condemnation proceedings and the giving by him of a receipt.

At the time of the condemnation, a small blacksmith shop stood on a portion of the land of Noyes so condemned, at the north-easterly corner thereof fronting on West Broad street, and also on the driftway when it was laid out.

The distribution of the estate of Thomas Noyes, after reciting that his death occurred on the 17th day of March, 1844, stated that he "died intestate, seized and possessed of divers parcels and pieces of real estate." Of this real estate it appears from the distribution that there was set to Henry Noyes, son of the deceased, the following: one lot with a blacksmith shop standing thereon, bounded northerly and easterly by the highways and southerly and westerly by the railroad abutment. This same land was distributed in 1850 to Phebe N. Wells, a sister of Henry Noyes, then deceased, at an appraised valuation of \$200.

In 1870 Phebe N. Wells, the distributee mentioned in the preceding paragraph, for the consideration of \$800, conveyed this property to Giles H. Wilcox by warranty deed, which deed contained the usual covenants of warranty and seisin. The real estate so conveyed was described precisely as set forth in the preceding paragraph.

On October 1st, 1877, James E. Sisson, as administrator of the estate of Giles H. Wilcox, conveyed this same land to Margaret A. Dickens. On December 6th, [518] 1879, Margaret A. Dickens conveyed it to the Mechanics Savings Bank. In November, 1889, the savings bank quitclaimed its interest in this same property to James Carley for the consideration of \$500. The same consideration appears in a deed for the property given by James Carley to Thomas Crowley in December, 1899. On April 10th, 1903, John H. Ryan, as administrator of the estate of Thomas Crowley, conveyed this same property to William H. Talmadge. The consideration expressed in this deed is \$1,071. Talmadge conveyed to the defendant in August, 1907, by warranty deed. The same description of the land in controversy appears in all the distributions and conveyances referred to in the preceding paragraphs.

The blacksmith shop as used on this land was replaced by a store which was used until 1908, when it was torn down and a modern store building and dwelling was then erected thereon by the defendant, Cella.

The occupation of this part of the *locus in quo* after the same was condemned and taken as aforesaid, was under the claim of Thomas Noyes and his successors in title, who were the owners of the fee. The present location of the Cella building is substantially the same as the blacksmith shop as used by Giles H. Wilcox.

The plaintiff constructed a wing-wall, when the abutment was built on West Broad Street, which wing-wall was so constructed as to clearly exclude the *locus in quo* from the land of the plaintiff.

Cella was notified of the plaintiff's claim before he began to erect his building hereinbefore referred to.

The first abutments for a bridge were constructed for a single track road in 1835. These abutments were rebuilt in 1871, when they were changed from the original location. The land in controversy will be required for use by the railroad company if it shall four-track its road, as it contemplates doing.

[519] "There was room and space sufficient between the blacksmith shop and the abutments and wing-wall for the railroad company to enter and make all repairs and do all construction which it became necessary at any time to do until the present building was erected up to and against the wing-wall."

Several plans and maps, used upon the trial of the case in the Superior Court, were made a part of the finding and were used upon the argument of the case before this court. Additional facts so far as necessary are stated in the opinion.

Hadlai A. Hull and Frank L. McGuire for appellant.

Abel P. Tanner and Herbert W. Rathbun for appellee.

ROBABACK, J.—The plaintiff excepts to certain facts found by the court. Among them are several which have an important bearing upon the plaintiff's case. It has been found that, after the condemnation of the Thomas Noyes land by the railroad company in 1833, he continued in possession of the small parcel of land with the shop upon it; that the present location of the Cella building is substantially the same location as the blacksmith shop; that the occupation of it after it was so condemned was under the claim of Thomas Noyes and his successors in title; and that the defendant and predecessors in title have used and enjoyed this property adversely since 1800.

It is urged that these facts are found without any evidence to support them. Under certain well-known principles of law this difficulty of making proof receives constant recognition by the court. The actor in any case will be required and, within the limits of sound [520] reasoning, permitted, to present to the court the best and fullest case that it is within his power to offer. In this respect the element of remoteness is an important one. It follows that where the fact in question comes to the tribunal from a time beyond living memory, placed at thirty years, there is an exception to the rule rejecting hearsay evidence, allowed in cases of ancient possession, and in favor of the admission of ancient documents in support of it. 2 Chamberlayne on Evidence, § 1195, and cases cited in notes 1 and 5, pages 1515 and 1516; 1 Greenleaf on Evidence (12th Ed.) p. 163. Ancient documents are admissible to prove ancient possession. They are evidence of acts of ownership and of facts tending to prove ownership, and, in many cases involving ancient possession, they are the only evidence that the nature of the case permits. *Merwin v. Morris*, 71 Conn. 555, 573, 575, 42 Atl. 855. In *Foote v. Brown*, 81 Conn. 218, 70 Atl. 699, where the ownership and possession of land was the subject of discussion, this court said (p. 225): "A mere paper chain of title in the plaintiff does not establish his ownership of the land, unless his possession or that of his grantors is shown. But evidence of actual possession is unnecessary if the jury is satisfied, by documentary or other evidence, of ownership by the plaintiff's predecessors in title, since title thus established draws with it possession in the absence of any evidence to the contrary." See also 1 Wharton on Evidence (3d Ed.) § 194; *Boston v. Richardson*, 105 Mass. 351, 371.

It is noticeable that most of the transfers of this property, by deed and by distribution, were made more than thirty years prior to the trial of the case in the Superior Court. This state of facts amply justified the admission of this class of evidence as ancient documents, and the recitals made therein are admissible against the plaintiff.

[521] The fact to be established was one of possession. The trial court has fairly found that the town records of the town of Stonington showed clear title to the *locus in quo* in the defendant by an ancient line of conveyances commencing with the deed of Thomas Noyes in 1800. In this connection it is of importance to notice that the distribution of his real estate, made in 1844, recited that he died "seized and possessed" of this identical property. These conveyances defined the defendant's interest in the property; they were admissible to prove possession. They were evidence of acts of ownership and of facts to prove such ownership.

It appears that during all these years this property had a substantial market value. In 1850 the distributors of Henry Noyes' estate appraised the property at \$200. Twenty years later Phebe N. Wells, the distributee of the estate of Henry Noyes, by warranty deed conveyed this parcel of land, with a blacksmith shop standing thereon, for a consideration, as expressed in the deed, of \$800. None of these conveyances recognized any title in the property in the railroad company or companies. The user was open and of such a character as to give notice of the extent of it to the plaintiff company and others engaged in the operation and maintenance of the railroad. It was under claim of right, manifested by the deeds, recitals therein, and the records thereof. *Parker v. Hotchkiss*, 25 Conn. 321; *New London Water Com'rs v. Perry*, 69 Conn. 461, 468, 37 Atl. 1059; *Williams v. Wadsworth*, 51 Conn. 277.

An examination of the land and probate records would have shown a clear title to the property in the predecessors in title of Cella. The railroad company's map of its layout, in the Secretary of State's office in Hartford, would not have furnished any satisfactory information as to the railroad company's right to this [522] strip of land, as this exhibit was merely a map with a center line determined by courses.

At least three witnesses testified that the location of the defendant's business block is upon the same ground as that of the old blacksmith shop. These witnesses also described the changes which had taken place in the structures upon this land in later years.

The reasons of appeal are numerous. There are several which involve the action of the trial court in finding that the plaintiff and its predecessors in title abandoned the *locus*

in quo. This case was before us at the October term, 1912, when the judgment rendered upon a former trial was set aside. See 86 Conn. 275, 85 Atl. 521. In the opinion after it was written at that time the word "not," in the twelfth line from the bottom of page 279, was inadvertently omitted. The opinion when it was written read, as it should now read, that "mere nonuser and lapse of time, unaccompanied by any other evidence showing an intention to abandon, may not be enough to constitute abandonment." It is almost unnecessary to call attention to this inadvertence, as the meaning of the court was too plain to be mistaken, and the general tenor of the opinion such that no one could be or has been misled by this omission. The law is, as the plaintiff contends, that "mere nonuser and lapse of time" is not enough to constitute abandonment. But abandonment may be inferred from circumstances, or may be presumed from long continued neglect. *Derby v. Alling*, 40 Conn. 410, 436; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, 173; *New York, etc. R. Co. v. Cella*, 86 Conn. 275, 279, 85 Atl. 521. Lapse of time and nonuser are competent evidence of an intent to abandon, and as such may be entitled to great weight when considered with other circumstances. *Derby v. Alling*, 40 Conn. 410, 436.

[523] The plaintiff contended, however, that there was no evidence to warrant a finding of such abandonment. The most important facts relating to this question were as follows: In 1833, when the land was condemned, and for a great many years thereafter, the railroad company had no use for it as a right of way. A wing-wall was so constructed as to clearly exclude this strip of land from the land of the plaintiff. In 1906 a letter was addressed to the plaintiff company which contained the following: "Stonington, February 20th, 1906. To the Land Agent, New York, New Haven and Hartford Railroad Company, New Haven, Conn. Dear Sir:—As a representative of William H. Talmadge, who is the owner of the property adjoining the railroad in Pawcatuck, I take the liberty to write you relative thereto. Mr. Talmadge has decided to sell the same and asked me to dispose of it for him for \$1,500, with no intention to deviate from that price. The place is rented to Arthur R. Riley a plumber and he in turn sublets part of it to a shoemaker and the place brings in a rental of \$12.50 per month. I spoke to a real estate agent in Pawcatuck to put a sign on it offering the place for sale and after I did so, it occurred to me that if the railroad company four-tracked its system it would be another piece of property that it should own and perhaps it would be just as well for me to write and see what you think of it. After this

town voted for license last fall I was offered a rental of \$70.00 per month for it, but Mr. Talmadge would not have a saloon there under any consideration. I have no doubt if other parties buy the place the company would want it in order to widen their road and for that reason I believe it would be policy to acquaint the company's representative before going further into the sale of it. In the meantime if I have an opportunity to dispose of it and in justice to the owner I shall do so. Very respectfully, John H. Ryan."

[524] This letter was answered the following day requesting a sketch of the property. This was furnished. Later in 1906 another letter was written to the railroad company relating to the same subject-matter, and the company replied that it was not interested in any land upon that side of the railroad.

In 1907 the defendant, before making a purchase of the property, ascertained that the land records of the town of Stonington showed a perfect title in its prospective grantor. He had no notice of an existing easement, but was informed at this time that the plaintiff made no claim to any land upon that side of the railroad.

In a letter to the defendant, Cella, in 1909, the plaintiff, through its attorneys, stated to the defendant: "We are informed that you are making some improvements and expending money on the building owned by you, located on New York, New Haven and Hartford railroad property, at the corner of Mechanic Street and West Broad Street, in the village of Pawcatuck. The railroad company have use for this property now, and you will be obliged to remove your building. While the railroad company did not have actual use for the property they seem to have no objection to your building remaining on the ground, but now they will be obliged to use the ground, and they will have to ask you to remove your building. We are writing to you to save you any useless expense in repairing this building. Very respectfully, Hull, McGuire & Hull."

For over seventy-five years the claim now made had been discarded, and it is quite clear that it would never have been revived except for the possibility of increasing the track facilities of the plaintiff's road. During that time the defendant and others, through whom he claims, obtained title to this property without any notice whatever [525] of an existing right to use this land for railroad purposes.

Such long continued neglect, with the other evidence presented by the defendant in support of his contention as to adverse user, was sufficient to justify the conclusion of the trial court as to abandonment. In Washburn on Easements (3d ed.) p. 661, the author says:

"The owner of an easement may destroy his right to the same by actually abandoning the right as well as the enjoyment, especially if a third party become interested in the servient estate after such act of abandonment; and it would operate unjustly upon him if the exercise of the easement were resumed in favor of the dominant estate." See also *Westcott v. New York, etc. R. Co.* 152 Mass. 465-468, 25 N. E. 840; *Bicknell v. New York, etc. R. Co.* 161 Mass. 428-430, 37 N. E. 378; *Snell v. Levitt*, 110 N. Y. 595, 603, 18 N. E. 370, 1 L.R.A. 414.

An examination of the record fails to disclose that any material fact has been found without evidence; the finding therefore must stand.

Some of the errors assigned relate to certain evidential facts which the court incorporated in the finding and which the plaintiff now claims are legally inconsistent with the ultimate conclusions of the court as to adverse possession and abandonment. It appears from the finding that there was always room on the *locus* for the railroad company to do all it had occasion to do in constructing and repairing its wing-walls and abutments, without interfering with the blacksmith shop or old building. The trial court has also found that the present building is constructed against the wing-wall and shuts off all access to it. The changes in the location of the abutments at different times, the location of the blacksmith shop and of the Cella building, in connection with other facts of which there was evidence, show that [526] the finding is not materially inconsistent with the conclusiveness of the court upon the controlling questions in issue. A construction most favorable to the plaintiff upon this point would not be sufficient to substantiate its claim that it was entitled to claim possession of the entire lot in question. The evidence and claims of the plaintiff in this connection simply refer to a small strip of land back of the conceded location of the old blacksmith shop, which land it is said the railroad company could have used if it desired for the purpose of repairing or reconstructing its abutments and wing-walls. Neither the width nor length of this narrow piece of land is ascertainable from the pleadings, evidence, or finding, by means of which this small portion of the Cella lot might be identified or described if the plaintiff should now be allowed to recover possession of it.

The receipt of the letter of February 20th, 1906, from Ryan to the land agent of the defendant company, was acknowledged by a communication which reads as follows: "February 21, 1906. Dictated by A. C. Mr. John H. Ryan, Stonington, Conn. Dear Sir:—Yours of the 20th inst., offering for sale property owned by William H. Talmage, at

Pawcatuck, has been received and if you will send me a sketch showing the property with relation to the railroad, we will look into the matter. Yours truly, _____, Commissioner."

There was no error in admitting Ryan's letter in connection with the plaintiff's reply thereto. *Beach v. Travelers' Ins. Co.* 73 Conn. 118, 120, 46 Atl. 867; *Hoggson, etc. Mfg. Co. v. Sears*, 77 Conn. 587, 594, 60 Atl. 133. The trial court properly overruled the plaintiff's claim that "it does not appear that it was addressed to anybody authorized in any way to waive or give away the rights of the plaintiff." This letter was addressed to the land agent of the New York, New [527] Haven and Hartford Railroad Company, and answered the day following by one assuming to act for the company. It should be presumed that this answer was made by one whose duty it was to act in this matter, until the contrary appears. *State v. Main*, 69 Conn. 123, 140, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L.R.A. 623; 16 Cyc. pp. 1076, 1078. This letter tended to show that notice had been given to the railroad company that a third party was claiming the property at that time. For this purpose only it was properly received in evidence.

In its brief the plaintiff contends that the court erred in admitting evidence as to the contents of a letter said to have been lost, upon the ground that the loss of the letter had not been sufficiently proved. The finding does not disclose that this claim was made before the trial court. Had this claim been made at that time, undoubtedly further evidence would have been required upon that subject.

The defendant, against the objection of the plaintiff, was allowed to testify as to the length of time that he was engaged in the construction of the building upon this property, also that he had expended about \$5,000 in the erection of the same. This evidence was plainly admissible under the issue raised upon the defendant's claim for improvements made upon the property before the commencement of this action.

There is no error.

In this opinion the other judges concurred.

NOTE.

Forfeiture of Easement of Right of Way by Nonuse.

General Rule, 595.

Exceptions to Rule:

In General, 597.

Adverse User, 598.

General Rule.

As a general rule the mere nonuse of a right of way will not entail a forfeiture of the easement unless it is accompanied by some

unequivocal act destroying the purpose of its creation or the means of its enjoyment, or an intention to abandon it is otherwise plainly manifested.

England.—*Lovell v. Smith*, 3 C. B. N. S. 120, 91 E. C. L. 120; *Reg. v. Chorley*, 12 Q. B. 515, 64 E. C. L. 515. See also *Metropolitan R. Co. v. Great Western R. Co.* 82 L. T. N. S. 451, 64 J. P. 472; *Young v. Star Omnibus Co.* 86 L. T. N. S. 41.

Canada.—*Brooklebank v. Colwill*, 8 Ont. W. Rep. 231. See also *Jones v. Tuckersmith* Tp. 33 Ont. L. Rep. 634, 23 Dominion L. Rep. 569, 8 Ont. W. N. 344.

United States.—*Townsend v. Michigan Cent. R. Co.* 101 Fed. 757, 42 C. C. A. 570.

Alabama.—See *Buck v. Louisville, etc. R. Co.* 169 Ala. 29, 33, 53 So. 1008.

Arkansas.—*Memphis, etc. R. Co. v. Humphreys*, 65 Ark. 631 mem. 48 S. W. 86.

California.—*Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690; *People v. Southern Pac. Co.* 172 Cal. 692, 158 Pac. 177; *Pitcairn v. Harkness*, 10 Cal. App. 295, 101 Pac. 809.

District of Columbia.—*Brunthaver v. Talty*, 31 App. Cas. 134.

Illinois.—*Stannard v. Aurora, etc. R. Co.* 220 Ill. 469, 77 N. E. 254; *Golconda Northern Ry. v. Gulf Lines Connecting R. Co.* 265 Ill. 194, Ann. Cas. 1916A 833, 106 N. E. 818. See also *Durfee v. Peoria, etc. R. Co.* 140 Ill. 435, 30 N. E. 686; *Lyman v. Suburban R. Co.* 190 Ill. 320, 60 N. E. 515, 52 L.R.A. 645; *Hofherr v. Mede*, 226 Ill. 320, 80 N. E. 893; *Bornstein v. Berliner*, 170 Ill. App. 519.

Indiana.—*Cleveland, etc. R. Co. v. Griswold*, 51 Ind. App. 497, 97 N. E. 1030.

Iowa.—*Barlow v. Chicago, etc. R. Co.* 29 Ia. 276; *McClain v. Chicago, etc. R. Co.* 90 Ia. 646, 57 N. W. 594. See also *Morgan v. Des Moines Union R. Co.* 113 Ia. 561, 85 N. W. 902.

Kansas.—*Edgerton v. McMullan*, 55 Kan. 90, 39 Pac. 1021.

Kentucky.—*Johnson v. Clark*, 57 S. W. 474, 22 Ky. L. Rep. 418. See also *Crigler v. Newman*, 91 S. W. 706, 29 Ky. L. Rep. 27.

Maine.—*Tabbutt v. Grant*, 94 Me. 371, 47 Atl. 899.

Maryland.—See *Vogler v. Geiss*, 51 Md. 407.

Massachusetts.—*Pope v. Devereux*, 5 Gray 409; *Hayford v. Spokesfield*, 100 Mass. 491; *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3; *King v. Murphy*, 140 Mass. 254, 4 N. E. 566; *Enfield Mfg. Co. v. Ward*, 190 Mass. 314, 76 N. E. 1053; *New York Cent. etc. R. Co. v. Chelsea*, 213 Mass. 40, 99 N. E. 455; *Parsons v. New York, etc. R. Co.* 216 Mass. 269, 103 N. E. 693; *Burnham v. Mahoney*, 222 Mass. 524, 111 N. E. 396. See also *Emerson v. Wiley*, 10 Pick. 310.

Michigan.—*Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342; *Murphy Chair Co.*

v. American Radiator Co. 172 Mich. 14, 137 N. W. 791.

Minnesota.—*Norton v. Duluth Transfer R. Co.* 129 Minn. 126, Ann. Cas. 1916E 760, 151 N. W. 907.

Missouri.—*Scarritt v. Kansas City, etc. R. Co.* 148 Mo. 676, 50 S. W. 905; *Dulce Realty Co. v. Staed Realty Co.* 245 Mo. 417, 151 S. W. 415; *Hatton v. Kansas City, etc. R. Co.* 253 Mo. 660, 162 S. W. 227; *Missouri Pac. R. Co. v. Bradbury*, 106 Mo. App. 450, 79 S. W. 966. See also *Kansas City, etc. R. Co. v. Kansas City, etc. R. Co.* 129 Mo. 62, 31 S. W. 451.

Nebraska.—See *Moll v. Hagerbaumer*, 98 Neb. 555, 153 N. W. 560.

New Jersey.—*Manning v. Port Reading R. Co.* 54 N. J. Eq. 46, 33 Atl. 802.

New York.—*Miller v. Garlock*, 8 Barb. 153; *Corning v. Gould*, 16 Wend. 531; *Suydam v. Dunton*, 84 Hun 506, 32 N. Y. S. 333; *Conabeer v. New York Cent. etc. R. Co.* 156 N. Y. 474, 51 N. E. 402; *Porter v. International Bridge Co.* 200 N. Y. 234, 21 Ann. Cas. 684, 93 N. E. 716, *modifying* 131 App. Div. 921, 115 N. Y. S. 1141; *Valentine v. Schreiber*, 3 App. Div. 235, 38 N. Y. S. 417; *Delaware, etc. R. Co. v. Oswego*, 92 App. Div. 551, 86 N. Y. S. 1027; *Heughes v. Galusha Stove Co.* 133 App. Div. 814, 118 N. Y. S. 109; *Norris v. Hoffman*, 62 Misc. 385, 115 N. Y. S. 890, *affirmed* 133 App. Div. 596, 118 N. Y. S. 156, *order affirmed* 197 N. Y. 578, 91 N. E. 1118. See also *Tyler v. Cooper*, 47 Hun 94, 16 N. Y. St. Rep. 545; *Lewisohn v. Lansing Co.* 51 Misc. 274, 100 N. Y. S. 1077; *Bauman v. Wagner*, 146 App. Div. 191, 130 N. Y. S. 1016.

North Carolina.—*Carolina Cent. R. Co. v. McCaskill*, 94 N. C. 746; *Beattie v. Carolina Cent. R. Co.* 108 N. C. 425, 12 S. E. 913.

Ohio.—See *Schaeffer v. Claudia*, 25 Ont. Cir. Ct. Rep. 249.

Pennsylvania.—*Hummel v. Cumberland Valley R. Co.* 175 Pa. St. 537, 34 Atl. 848. See also *Bombaugh v. Miller*, 82 Pa. St. 203.

Rhode Island.—*Johnson v. Stitt*, 21 R. I. 429, 44 Atl. 513; *Sweezy v. Vaillette*, 37 R. I. 51, 90 Atl. 1078.

South Carolina.—*Lorick v. Southern Ry.* 87 S. C. 71, 68 S. E. 931.

Tennessee.—*Clayton v. Wise*, 1 Tenn. Civ. App. 620; *Boyd v. Hunt*, 102 Tenn. 495, 52 S. W. 131.

Utah.—*Brown v. Oregon Short Line R. Co.* 36 Utah 257, 102 Pac. 740, 24 L.R.A. (N.S.) 86. See also *Tuttle v. Sowadzki*, 41 Utah 501, 126 Pac. 959.

Virginia.—*Oney v. West Buena-Vista Land Co.* 104 Va. 580, 52 S. E. 343, 113 Am. St. Rep. 1066, 2 L.R.A. (N.S.) 832.

Washington.—*McAdam v. Benson Logging, etc. Co.* 57 Wash. 407, 107 Pac. 187. And see the cases cited throughout this note.

Thus in *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3, the court said: "The facts that the highway was as convenient for the plaintiff as the old passageway, and that the plaintiff used it as a substitute, do not extinguish its right of way, unless it has intentionally abandoned its easement. These facts, if accompanied with the fact of an entire nonuser of the way, may be strong evidence of an abandonment by the plaintiff. But, unless there was an intention of abandonment, they do not operate in law to extinguish the right of way, whether acquired by grant or prescription."

In *Parsons v. New York, etc. R. Co.* 216 Mass. 269, 103 N. E. 693, holding that there was no evidence of an abandonment of an easement arising by express grant, the court said: "An easement created by deed is not defeated by mere nonuser. There must be in addition other acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence."

So in *Miller v. Garlock*, 8 Barb. (N. Y.) 153, it was said: "The mere nonuser of an easement even for twenty years will not necessarily raise a presumption of its extinguishment, unless there has been in the meantime some act done by the owner of the land charged with the easement, inconsistent with, or adverse to, the existence of the right. And in that case a release or extinguishment of the right will be presumed."

Likewise in *Reg. v. Chorley*, 12 Q. B. 515, 64 E. C. L. 515, the court said: "It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury."

In *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690, wherein it appeared that by a deed the grantors conveyed a strip of land thirty-five feet wide dividing the two parcels which according to the language used was and should continue to be, so far as their grantee and his successors were concerned, a street, the court said that the rights of the defendants, not having been acquired by enjoyment, but by deed, could not be lost by nonuser.

In *Conabeer v. New York Cent. R. Co.* 156 N. Y. 474, 51 N. E. 402, the court said: "Where one acquires a title by deed, it will not be affected by nonuser unless there is a loss of title in some of the ways recognized by law. Mere nonuser, however long continued, does not create an abandonment."

In *Brunthaver v. Talty*, 31 App. Cas. (D. C.) 134, it was said: "There is no way, in our opinion, in which an easement created

by grant can be extinguished by abandonment,—that is to say by nonuser,—unless there has been, in connection with acts inconsistent with the intent to use, some acquiescence in its obstruction by another for a reasonable period at least, or some representations that would work an estoppel.”

Likewise in *Memphis, etc. R. Co. v. Humphreys*, 65 Ark. 631, mem. 48 S. W. 86, it appeared that certain lands were granted to a railroad to be used for railroad purposes only, and to revert to the owners if they should at any time be abandoned and cease to be used for such purposes. During the Civil War, in 1863, the Federal army removed the track which was not relaid and replaced until 1873. After the close of the war, the company undertook to complete its unfinished road, and finding that a sand bar had formed across the front of the granted lands, so as to obstruct the ferriage necessary in the transportation of the railroad passengers across the river it procured iron, and laid it on the old track up the bank of the river, and, for the time being, ran its cars over it, still occupying the twenty acres for the purposes of the grant as far as practicable. After the entire road was completed, and the obstruction had been gotten out of the way, the iron was relaid on the track across the granted land, and it again became part of the main line of the road. Holding that there had never been an abandonment the court said: “The sole condition upon which a forfeiture might be claimed is the abandonment by the company of the tract of land granted and its use for railroad purposes; and the burden to show the abandonment is, of course, on the plaintiffs, admitting for the sake of argument that the condition itself, in the deed, is not void as creating a perpetuity. The agreed statement of facts does not show that the twenty acres were ever abandoned by the company, or have ever ceased to be used for railroad purposes, and for such purposes only. The only showing is that the track, which was removed by the Federal army, in 1863, was not relaid and replaced until 1873. This does not show an abandonment of the land, even for the roadbed purpose; since the delay in relaying the track is shown to be not unreasonable, under the circumstances. This essential fact of abandonment is not established by the proof in the case, and the plaintiffs therefore fail to show any right of action in themselves as against the defendant.”

In *Nichols v. Peck*, 70 Conn. 439, 39 Atl. 803, 66 Am. St. Rep. 122, 40 L.R.A. 81, it was held that a prescriptive right to a way over a farm was not extinguished by the fact that the owner of the prescriptive right used another way under an implied license from the owner of the farm. The court said: “The

disuse of the part which followed the change of the grade of the highway, arose from circumstances which exclude any inference of an intent to abandon that part, unless by exchanging it for another way, the right to which should be equally secured.” See also *Bowen v. Cooper*, 66 S. W. 601, 23 Ky. L. Rep. 2065; *Crounse v. Wemple*, 29 N. Y. 540.

Exceptions to Rule.

IN GENERAL.

While the mere nonuse of a right of way will not extinguish the easement, its nonuse for a long period of time with no intention of resuming it will work an extinguishment. *Denver, etc. R. Co. v. Mills*, 222 Fed. 481, 138 C. C. A. 77; *Gurdon, etc. R. Co. v. Vaught*, 97 Ark. 234, 133 S. W. 1019; *Home Real Estate Co. v. Los Angeles Pac. Co.* 163 Cal. 710, 126 Pac. 972; *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144; *McElwaney v. MacDiarmid*, 131 Ga. 97, 62 S. E. 20; *Marigny v. Pontchartrain R. Co.* 15 La. Ann. 427; *Browne v. Baltimore Methodist Episcopal Church*, 37 Md. 108; *Matter of Buffalo*, 65 Misc. 636, 120 N. Y. S. 611; *Blenis v. Utica Knitting Co.* 73 Misc. 61, 130 N. Y. S. 740. See also *Townsend v. Michigan Cent. R. Co.* 101 Fed. 757, 42 C. C. A. 570. Compare *Davidson v. Ellis*, 9 Cal. App. 145, 98 Pac. 254; *People v. Gloversville*, 128 App. Div. 44, 112 N. Y. S. 387.

Thus in *Gurdon, etc. R. Co. v. Vaught*, 97 Ark. 234, 133 S. W. 1019, the court said: “The question as to whether or not a railroad company has abandoned a right of way acquired by it is to a great extent one of intent; but such intention can be established by the acts of the company clearly indicating its purpose not to use such right of way and by long nonuser thereof.”

In *McElwaney v. MacDiarmid*, 131 Ga. 97, 62 S. E. 20, it appeared that an easement of a right of way was acquired by grant. The court said that the easement might be lost or forfeited by the owner without his “absolute refusal” to exercise his privileges thereunder and that it would cease to exist if there was an abandonment or nonuser for a term sufficient to raise the presumption of release or abandonment.

So in *Ford v. Harris*, 95 Ga. 97, 22 S. W. 144, holding that an easement over a right of way acquired by grant was not lost by mere lapse of time or nonuser unless it was expressly abandoned, the court said: “We do not, of course, mean to say that a right of this kind might not become stale by long lapse of time, or by nonuser under circumstances manifesting that the parties at interest had no intention ever to claim or use the right.” But in *Davidson v. Ellis*, 9 Cal.

App. 145, 98 Pac. 254, the court said, briefly: "The easement having been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the trial."

In *Pratt v. Sweetser*, 68 Me. 344, holding that a right of way was not necessarily lost by mere nonuser for twenty years, the court said: "The better doctrine seems to be that nonuser for the period mentioned is evidence of an intention to abandon; but it is open to explanation, and it may be controlled by evidence that the owner had no such intention while omitting to use it." See also *Cox v. Forrest*, 60 Md. 74; *Knock v. Knock*, 27 Can. Sup. Ct. 664.

In *Henderson v. Central Pass. R. Co.* 21 Fed 358, *appeal dismissed* 140 U. S. 683, 11 S. Ct. 1021, 35 U. S. (L. ed.) 597, the court said that the mere nonuser of a right of way, acquired by a railroad corporation, for ten years, without the consent of the state or city, should be sufficient evidence of abandonment, and should authorize the state to assume that fact, and grant the right to another.

In *Thompson v. Meyers*, 34 La. Ann. 615, the court said that as provided by the code a right of passage through an alley way was lost by nonuser during ten years.

In *Jones v. Meek*, 2 Hawaii 9, it was held that a nonuser of a right of way for five years raised the presumption of an abandonment and particularly so when the servient tenement passed into the hands of a purchaser who had no notice of the easement.

So in *McDowell v. Blue Ridge, etc. R. Co.* 144 N. C. 721, 57 S. E. 520, the court said that where land was conveyed as a railroad right of way with the condition attached that it should revert to the grantor if not used in five years, the grant was forfeited for such failure to use it.

Likewise in *Brown v. Stuart*, 90 Kan. 302, 133 Pac. 725, it was held that a long continued nonuser of a right of way was a breach of a condition in a deed providing that it should revert to the grantors if not used.

In *Tabbutt v. Grant*, 94 Me. 371, 47 Atl. 899, though the evidence in the case failed to show such an agreement, it was held that an agreement for a substitution of a right of way together with nonuser would extinguish the easement. The court said: "Of course, mere nonuser of a definite right of way for any period does not of itself extinguish the right. The defendant, however, contends that the evidence shows an executed agreement for a substitution of the new path, for the old one, by which the plaintiff acquired the right to use the new path, and in consideration thereof surrendered the right to use the old path. Such an agreement may be made by parol, and when executed,—when

in pursuance thereof the owner of the right of way begins to use the new path, and the owner of the servient estate shuts up the old path,—then the former acquires the right to use the new path and effectually releases the right to use the old path. Such an agreement can be shown by conduct as well as by words, but it must appear that there was an agreement. If the conduct of the parties fails to show that, it does not change their rights." See to the same effect *Pope v. Devereux*, 5 Gray (Mass.) 409.

In *Kirkland v. Pitman*, 122 Ga. 256, 50 S. E. 117, the court said that the duty to repair a right of way no doubt continued after the prescriptive right had been acquired, but on principle it would seem that, when the title vested, it would not be divested by neglect, but only by abandonment.

In *Kammerling v. Grover*, 9 Ind. App. 628, 36 N. E. 922, it was held that the nonuser of a right of way which had become obliterated would extinguish the easement, the purchaser not having notice of it.

In *Columbia Valley R. Co. v. Portland, etc. R. Co.* 162 Fed. 603, '89 C. C. A. 361, the court said that a right of way over public lands was forfeited where the railroad had not been constructed within five years in accordance with the statute.

ADVERSE USER.

While the mere nonuse of a right of way will not extinguish the easement, nonuse accompanied by an adverse possession of the servient tenement will extinguish it.

England.—*Ward v. Ward*, 7 Exch. 838. Compare *James v. Stevenson* [1893] A. C. 162.

Connecticut.—*New York, etc. R. Co. v. Cel-la*, 86 Conn. 275, 85 Atl. 521. And see the reported case.

Illinois.—*Swedish Evangelist Lutheran Church v. Jackson*, 229 Ill. 506, 82 N. E. 348.

Indiana.—*Baugh v. Arnold*, 123 Ind. 6, 91 Atl. 151; *Cleveland, etc. R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164.

Iowa.—See *Reed v. Gasser*, 130 Ia. 87, 106 N. W. 383.

Maine.—*Adams v. Hodgkins*, 109 Me. 361, 84 Atl. 530, 42 L.R.A.(N.S.) 741.

Massachusetts.—*New York, etc. R. Co. v. Benedict*, 169 Mass. 262, 47 N. E. 1027.

Michigan.—*Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791.

Missouri.—See *Roanoke Invest. Co. v. Kansas City, etc. R. Co.* 108 Mo. 50, 17 S. W. 1000.

New Jersey.—*Mason v. Ross*, 75 N. J. Eq. 136, 71 Atl. 141. See also *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474, 53 Atl. 699.

New York.—*Andrus v. National Sugar Refining Co.* 93 App. Div. 377, 87 N. Y. S.

122 Ark. 386.

671, *affirmed* 183 N. Y. 580, 76 N. E. 1088; *Rupperecht v. St. Mary's Roman Catholic Church Soc.* 131 App. Div. 564, 115 N. Y. S. 926, *affirmed* 198 N. Y. 576, 92 N. E. 1101; *Marshall v. Wenninger*, 20 Misc. 527, 46 N. Y. S. 670. See also *Brady v. Brady*, Judgmt. 31 Misc. 411, 65 N. Y. S. 621, *affirmed* 88 App. Div. 427, 65 N. Y. S. 621, 84 N. Y. S. 1119, *reversed* *Brady v. Smith*, 181 N. Y. 178, 2 Ann. Cas. 636, 73 N. E. 963, 106 Am. St. Rep. 531; *Stillman v. Olean*, 72 Misc. 196, 129 N. Y. S. 515.

North Carolina.—*May v. Atlantic Coast Line R. Co.* 151 N. C. 388, 66 S. E. 310.

Ohio.—*Tudor Boiler Mfg. Co. v. I. & E. Greenwald Co.* 26 Ohio Cir. Ct. Rep. 556.

Oregon.—See *Hoffman v. Dorris* (Ore.) 163 Pac. 972.

Pennsylvania.—*Richmond v. Bennett*, 205 Pa. St. 470, 55 Atl. 17; *Stuart v. Rosengarten*, 23 Pa. Dist. 548; *Twibill v. Lombard*, etc. Pass. R. Co. 3 Pa. Super. Ct. 487, 40 W. N. C. 134; *Weaver v. Getz*, 16 Pa. Super. Ct. 418, 18 Lane. L. Rev. 225; *Citizens' Electric Co. v. Davis*, 44 Pa. Super. Ct. 138; *Nickels v. Cornet Band*, 52 Pa. Super. Ct. 145, 151. See also *Hall v. McCaughy*, 51 Pa. St. 43.

Rhode Island.—See *Bochterle v. Saunders*, 36 R. I. 39, 88 Atl. 803.

South Carolina.—See *Cuthbert v. Lawton*, 3 McCord L. 194.

Thus in *Baugh v. Arnold*, 123 Md. 6, 91 Atl. 151, the court said that the law was established that the mere nonuser of an easement even for more than twenty years will not afford a conclusive evidence of abandonment, but such nonuser for a prescriptive period, united with an adverse use of the servient estate inconsistent with the existence of the easement, will extinguish it.

In *New York*, etc. R. Co. v. *Cella*, 86 Conn. 275, 85 Atl. 521, the court stated the rule as follows: "Mere nonuser and lapse of time, unaccompanied by any other evidence showing an intention to abandon, may be enough to constitute abandonment. Such facts are competent evidence of an intention to abandon, and, if united with an adverse user of the servient estate inconsistent with the existence of the easement, may extinguish it."

So in *Ward v. Ward*, 7 Exch. (Eng.) 838, the court said: "The presumption of abandonment cannot be made from the mere fact of nonuser. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The nonuser, therefore, must be the consequence of something which is adverse to the user."

Likewise in *Swedish Evangelist Lutheran Church v. Jackson*, 229 Ill. 506, 82 N. E. 348, it was said: "A complete nonuser of an

easement for twenty years, with possession in another that is inconsistent with or adverse to the right of such easement, will bar the easement."

In *Citizens' Electric Co. v. Davis*, 44 Pa. Super. Ct. 138, the court said: "Adverse occupancy for the statutory period must be added to nonuser by the dominant owner in order to extinguish the easement."

But in *James v. Stevenson* [1895] A. C. (Eng.) 162, it was held that the nonuser of a way coupled with the use of the land by the servient owner for agricultural purposes for many years when the way was not required was not sufficient evidence of abandonment to work a forfeiture.

MOORE ET AL.

v.

PAVING IMPROVEMENT DISTRICT.

Arkansas Supreme Court—January 31, 1916.

122 Ark. 326; 183 S. W. 766.

Taxation — Local Assessment — Fairness — Sufficiency of Evidence.

In a suit to set aside an assessment for paving purposes, the evidence is held to show that the assessment was made in good faith, and was a reasonable assessment of future benefits, and not a mere arbitrary apportionment of the costs.

Words and Phrases — Meaning of "Said."

Where the description of a zone of a paving district, which had referred to block 10, subsequently refers to said lot 10, "said" must be treated as "aforesaid," and the word "lot" as "block;" the error being a mere clerical one.

[See note at end of this case.]

Taxation — Local Assessment — Error in Description — Effect.

Where the description of an assessment district for paving shows that the word "second" is through clerical mistake omitted before the name of an addition, the addition being subject to identification and the omission a mere inadvertence, it will not invalidate the description.

Appeal from Miller Chancery Court: SHAWEE, Chancellor.

Action by Ralph G. Moore et al., plaintiffs, against Paving Improvement District No. 20 of Texarkana, defendant. Judgment for defendant. Plaintiffs appeal. **AFFIRMED.**

[327] This appeal is prosecuted from a decree establishing the validity of a paving improvement district in Texarkana, Arkansas.

The district includes practically all the improved part or area of said city and its validity was challenged because of an insufficient description of the boundaries thereof and because of the manner of assessment of benefits, it being alleged that the assessments were arbitrarily made upon a front foot basis and without regard to the value of the property and to whether the benefit assessed would be derived from the improvement.

The territory was divided into zones or districts by the assessors in consideration of the amount of assessment to be levied as benefits against each individual tract or piece of land. The assessors were men of long residence in the city and district and successful in their business affairs, as well as property holders therein. They were thoroughly familiar with the conditions existing, [328] had maps and plats of the entire city before them and the tax books of the county showing the assessed valuation of the different lots and parcels of land. They concluded that in the zone north of 9th street, the lots of the same dimension would be benefited practically in the same amount, the streets therein being all fifty feet in width, and adopted as a basis \$125 as benefit to each inside lot with \$150 as benefit to the corner lots and estimated the benefits to accrue to the improvements on each lot at from \$25 to \$125, according to the size and valuation of the houses. An additional amount was added to each lot as a benefit for putting in curb, where there was none. The property being more valuable south of 9th street and the streets nearly twice as wide, the benefits were increased to more than double the amount assessed against lots in the zone to the north, the basis for estimating benefits being there \$300 for inside lots and \$350 for corner lots, with \$25 to \$700 for improvements on the different lots, according to the size and value thereof. In the business district on Broad street and State Line Ave. the system, or house and lot basis of assessment, was abandoned largely and the benefits estimated in a gross sum because of the much greater value of the property and its location and use. This was the general plan adopted as a basis: for example, the pencil memorandum of assessments shows the assessment against three Sanderson lots on the outside edge of the district north of 9th street as follows: "Benefit to three lots \$325; benefits to the house on the lots, \$100—total \$425. Lots 2 and 3 are inside lots and upon a basis of \$125 each, the benefits to the two would be \$250. Lot One, the corner, if assessed at the general basis of \$150 per lot would have made the total amount of benefit assessed against the lots \$400, but said lot being on the edge of the district, and getting no benefit on the north side, and subject to be included in

another district, the value of the benefit to it was reduced half, making \$75, which added to \$250 made the total assessment of \$325.

[329] Mr. A. H. Whitmarsh, one of the assessors, testified that he was a manufacturer, and dealer in lumber, had resided in the district for twenty years, and was familiar with the property therein. They had several meetings of the Board, and never failed to have a meeting when assessing benefits. That the board viewed part of the property together during the time of assessing. That before they began work, they were shown an estimate by an engineer of the total cost of the improvement, which showed the character of the pavement to be put down in the district. That they had a map of the city, with the boundaries marked thereon, while the assessment was being made, and at one or two meetings, before any figures were made, the Board discussed the general proposition, and the best method of making the assessment. "We were trying to get the assessment fixed up in some way, and we got it about as near right as a set of men could do it. The method used, in our belief, was an equitable basis. We tried to make the assessment as fair as could be made, all the conditions considered."

T. S. Mullins, another assessor, stated that he was in the wholesale grocery business, that his company owned lots in the downtown district fronting on Front street, one block south of Broad street, which was the retail center of the city. Its property was in the wholesale district, that his residence was in the district, ten blocks from the business district, and he had resided in the district for fifteen years and was reasonably familiar with the property. That the assessors had ideas of their own about the respective values of the property assessed, but were not real estate men, and did not attempt to fix any particular values, having the county assessors values before them. "We tried to assess each division of a block, or lot, according to the benefits it would receive. We considered the property, and that the value would be enhanced the amount we assessed against each and every piece of property in town."

E. W. Frost testified that he lived within two blocks of the district, and that the assessors spent three or four [330] days in working out the assessments. "We commenced on the plan that we had to provide enough money to do the work, which was estimated to cost so much. We made the difference in values because there was a difference. We thought some of the lots and property worth more than lots differently located. We started in to make the assessment an amount sufficient to pay the bonds and interest, and in doing so, tried to proportion it so it would be as nearly equal as was possible for us to make

it. In making our assessments, we considered the question of benefits. We were trying to fix the assessments equal to the benefits to the particular piece of property. We understood the amount we fixed would be an assessment of benefits, and that was the basis we were working on." In answering the question whether he considered the improvement would enhance in value the particular property, or benefit it to the extent of the assessment, he said "I do not think I thought about enhancing the value of the property, it was just simply an improvement that was needed, and when it was done would be of that much benefit, if it was done properly and right. The property would be benefited by the improvement in the amount the owner had to pay."

There was other testimony tending to show a great disparity in the assessment of benefits made upon certain property in different zones of the district, market value of the particular property being considered, and also that the assessment of benefits against certain property could not be reasonably explained otherwise than that it was arbitrarily made upon a frontage or front foot basis.

M. E. Sanderson for appellants.

Frank S. Quinn for appellee.

[331] SMITH, J. (*after stating the facts*).

—It is contended that the assessment by the board of assessors was not an assessment of benefits to accrue to each lot and parcel of land by reason of the improvement, but only an arbitrary apportionment of the cost of the improvement upon the several lots in the district upon a frontage or front foot basis and without regard to the value of the land and to whether the making of the improvement would result in the amount of benefit assessed against it.

This objection is urged against the validity of the assessment as a whole, it being charged that the assessors acted arbitrarily, that the assessment made is [332] unfair, unjust, unequal, grossly inequitable and not uniform.

Each of the assessors testified delineating the purpose in mind at the time the assessment was levied and the methods pursued in reaching the result obtained. It is undisputed that each and all of them are successful business men of large experience, property owners in the district, two having resided therein from fifteen to twenty years and the other residing just outside the district near the northwest corner. They had before them during their deliberations, maps of the city, showing the boundaries of the district and the description of each lot and parcel of land therein, as well as a copy of the county assessment list showing the value for which the lands were assessed for taxes.

They did not pretend to know the actual market value of each tract of land, but were personally acquainted with each lot, the improvements thereon and conditions surrounding it. Their testimony shows that they had in mind and considered in levying the assessment of benefits against the particular tracts, all the elements that can be considered in estimating the value of lots and improvements.

It is true they divided the district into zones, and in the residential portion north of 9th street, where the streets were narrow and the houses not so valuable and the lots virtually of the same dimensions, estimated the benefits to accrue upon the lots of like size and condition in the same amount; that they divided the improvements thereon with which they were familiar, into certain classes, considering, in assessing the benefit against the land that it would result in a certain amount from the improvement thereon, estimated by ranging from \$25 to \$125, according to the kind and value of such improvement. They likewise estimated an additional benefit to such lots of \$6.00 for the cost of curbing, where none had already been put down.

In the zone south of 9th street, where the houses were much more valuable and the streets almost double the width of those to the north, a different basis of \$300 to [333] \$350 to the lots of like width and condition, with an estimate of from \$125 to \$700, in one instance, to accrue from the value of the improvements considered.

In the business district, a different system was adopted, the property being more valuable, likewise the improvements, and of an altogether different kind. Here they considered the location of the property, the use in which it was being employed and its value therefor and estimated the benefits in such manner as would in their opinion make it as nearly equitable, equal and uniform as could be arrived at in the judgment of business men of long experience and accurately and intimately acquainted with the property and conditions existing.

The assessment against the railroads, their lands and trackage, was made in a lump sum, it is true, but the assessors each testified that they were familiar with the lands south of Front and Broad streets, belonging to the railroad company, and the railroad tracks thereon and that in assessing the benefits they took into account the situation of the lands and tried to make the assessment equitable and equal, so far as the land was considered, to that on the opposite side of the street occupied by business houses.

They also took into consideration the value of the railroad tracks but not the franchise and they did not assess the benefits separately

of the different railways occupying the lands with their tracks, having made an assessment of the entire benefit to accrue to all of it and the railroads having agreed to the justice of the assessment and to an apportionment thereof between themselves, which was considered desirable by the assessors, who did not definitely know what particular improvement belonged to each of said companies.

It is also complained that a contract was made by the commissioners of the district with the railroad companies for the paving of Front street upon which their tracks are located and adjoining which, on the south, much of their property is situated, agreeing to credit the entire amount of the assessed benefits upon the contract [334] price for the pavement and that this was considered by the assessors in the making of the assessment of benefits as well as the fact that a franchise was also to be granted by the city to the railroads, for operation of tracks along Front street in consideration thereof. The assessors denied having taken these matters into consideration in assessing the benefits against the property of the railroads, or that the benefits assessed were in any way affected thereby.

While the assessors did not know the market value of all the particular pieces of property in the district, they knew the value in a general way, and that property in certain localities was much more valuable than that in others and all the elements going to make up such valuation and difference. This is nowhere disputed.

(1) It cannot be fairly said that the assessment of benefits was made arbitrarily and amounted to but an apportionment of the cost of the improvement made without regard to the value of the lands and the benefit to accrue from the improvement to be constructed. In *Kirst v. Street Imp. Dist.* No. 120, 86 Ark. 1, 109 S. W. 526, the court said: "The statute requires the board to assess the value of the benefits to accrue to each piece of property. . . . This means that the assessors shall, from their knowledge, experience, observation and judgment, make a fair and just estimate of the benefit which each particular piece of property will receive by reason of the improvement."

It is also well known and generally recognized that the assessment of future benefits is largely a matter of estimate and to some extent speculative, depending chiefly upon the opinions of men of sound judgment to determine what the future benefits will probably be, and it is recognized that it is impossible to find an exact standard for the measurement thereof in advance of the improvement constructed and the law does not require of the assessors the unattainable. *St. Louis,*

etc. R. Co. v. Ft. Smith, etc. Bridge Dist. 113 Ark. 493, 168 S. W. 1066.

The assessment made by the board may not have resulted in exact equality and fairness to every land [335] owner, but a great area with varying conditions and improvement was included in the district and as already said, it was not to be expected that some inequalities and injustice might not result which would be, and in many instances were in fact corrected, upon being called to the attention of the board and commissioners.

From the whole testimony considered in the light of the requirements of the law relating to the establishment of improvement districts, this court is not able to say that the findings of the chancellor are not sustained by the preponderance thereof.

(2-3) It was next alleged that the boundaries of the district were not sufficiently and definitely described and that it should have been adjudged void, because of such uncertainty. There is no claim made that the description of the district as petitioned for, organized, and as described in the publication of the ordinance establishing it varies in any way, the contention being only that its boundaries are not sufficiently defined in two particulars, as follows: After the description reaches the north boundary line of the northeast quarter of block 10, of Witherspoon's addition, it continues, "Thence south along the center of the alleys in block 9 and block 14 of Deutschman's third addition, and block 3 and block 6 of Kelley & Bramble's addition, to the north boundary line of the northeast quarter of block 10 of Witherspoon's addition to the city of Texarkana, Arkansas."

"Thence east along the north property line of the northeast quarter of said lot 10 of Witherspoon's addition and along the north property line of lot 12 in block 1 of H. A. Mann's addition to the center of the alley in said block 1 of H. A. Mann's addition."

"Thence south along the center of the alleys in block 1 and 2 of H. A. Mann's addition and through the alley in block 2 of Peek's addition to the center of Ninth street."

And further: "Thence south across Ninth street and through the alleys in block 16 and block 21 and block 37 and block 42 of the city of Texarkana, Arkansas, to [336] the center of the alley in block 1 of E. N. Maxwell's second addition to the said city of Texarkana, Arkansas;

"Thence east along the center of the alley in said E. N. Maxwell's second addition to a point opposite the east boundary line of lot 7, in block 1, of E. N. Maxwell's addition:

"Thence south along the said east boundary line of lot 7 in block 1, in E. N. Maxwell's second addition, and along the east boundary line of lot 2 in block 2 of said E. N. Maxwell's second addition to the center of the

alley in said block 2 of E. N. Maxwell's second addition."

It will be observed that in the middle paragraph of the first description, the line continues east along the north property line of the northeast quarter of said "lot 10" of Witherspoon's addition, instead of block 10 as was the fact and as sufficiently shown by the description.

In the first paragraph reaching the northeast quarter of block 10, the description refers to said lot instead of block and is apparently a clerical error when the whole description is read together.

It was further shown by comparison with the city map, that there is or was no lot 10 in Witherspoon's addition and the word "said" before "lot 10" refers necessarily to something already mentioned. It means aforesaid: before mentioned. 34 Cyc. 1825. It has also been defined as "A word of reference to what has been already spoken of or specified, and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things. Hinrichsen v. Hinrichsen, 172 Ill. 462, 465, 50 N. E. 135."

It is obvious from the description and the use of the word "said" that "block" was meant and intended to be used instead of "lot," the mistake being a clerical misprision.

(4) In the middle paragraph of the second part of the description above set out, it appears that the word "second" is omitted in the last line designating the addition. The boundary line as shown by the first paragraph, after reaching the center of the alley of block 1 of E. N. [337] Maxwell's second addition to the city of Texarkana, Arkansas, continues thence along the center of the alley in said E. N. Maxwell's second addition to a point opposite to the east boundary line of lot 7 in block 1 of E. N. Maxwell's addition, thence along the said east boundary line to lot 7 in block 1 in E. N. Maxwell's second addition, etc. There was in fact an E. N. Maxwell's addition to the city, but as shown a line could not run east along the center of the alley of block 1 in E. N. Maxwell's second addition to a point opposite the east boundary line of lot 7 in block 1 of E. N. Maxwell's addition, and it is apparent from the expressions used both before and after, that the word "second" was omitted by inadvertence from before the words E. N. Maxwell's addition in said paragraph, it being clearly apparent from the conditions existing and the description before and after that it was a clerical omission.

The circumstances all show unmistakably the intention to locate the line through the center of the alley in block 1 of E. N. Maxwell's second addition to the east boundary

line of lot 7 in said block 1 thereof and there was no such uncertainty about the description as to prevent the property intended to be included from being definitely and certainly ascertained. The description was sufficient to identify the lands included in the district and give notice to the owners of their assessments, and said owners could not have been misled by it into concluding that their lands were not so included.

We find no prejudicial error in the record and the judgment is affirmed.

NOTE.

Legal Meaning of "Said."

The word "said" has been defined briefly as being a word of reference, meaning "before mentioned," "previously mentioned," or the like. *State v. Greene*, 154 Ala. 249, 46 So. 268; *Kephart v. Buddecke*, 20 Colo. App. 551, 80 Pac. 501; *Com. v. Schweiters*, 122 Ky. 880, 93 S. W. 592; *In re Phelan*, 82 N. J. Eq. 316, 87 Atl. 625; *State v. Stevenson*, 68 Vt. 529, 35 Atl. 470. In *Wheeler, etc. Mfg. Co. v. Filer*, 52 N. J. Eq. 164, 28 Atl. 13, it was held that the term "said defendants" in a pleading could refer only to defendants previously named. In *Iowa College v. Fenno*, 67 Ia. 247, 25 N. W. 152, the word "said" was held to be a word of limitation whose office was to denote that the word limited by it meant the same as the previous word which was referred to by it.

The only controversy which seems to have developed with respect to the meaning of the word "said" concerns the rule of construction to be followed where there is more than one antecedent to which the word might be referred. The few authorities in point are not perfectly harmonious, but when the decisions are viewed in the light of the facts of each particular case, the conflict of opinion is more apparent than real. For instance, some courts have called to their aid a strict or grammatical rule of construction and have held that the word should be considered as referring to its last or immediate antecedent. It is indisputable, however, that no other reasonable construction of the word could have been adopted under the facts of those particular cases. The authorities so holding are as follows: *Hinrichsen v. Hinrichsen*, 172 Ill. 465, 50 N. E. 135; *Carver v. Carver*, 97 Ind. 497; *Temple v. State* (Ind.) 113 N. E. 233; *Ellis v. Horine*, 1 A. K. Marsh (Ky.) 417; *Garrett v. South Penn Oil Co.* 66 W. Va. 587, 66 S. E. 741. And see the reported case. See also *Wigmore v. Wigmore*, W. N. (Eng.) 72, 93; *Hall v. Warren*, 9 H. L. Cas. (Eng.) 420; *Esdaile v. Maclean*, 15 M. & W. (Eng.) 277, 16 L. J. Exch. 71; *Robert Portner Brewing Co. v. Southern Express Co.*

109 Va. 22. On the contrary, other courts have leaned to a more liberal rule of construction and have held, either directly or in effect, that "said" will not necessarily be considered as referring to its last antecedent, but will be referred to any antecedent plainly required by the sense or meaning of the instrument as a whole. But again it is indisputable that the latter courts could have reached no other conclusion in view of the facts of those particular cases. See the following cases: *Healy v. Healy*, Ir. R. 9 Eq. (Eng.) 418; *Peppercorn v. Peacock*, 3 M. & G. 356, 42 E. C. L. 192; *Rex v. Countesthorpe*, 2 B. & Ad. 487, 22 E. C. L. 128; *Gloss-Sheffield Steel, etc. Co. v. Dunn*, 9 Ala. App. 528, 63 So. 812; *Wilkinson v. State*, 10 Ind. 372; *People v. Burns*, 5 Mich. 114; *Brown v. State*, 28 Tex. App. 379, 13 S. W. 150. See also *Southern Mut. Ins. Co. v. Pike*, 34 La. Ann. 829; *Shattuck v. Balcom*, 170 Mass. 245, 49 N. E. 87; *Piper v. Boston, etc. R. Co.* 75 N. H. 435, 75 Atl. 1041.

In *Reg. v. Martin*, 9 C. & P. 215, 38 E. C. L. 87, it was held that while the word "said," as used in the second count of an indictment, was sufficient to identify a person mentioned in the first count, it did not incorporate into the second count the description of such person contained in the first count.

For authorities construing the word "said" according to the circumstances of each particular case and without reference to any particular rule of construction, see the following: *Reg. v. Eyre*, 7 El. & Bl. 619, 90 E. C. L. 619; *Dickason v. Foster*, 4 L. T. N. S. (Eng.) 628; *Lord v. Tyler*, 14 Pick. (Mass.) 156; *Palmer v. Evangelical Baptist Benev. etc. Soc.* 166 Mass. 143, 43 N. E. 1028; *Lyons v. Elston*, 211 Mass. 478, 98 N. E. 93; *State v. Omaha*, 39 Neb. 745, 58 N. W. 442; *Antipoeda Baptist Church v. Mulford*, 8 N. J. L. 182; *Haggerty v. Hockenberry*, 52 N. J. Eq. 354, 30 Atl. 88; *Trunkey v. Van Sant*, 176 N. Y. 543, 68 N. E. 946; *Byars v. Bennington, etc. R. Co.* 99 App. Div. 34, 90 N. Y. S. 736; *Matter of De Rycke*, 99 App. Div. 596, 91 N. Y. S. 159; *Kline v. German Union F. Ins. Co.* 147 App. Div. 790, 132 N. Y. S. 181; *Alexander v. Houghton*, 86 Tex. 702, 26 S. W. 937; *Moss v. State*, 47 Tex. Crim. 459, 11 Ann. Cas. 710, 83 S. W. 829.

BROWN

v.

STATE.

Washington Supreme Court—August 20, 1915.

87 Wash. 44; 151 Pac. 81.

Wills — Nuncupative Will — Attempt to Make Formal Will.

The evidence, in a proceeding for the probate of an alleged nuncupative will, is held to show that decedent's intention was to make a written will, which fact was not changed by the failure of his attempt to make a written will because of defective attestation.

[See note at end of this case.]

Same.

To sustain a will as a nuncupative will, it must be proved that decedent, while uttering the words offered as a will, had a present testamentary intention, and that he intended that the very words, then uttered, and no others, should constitute his will; if he gives instructions for a will which is subsequently to be drawn up and executed in writing, and it is not done, or if he gives oral directions which are taken down in the form of a will, which he fails to execute as a formal written will because of his death before he can do so, the writing cannot be sustained as a nuncupative will.

[See note at end of this case.]

Nuncupative Wills Not Favored.

Nuncupative wills are not favored in law, because of the great opportunities for fraud and perjury attending the probating of such wills.

Attempt to Make Formal Will as Nuncupative Will.

Under Rem. & Bal. Code, § 1330, providing that no nuncupative will shall be good when the estate bequeathed exceeds the value of \$200, unless proved by two witnesses present at the making thereof, unless there is proof that testator, when pronouncing it, bade some person present to bear witness that it was his will, and unless it was made at the last sickness and at the dwelling house of decedent or where he had been residing for ten days or more, it is not only necessary that decedent should intend to make a will, but he must intend to make an oral will, and words spoken at the time of the signing of a writing actually intended by decedent as a written will, and reduced to writing by witnesses and filed in court, do not constitute a nuncupative will.

[See note at end of this case.]

Appeal from Superior Court, Ferry county: PENDERGAST, Judge.

Probate proceeding. John Brown, propo-
nent, and State of Washington, claimant.

Probate denied. Proponent appeals. The facts are stated in the opinion. **AFFIRMED.**

G. V. Alexander for appellant.
T. E. Skaggs for respondent.

[45] PARKER, J.—This is an appeal by John Brown from an order of the superior court for Ferry county, denying probate of an alleged nuncupative will claimed by him, as proponent, to have been made by C. T. Warren, late of that county. The state of Washington is respondent in this case because of the fact that it claims the property left by the deceased, by escheat.

On the 15th day of March, 1914, C. T. Warren signed a writing, the whole of which, together with the witnessing thereof, reads as follows:

"The Last Will and Testament of Charles T. Warren.

"Dated at Keller, Washington, this 15th day of Mar. 1914.

"In case of death, I wish to bequeath my property and money as follows:

"To Mrs. Belle Cody, One Thousand Dollars (\$1,000), and lots 11 and 12 Block 35, and all improvements on same, situated in Harlinda.

"To John Brown, lots 1 and 7, block 47, in the town of Harlinda, and I also wish to give John Brown all my county warrants and notes, and what money is left after paying expenses.

"I hereby appoint John Cody executor of this will without bonds. C. T. WARREN.
"Witness, I. J. Dickinson."

Thereafter, on the first day of April, 1914, C. T. Warren died. Thereafter, on the 14th day of May, 1914, this writing being apparently conceded by all parties interested to be defective as a written will because of its defective attestation by witnesses, as required by Rem. & Bal. Code, § 1320 (P. C. 409, § 29), John Cody and J. C. Cody, who were present when deceased signed the writing and were acquainted with the facts and circumstances attending its signing by deceased, reduced to writing their signed statement purporting to embody an oral testamentary disposition by the deceased [46] of his property, made at the same time he signed this paper, which it is insisted is in legal effect a nuncupative will.

For present purposes we shall assume that, on the 15th day of March, when the deceased signed this writing and when he is claimed to have made a nuncupative will, he was in his last sickness and then attempted to make a will, being prompted so to do under a sense of impending death. In other words, that he was then in such con-

dition physically and mentally that he could have made a valid nuncupative will. However, we desire to have before us as we proceed, the fact that while he was very sick and threatened with early death on that day, he thereafter revived to such an extent that, for a few days before his death, he was sitting up and walking around unattended by a nurse, the nurse theretofore attending him having been discharged. It is also to be noted that he retained his mental faculties unimpaired up to almost the last moment of his life, that is, for a period of about fifteen days following his attempted making of a will.

John Cody testified for appellant with the view of establishing a nuncupative will, as follows:

"I reside in the county of Ferry, state of Washington, and have been over the age of sixty years during all of the times herein mentioned, I knew C. T. Warren, now deceased, on the 15th day of March, 1914, the date of the instrument now shown to me, marked as filed in this court on the 28th day of April, 1914, purporting to be the last will and testament of said C. T. Warren, now deceased.

"The said instrument was signed and executed by the said C. T. Warren, now deceased, at Harlinda (Keller Postoffice) in the county of Ferry and state of Washington, on the said 15th day of March, 1914, the day it bears date, in the presence of myself and in the presence of J. C. Cody, and I. J. Dickinson; and the said C. T. Warren, on said date, thereupon published the said instrument as, and declared the same to be his last will and testament, and requested said I. J. Dickinson, in attestation thereof, to subscribe his name as witness thereto, and the said I. J. Dickinson did, then and [47] there in the presence of said C. T. Warren, now deceased, and in the presence of myself and said J. C. Cody, subscribe his name as witness to said instrument.

"At the time of executing said instrument, to wit, on the 15th day of March, 1914, the said C. T. Warren, now deceased, was then over the age of twenty-one years, to wit, of the age of sixty-four years, or thereabouts, and was of sound and disposing mind and not acting under duress, menace, fraud, undue influence or misrepresentation.

"At the time said C. T. Warren executed said instrument, on said 15th day of March, 1914, the said C. T. Warren, in addition to asking said I. J. Dickinson to attest the same, and to subscribe his name as witness thereto, also bid myself and the said J. C. Cody to bear witness that such was his wish, desire and will. I further state that such written instrument, so signed by said C. T. Warren in the presence of myself and in the

presence of said J. C. Cody and said I. J. Dickinson, was made at the dwelling-house of said C. T. Warren in the town of Harlinda in the county of Ferry and state of Washington, when the said C. T. Warren was then and there in his last sickness and in expectation of death on account of said sickness; that I was then and there well acquainted with said C. T. Warren, and said J. C. Cody and I. J. Dickinson, and also well acquainted with John Brown and W. L. Murphy, who were also then and there present at the residence of said C. T. Warren; that another paper or will, being the nuncupative will of said C. T. Warren, now deceased, now shown to me, and marked as filed in this court on this 14th day of May, 1914, and which states that it was reduced to writing by myself and J. C. Cody, was so reduced to writing by us, and fully, truthfully and fairly sets forth the wishes, desire and will of said C. T. Warren, concerning the disposition of his property, as the said Warren, or testator, pronounced the same on said 15th day of March, 1914, and that all the statements so made in said nuncupative will are true, and were by said testator so pronounced at the time and in the manner set forth in said nuncupative will, by said C. T. Warren, or testator, to myself and said J. C. Cody, who had been bidden by said Warren, or testator, to bear witness that such was his will and wish in disposing of his property."

[48] J. C. Cody and I. J. Dickinson, the only other witnesses, testified in substance the same. The claimed nuncupative will here referred to by the witnesses purports to dispose of the property of the deceased exactly as the writing signed by him as a written will. This claimed nuncupative will is in fact nothing but an oral expression of deceased, of the same purport as the language of the instrument signed as a written will, which oral expression was made at the same time.

It would be difficult, indeed, to view these facts otherwise than as evidencing an intention on the part of the deceased to make a written will on March 15, 1914. The paper then signed by him purports upon its face to be his "last Will and Testament," and by the testimony of the witnesses here relied upon, referring to that paper: "C. T. Warren on said date thereupon published the said instrument as, and declared the same to be, his last will and testament." It seems plain to us that deceased intended to make a written will; and the fact that his attempt to make a written will failed because of defective attestation does not change the fact of that intent. Now his claimed intention to make an oral or nuncupative will, and the making of such a will, according to the contention of appellant, occurred, if at all, at

the same time that he signed this writing as his written will. Just how this manifest intent to make a written will can be harmonized with his claimed intent to make an oral will at the same time is indeed difficult for us to comprehend.

Section 1330, Rem. & Bal. Code, provides:

"No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return."

[49] In 1 Underhill, Law of Wills, § 168, it is said:

"A nuncupative will is defined by the early writers, 'as when a man lieth languishing for fear of sudden death, dareth not to set the writing of testament, and therefore he prayeth his curate and others to bear witness to his last will, and declareth by word, that is his last will.'"

And at § 174 the learned author further observes:

"It must be proved that the deceased, while uttering the words offered as a will, had a *present testamentary intention*, and that he intended that the *very words then uttered*, and no others, should constitute his will. If he gives instructions for a will which is subsequently to be drawn up and executed in writing, and it is not done; or if he gives oral directions which are taken down in the form of a will, which he fails to execute as a formal written will because of his death, unconsciousness or delirium coming on before he can do so, the writing cannot be sustained as a nuncupative will."

It has been many times said by the courts, in substance, that nuncupative wills are not favored in law; the reason apparently being the same as that which prompted the enactment of restrictive statutes like ours, which exist in most states touching the manner and the circumstances under which nuncupative wills may be made. That is because of the great opportunity for fraud and perjury attending the probating of such wills. All of the reasons calling for the enactment and enforcement of statutes of fraud are present here. This court in *In re Miller*, 47 Wash. 253, 14 Ann. Cas. 1163, 91 Pac. 967, 125 Am. St. Rep. 904, 13 L.R.A. (N.S.) 1092, expressed some views which may seem to look with more favor upon such wills than did the courts in some of the earlier decisions, in so

far as required proof touching the question of the last sickness of the deceased is concerned. In that decision, however, this court adheres to the rule that requires strict proof of the fact of the making of such a will.

A review of the decisions renders it plain that it is not only necessary that the deceased should intend to make a will, but that he should *intend to make an oral will*, as distinguished from a written will, before he will be held to have made a nuncupative will.

In *In re Wiley*, 187 Pa. St. 82, 40 Atl. 980, 67 Am. St. Rep. 569, the court said:

"Every one who undertakes to make a testamentary disposition of his property, must conform to the law regulating such disposition; and if he does not take care to do so, the law cannot uphold it. And in *Porter's Appeal*, 10 Pa. St. 254, it was held that the decedent must intend not only to make his will, but to make it in the form that it is presented for probate; that is, there as here, to make a nuncupative will. 'There ought therefore to be present in order to constitute a nuncupative will, not only the *animus testandi*, but the mind and intent to nuncupate.' It was accordingly held that, although the decedent declared his intentions to a scrivener who noted them in writing at the time and in the presence of decedent who called upon two persons present to witness that that was his will, yet it was not a valid nuncupative will because the testator had in contemplation a will to be put in writing."

In *Godfrey v. Smith*, 73 Neb. 756, 10 Ann. Cas. 1128, 103 N. W. 450, the court observed:

"It will be noted that this provision of the statute requires that the will be proved by the oath of at least three witnesses who were present at the making thereof, and that it be proved that the testator, at the time, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect. Under this provision of the statute it must be proved that the deceased, while uttering the words offered as a will, had not only a present testamentary intention, but also an intention to make an oral will, and that he intended that the words then uttered and no others should constitute his will. If he only gives instruction for a will that he desires to have reduced to writing, but fails to execute, the instructions cannot be sustained as a nuncupative will."

In *In re Hebden*, 20 N. J. Eq. 473, the court said:

"He must intend, at the time, that the verbal declaration so declared shall be his will. This is entirely inconsistent [51] with the position contended for, that unexecuted verbal instructions for a will, which are intended to be reduced to writing and signed, may be proved as a nuncupative will. The

very essence and substance of the matter is, that the testator shall intend the declaration so made to be his will."

In *Reese v. Hawthorn*, 10 Grat. (Va.) 548, the court made similar observations as follows:

"Certainly no case has been cited, nor do I think any can be found, which would justify us in extending the provisions of the statute to a case like this; when there was not only no purpose to make a nuncupative will, no want of opportunity to make a written one; but where a written will was solemnly and deliberately prepared, signed by the testatrix and subscribed by the witnesses, with all the forms which they supposed the law required to perfect it as a written will. To hold this a good nuncupation would be to obliterate most of the distinctions between written and verbal wills, and to open wide the door to the frauds which it was the object and purpose of our statute on wills to exclude."

See, also, *Dockum v. Robinson*, 26 N. H. 372; *Stamper v. Hooks*, 22 Ga. 603, 68 Am. Dec. 511; *Scales v. Thornton*, 118 Ga. 93, 44 S. E. 857; *Male's Case*, 49 N. J. Eq. 266, 24 Atl. 370; *Porter's Appeal*, 10 Pa. St. 254.

Our attention is especially called to *Baird v. Baird*, 70 Kan. 564, 3 Ann. Cas. 312, 79 Pac. 163, 68 L.R.A. 627, which was cited and quoted from with approval in the opinion of this court in *In re Miller*, supra. In the *Miller* case, this court was dealing only with the question of last sickness and deceased's sense of impending death. However, in the *Baird* case, while there was a memoranda made at the time the deceased made his nuncupative will, which memoranda contained the substance of it, the memoranda was not signed by the deceased or intended by him in any sense to be a written will. We find no decisions holding words spoken at the time of the signing of a writing, which writing was actually intended by the deceased as a written will, to constitute the [52] making of a nuncupative will. There may be an exception where the intention to make a written will is rendered clear, and deceased is prevented by sudden death or extreme sickness during the preparation of a written will from formally executing it, though the decisions are not in harmony in recognizing such exception. 30 Am. & Eng. Enc. of Law (2d ed.), 594. However, we have no such case here, since, as we have seen, the deceased lived fifteen days after the attempted making of his written will, with his faculties unimpaired up to the time of his death, during which time no attempt was made to make any will.

We conclude that the deceased did not make or intend to make a nuncupative will, and that therefore the trial court properly

rejected probate thereof. The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and HOLCOMBE, JJ., concur.

NOTE.

Attempt to Make Formal Will as Constituting Nuncupative Will.

Generally.

It is generally held that where a person attempts to make a formal written will but for some reason the will is not legally completed before the intending testator dies, the instrument cannot be established as a nuncupative will. *Stamper v. Hooks*, 22 Ga. 603, 68 Am. Dec. 511; *Ellington v. Dillard*, 42 Ga. 361; *Knox v. Richards*, 110 Ga. 5, 35 S. E. 295; *In re Grossman*, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219; *Donald v. Unger*, 75 Miss. 294, 22 So. 803; *Dockum v. Robinson*, 26 N. H. 372; *Matter of Hebden*, 20 N. J. Eq. 473; *Hale's Case*, 49 N. J. Eq. 266, 24 Atl. 370; *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216; *Porter's Appeal*, 10 Pa. St. 254; *Hunt v. White*, 24 Tex. 643; *Rees v. Hawthorn*, 10 Grat. (Va.) 548. And see the reported case. See also *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 67 Am. St. Rep. 383.

In *Porter's Appeal*, 10 Pa. St. 254, it appeared that a person in his last sickness called in his neighbor and declared his wishes as to the disposition of his estate and directed the neighbor to write it down as his will, whereupon the neighbor made a memorandum of the directions given him by intending testator, who died an hour later but continued sensible to the last. It was held that there was no proof of a nuncupative will. The court gave the reason for the rule as follows: "A nuncupative will is, where the testator, without any writing, declares his will or testament, as to his personal estate, before two witnesses. The provisions of our statute are copied from those of the 29 Chas. 2, ch. 3, § 5, with the exception that, in England, there must be three witnesses. No case was produced on the argument, either from the English or American books, where it was held that a decedent, who intended to make a written will, which, for any cause, was left incomplete or unfinished, died testate by nuncupation of the unfinished will. I have met with but one case, that of *Offutt v. Offutt*, 3 B. Mon. (Ky.) 162, 38 Am. Dec. 183, where it was ruled that a paper not perfected as a written will may be established as a nuncupative will, where its completion is prevented by the act of God. But this depended much on the peculiarity, or rather distinctive character of

the Kentucky statute. But even that case does not fit the one in hand, which, as I think is evident from the testimony, was not prevented from being completed by the act of God. But I doubt very much the fitness of that rule in this state, which doubt is strongly confirmed by no such English case being produced in the long line of their authorities since the enactment of the 29 Chas. 2. The reason of the exigency appears to be the other way. If a decedent should be arrested by death when his will was half completed, and all the personal estate disposed of, you thrust upon him a testamentary disposition, probably contrary to his intent; for the direction which he gave to his personal estate may have been entirely controlled and influenced by the manner in which he intended to dispose of the realty. In such cases, the disposition of one often compensates for the disposition of the other. This rule would be unsafe, and would, probably, often result in establishing a testamentary disposition of personal estate contrary to the will and intent of the testator. There ought, therefore, to be present, in order to constitute a nuncupative will, not only the *animus testandi*, but the mind and intent to nuncupate. . . . But the whole momentum of the testimony is clear, that the decedent intended to make a written will, and that leaning of the testimony is supported by the words of the memorandum written at decedent's request, 'told me to write down as his will, and for us to witness it.' What were they asked to witness? Why, his written will. If that was left incomplete, by the ignorance or wilfulness of the scrivener, the courts cannot therefore make a nuncupative will, against the will of deceased, and thereby let in a dangerous precedent upon society. The statute obviously meant that the intent to nuncupate should exist. After providing that all wills shall be in writing, there is, by way of proviso, a provision to make a nuncupative will of personal estate, under certain restrictions; that is, a decedent shall be allowed, in extremes, to dispose of his personal estate, where he intends to do that, and had not time to make or complete a written will. For the whole scope and policy of the law is, that when there is time, the will must be written; but when there is not time, a verbal disposition of the personal estate alone is allowed in extremity."

But it has been held that a will written according to the instructions of one who is on his deathbed and who dies before the instrument can be completed as a formal written will, is good as a nuncupative will. The reason given for the holding is that the intending testator is in extremis, and the completion of the will is prevented by the act of

God. Offutt v. Offutt, 3 B. Mon. (Ky.) 162, 38 Am. Dec. 183; Mason v. Dunman, 1 Munf. (Va.) 456; Phoebe v. Boggess, 1 Grat. (Va.) 129, 42 Am. Dec. 543. In Mason v. Dunman, *supra*, it appeared that a person on his death-bed called for a neighbor and requested him to take notes on paper and make his will. Most of the notes so taken were read to the sick man, but when a draft of the will was prepared he was delirious and soon after died. The notes so taken were established as a nuncupative will. In Phoebe v. Boggess, 1 Grat. (Va.) 129, 42 Am. Dec. 543, it appeared that one being in extremis but of sound mind, requested one of his neighbors to write his will. After the will was written from the dictation of the intending testator and read to him, he approved it; but in an attempt to sign it he desisted, saying he could not see. The instrument was held to be a good nuncupative will. In Offutt v. Offutt, 3 B. Mon. (Ky.) 162, 38 Am. Dec. 183, it appeared that a person attempted to make a testamentary disposition immediately before his death. A paper purporting to be his will was written at his request and in his presence. It was read and approved by him, but he died before the paper could either be subscribed by himself or attested by the witnesses present. The instrument was held to be a good nuncupative will, the court saying: "A paper not perfected as a written will may be established as a nuncupative disposition, if its noncompletion in the form contemplated resulted from the act of God or from any other cause than an intention to abandon or postpone the consummation of it according to law, provided there shall be proof of the testamentary declarations, by the requisite number of competent witnesses, who were present when those declarations were made." In Reese v. Hawthorn, 10 Grat. (Va.) 548, the foregoing cases were distinguished, the court saying: "Everything has been done as well by the testatrix as by the witnesses, which either she or they supposed it necessary for her or them to do, in order legally to declare and certify her testamentary purposes in the form of a written will. The defect in the instrument designed to be executed has grown out of no emergency. The case is, therefore, plainly distinguishable from the cases of Mason v. Dunman, 1 Munf. 456; Phoebe v. Boggess, 1 Grat. (Va.) 129, and Offutt v. Offutt, 3 B. Mon. (Ky.) 162, cited by the counsel of the appellee. In each of these cases, it is true, there was a purpose and an effort to make a written, and not a nuncupative will. But in each of them the noncompletion of the will, in the form contemplated by the testators, resulted from the act of God. In the first case the testator having made known the disposition he desired to make, a friend took notes of

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them, and retired into another room to draw them out formally, but before the instrument could be finished and presented to the testator for his approval and signature, he had become delirious, and incapable of reading it, or hearing it read. In the second case, the will was written by a friend from the dictation of the testator; and after it was written, and read to and approved by the testator, he made an effort to sign it; but desisted, saying he could not see, and requested the friend who had drawn it to sign it for him; but before his signature could be thus made the testator swooned. And in the last case, the will was written at the request and in the presence of the testator, and was read to and approved by him; but he died before the paper could either be subscribed by himself or attested by the witnesses. The principle to be deduced from these cases is, that testamentary declarations, made in the extremities of a last illness, may be established as a nuncupative will, if proved by the requisite number of witnesses who were present when they were made, even though there was a design by the testator to give to those declarations the form of a written will; the completion of such design being frustrated by the act of God depriving the testator of the capacity to perfect the instrument."

In Male's Case, 49 N. J. Eq. 266, 24 Atl. 370, it appeared that a person being in extremis, sent for his legal adviser to draw his will, and gave him instructions which were noted by the adviser on a memorandum. When the notes were completed the adviser said to three persons present that the sick person wanted them as witnesses, to which the sick person assented. Then the attorney read the notes to the intending testator who approved thereof. The attorney then wrote a formal will from the notes but before it was executed the intending testator died. It was held that this instrument could not be established as a nuncupative will as required by the statute.

It has also been held that where an intending testator was not able physically to sign the will, but is able to ask another person to execute it for him, the instrument cannot be established as a nuncupative will. In *re* Butler, 223 Pa. St. 252, 72 Atl. 508; In *re* Munhall, 234 Pa. St. 169, 83 Atl. 66.

Illustrations.

In Ellington v. Dillard, 42 Ga. 361, it appeared that one while on a visit in Germany made a will in writing which was a good formal will according to the laws of that country but was not sufficient under the Georgia statute, having been attested by two witnesses only. It was held that the instrument could not be established as a nuncupative will.

cupative will, as it was not made in extremis, nor was the intending testator prevented from executing it in the manner required by law. The court commenting on the rule said: "The fact that it was attested and subscribed by only two witnesses does not make it, in the sense of the law, a nuncupative will, although made during the last sickness of the testatrix, thirty days before her death; the more especially as it does not appear from the evidence in the record that, at the time the paper writing was signed by the testatrix, she was in extremis, or that the legal execution of the written paper was prevented by any sudden surprise or providential cause. If, after the will had been written, as dictated by the testatrix, and signed by her, and before the requisite number of witnesses could have subscribed the same, she had suddenly died, then the paper might have been propounded as a nuncupative will, notwithstanding she had signed the paper; for its legal execution would have been prevented by the act of God."

In *Knox v. Richards*, 110 Ga. 5, 35 S. E. 295, it appeared that an intending testator made declarations to the effect that he wanted his property to go to a designated person, which statements were made solely for the purpose of having a written will prepared. The court held that since there was no intent that the spoken words should themselves operate as a testamentary disposition, they did not constitute a nuncupative will.

In *Kennedy v. Douglas*, 151 N. C. 336, 66 S. E. 216, it appeared that a woman who intended to make a written will, dictated instructions to her friend and the latter made written notes of the instructions with respect to the disposition of the property. These notes were later, but three months before the death of the intending testatrix, and at her request, delivered to an attorney with instructions to prepare a form of a written will. The will was prepared but the execution was delayed because of the physical infirmity of the intending testatrix. It was held that this instrument under the circumstances did not constitute a nuncupative will "during sickness" within the statute relating to nuncupative wills, though there was no recovery from the sickness.

In *Donald v. Unger*, 75 Miss. 294, 22 So. 803, it appeared that an intending testatrix during an illness which lasted three months, after being advised that recovery was impossible, made repeated efforts to make a written will, and gave instructions to draw one up. It was held that the verbal instructions could not be admitted to probate as a nuncupative will, under a statute authorizing nuncupative wills during the last sickness of the testator. The court said: "The last sickness here lasted two or three

months; the alleged nuncupation took place a week or ten days before her death; the alleged testatrix had the amplest time and opportunity to make a written will, even after she was 'positively and emphatically' told by the physician—her son—that she could not possibly recover, and after that repeatedly tried to have a written will made, and one was at last prepared too late. Her purpose manifestly was to make a written will. It cannot be said that the alleged nuncupation was made here in such 'last sickness' as is meant by the statute. Without now defining that phrase precisely, but resting this case on its concrete facts, the most that could be said is that Mrs. Unger did give verbal instructions as to how her will should be written; but this is unavailing here, for the double reason that she is not shown, by the 'clearest and most indisputable evidence,' (*Lucas v. Goff* [33 Miss. 644] to have spoken the words in her 'last sickness,' within the meaning of the statute, and because 'verbal instructions for drawing up a written will cannot be admitted to probate as a nuncupative will.'"

In *Stamper v. Hooks*, 22 Ga. 603, 68 Am. Dec. 511, it appeared that a paper purporting to be a formal written will was not attested as required by law, because the witnesses did not subscribe in the presence of the testator. It was held that the instrument could not be established as a nuncupative will.

In the case of *In re Grossman*, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219, it appeared that a person requested his brother to draw up a will. The brother wrote down the wish of the intending testator, but before the instrument was brought to the latter for approval and execution, he died. It was held that the instrument was not valid as a nuncupative will, as there was nothing to show an intention to make a nuncupative will.

In *Matter of Hebden*, 20 N. J. Eq. 473, it appeared that a will was drawn up by an attorney pursuant to instructions. The execution thereof was postponed until the intending testator should feel stronger, but he died without executing the will. It was held that the instrument could not be established as a nuncupative will, as it was essential to a nuncupative will that it should be only a verbal declaration of the testator's wishes made when in extremis in the presence of witnesses called on by him to bear witness that the instrument was his will.

In *Dockum v. Robinson*, 26 N. H. 372, it appeared that a person, when taken sick, said that he should like to dispose of his property, and gave directions to draw up a will. A memorandum was drawn according to those directions but before the formal will was drawn up the intending testator died. It was held that the directions to draw up a

written will did not constitute a nuncupative will. The court in giving its reason for the holding said: "It is a perversion of language and a confusion of thought to pretend that directions to another to draw up a will in form for publication is itself a published will. The party himself cannot be supposed to think that he is thereby performing a final act. In the very expression of his purposes, and giving his commands, is involved the condition that the proposed disposition of his property shall not take effect, but in the particular form and manner that he has indicated."

It was held in *Hunt v. White*, 24 Tex. 643, that a recital by the witnesses to a written will, at the time of probating it, of additional oral instructions given by the testator in respect to his property, could not be sustained as a nuncupative will, since there was no intention on the part of the testator to make a nuncupative will.

In *Reese v. Hawthorn*, 10 Grat. (Va.) 548, it appeared that a few days before an intending testatrix died a formal will was drawn up which was approved and executed by her and was signed by four witnesses, but not in her presence as required by statute. It was held that the instrument could not be established as a nuncupative will, since the statute required that nuncupative wills were good only when made by a person during his last illness, in extremity, and in contemplation of immediate death.

KELLY

v.

WEAVER ET AL.

Oregon Supreme Court—July 6, 1915.

77 Oregon 267; 150 Pac. 166; 151 Pac. 463.

Evidence — Opinion Evidence — Speed of Automobile.

While, under L. O. L. § 729, subd. 8, declaring that judicial notice is taken of the laws of nature, the court may reject testimony irreconcilable with physical facts, conclusively established, or instruct that it be disregarded, it cannot do so as to reasonable testimony, and so where there is a question for the jury whether or not witness' means of observation were such as to entitle his testimony, as to what was the speed of an automobile, seen at some distance and for a comparatively short space, the testimony is admissible.

[See note at end of this case.]

Appeal from Circuit Court, Lane county: HARRIS, Judge.

Action by William R. Kelly, plaintiff, against A. W. Weaver et al., defendants. Judgment for plaintiff. Defendants appeal. **AFFIRMED.**

[267] This action was instituted by William R. Kelly against A. W. Weaver and Albert Weaver to recover damages for a personal injury. The facts are that on January 7, 1914, about 6:30 in the evening, as the defendants were riding east in an automobile on the south side of Main street in Springfield, Oregon, they overtook and knocked down a horse on which the plaintiff was riding, breaking the latter's right leg and otherwise hurting him. The negligence alleged is:

"That at the time the automobile struck the plaintiff's horse, and immediately prior thereto, the defendants [268] were driving the aforesaid automobile without giving warning, and in excess of 15 miles per hour, which was in violation of ordinance numbered 332 of the town of Springfield, Oregon"—giving the title of the enactment and the dates of its passage and approval. The primary pleading further states:

"That the defendants did not signal to the plaintiff or warn the plaintiff that they were approaching him from the rear, as provided by said Ordinance 332 of the town of Springfield."

The answer denied the material averments of the complaint, and alleged in effect that at the time the plaintiff was hurt, the horse which he was riding, becoming frightened at the headlight of an approaching trolley car, pranced, bringing his hind legs toward the middle of the street, thereby coming in contact with the defendants' automobile, and the injury complained of resulted from the plaintiff's contributory negligence. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, resulted in a judgment against the defendants for the sum of \$3,000, and they appeal. After the appeal was perfected William R. Kelly died intestate, whereupon Arthur A. Kelly was duly appointed administrator of the decedent's estate, and, having qualified, he was substituted as plaintiff.

Woodcock, Smith & Bryson and *Lark Bileau* for appellants.

L. M. Travis, A. K. Meek and *Foster & Hamilton* for respondent.

[269] *MOORE, C. J. (after stating the facts).*—1. It is maintained that an error was committed in permitting George Catching, over objection and exception, to testify as to the rate of speed at which the automobile was

going immediately prior to the accident. It is argued that the testimony fails to show the witness was qualified to express the opinion which he declared. Mr. Catching testified:

That just before the accident occurred he was in Springfield, going south on Seventh Street toward and about 300 feet from Main Street, when he saw an automobile driven east on the latter street. Alluding to that machine, plaintiff's counsel asked: "How far did you see it on Main Street?" This witness replied: "Well, I didn't see it after it got past Seventh Street more than about 100 feet. Not more than 100 feet, because it was practically, well, it was dark out there. It was running in a dark, black place. You see it had left the arc-light. It passed by there."

Having stated that very soon thereafter he again saw the automobile on Main Street, between Eighth and Ninth, where the accident occurred, he was asked in reference to its passing Seventh Street:

"What speed was the automobile going when you saw it?"

"A. I don't know how fast. . . ."

"Q. Do you know how fast the machine was going?"

"A. Really, I don't know how fast the machine was going. . . ."

"Q. Do you know approximately how fast that automobile was going?"

"A. Well, I will tell you."

[270] An objection was here interposed, on the ground, *inter alia*, that the witness was not qualified to answer the question, but, this having been overruled, he continued:

"Well, I would judge at the time it was running, well, it was going about between 20 and 25 miles an hour."

"Q. Did it continue at that speed as long as you saw it?"

"A. I could not say as to that, because I turned my attention away as soon as he had went into the dark, and I couldn't tell whether he slacked up or not."

"Q. Did anything especially call your attention to that automobile at the time?"

"A. Well, it was going along at a pretty lively gait was all."

"Q. Did that call your attention especially to the automobile at that time?"

"A. Yes; that was the only thing."

On cross-examination the witness was asked, regarding the automobile, "You could not state as a matter of fact and you do not know how fast it was going?" He answered, "I am just guessing at it now."

"Q. It is all mere guesswork with you?"

"A. Yes."

On redirect examination he was asked: "Have you ever ridden in a car where they had a gauge to tell how fast they were going?"

"A. Yes."

"Q. So that you are able to judge something about the speed that the car was going? You would know what speed a car was going at?"

"A. Well, I don't know under them conditions whether I would be or not."

"Q. What is your judgment, your best judgment, as you stood there and looked at the car; is it your best judgment that it was going at 20 to 25 miles an hour?"

[271] An objection to the question, on the ground that it was leading, having been overruled, the witness replied: "I would judge it was going 20 to 25 miles an hour."

"Q. That is your best judgment?"

"A. That is my best judgment of it at the time I saw it. I didn't know what it did do after that."

An exception to the general rule of expert evidence is the admissibility of testimony respecting the identity and appearance of persons and things, as to which facts, when personally observed by anyone of maturity and ordinary intelligence, he may express an opinion: *State v. Brown*, 28 Ore. 147, 41 Pac. 1042; *Portland First Nat. Bank v. Philadelphia F. Assoc.* 33 Ore. 172, 50 Pac. 568, 53 Pac. 8; *State v. Barrett*, 33 Ore. 194, 54 Pac. 807; *Weiss v. Kohlhausen*, 58 Ore. 144, 113 Pac. 46; *Kitchin v. Oregon Nursery Co.* 65 Ore. 20, 130 Pac. 408, 1133, 132 Pac. 956. Consonant with this recognized departure from the general rule, it was held in *Dugan v. Arthurs*, 230 Pa. St. 299, 79 Atl. 626, 34 L.R.A. (N.S.) 778, that a bystander, not possessed of technical or scientific knowledge, may give his opinion as to the speed of an automobile which runs down and injures a person in the highway. In deciding that case, the court says:

"The experience of nonexpert witnesses will enable them to form a reasonably accurate judgment as to the speed of a passing machine, and nothing beyond that is expected or should be required. Of course, the value and the weight to be given such testimony by the jury will, as in similar cases, depend upon the attention the witness has given the subject and the opportunities for observation which he may have had. His experience in such matters, however, goes to the weight, and not to the admissibility of his testimony. The witness is competent to express an opinion as to [272] the speed of the machine: it is for the jury to determine what weight they will give his testimony."

In *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752, it was ruled that:

"An adult person of reasonable intelligence and ordinary experience in life, who just before an accident observed the passing automobile, the rapid speed of which is claimed to have caused the accident, is presumably

capable, without proof of further qualification, to express an opinion as to how fast such automobile was going."

Persons who are accustomed to operate automobiles and have observed their velocity as indicated by speedometers can generally, without looking at such registering instrument, very accurately determine the rate of movement. So, too, police officers, a part of whose business is to apprehend violators of speed ordinances, from observing the movement of vehicles within a given distance when compared with the time required in passing over the intervening space, can very closely estimate the speed of an automobile by seeing it pass. Persons of the classes indicated are not always present at or immediately prior to a collision whereby an injury is inflicted that results in an action to recover damages for alleged negligence in operating an automobile and while other adults may not have enjoyed such opportunities for observing the rate of speed of such machines, they are nevertheless competent to express opinions on that subject, and though their estimates may be conjectural, they are admissible, the weight and value of their testimony being for the jury to determine.

The testimony of Mr. Catching was competent, and no error was committed in receiving it.

[273] Other errors are assigned. They, however, are deemed immaterial.

It follows that the judgment should be affirmed, and it is so ordered.

Affirmed.

Bean, Benson and Eakin, JJ., concur.

ON PETITION FOR REHEARING.

(September 7, 1915.)

MOORE, C. J.—2. In a petition for a rehearing it is insisted that, the witness George Catching having testified in effect that immediately prior to the accident he was in Springfield, Oregon, walking south on Seventh Street toward and about 300 feet from Main Street, when he saw an automobile driven east on the latter street, his sworn declaration shows he was too far from the passing car to enable him, in the space of 100 feet, in addition to the width of Seventh Street, to determine the speed of the vehicle, and, such being the case, an error was committed in permitting him, over objection and exception, to express an opinion on the subject.

A court will take judicial notice of the laws of nature: Section 729, subd. 8, L. O. L. Based on this [274] rule, it has been held that in an action to recover damages alleged to have been caused by the defendant's negligence, if the plaintiff's testimony is irreconcilable with physical facts, the existence of which are conclusively established, the court

should instruct the jury not to consider such testimony: Thompson, Trials (2d ed.) § 2264; Smitson v. Southern Pac. Co. 37 Ore. 74, 60 Pac. 907; Wolf v. City R. Co. 50 Ore. 64, 85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181; Payne v. Chicago, etc. R. Co. 136 Mo. 562, 38 S. W. 308. The distance of the witness from the car when he saw it pass the space of his vision, the time the vehicle could possibly have been seen by him, and the amount of light then existing at that place, were factors from which to determine whether or not he could have so carefully observed the automobile as to enable him to state, in his opinion, how fast it was moving. If the evidence had disclosed that the witness was blind, or his sight impaired, or that at the time there was no light at the crossing, or that he was at such a distance from the car as to preclude the possibility of seeing it, the court might legally have excluded his testimony or directed the jury not to consider it. Catching's sworn statements, however, are reasonable, and it was the exclusive province of the jury to determine whether or not his means of observation were such as to entitle his testimony to be worthy of belief. Under the circumstances detailed, the court could not, as a matter of law, have excluded his testimony or instructed the jury not to consider it.

The former opinion is therefore adhered to. Affirmed.

Bean, Benson and Eakin, JJ., concur.

NOTE.

Opinion Evidence as to Speed of Automobile.

The recent cases are generally in accord with the rule enunciated in Wolfe v. Ives, 83 Conn. 174, 19 Ann. Cas. 752, to the effect that a person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed at which an automobile is being operated at a given time. Cedar Creek Store Co. v. Stedham, 187 Ala. 622, 65 So. 984; Galloway v. Perkins (Ala.) 73 So. 956; Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109; Dilger v. Whittier (Cal.) 164 Pac. 49; Fisher Motor Car Co. v. Seymour, 9 Ga. App. 465, 71 S. E. 764; Book v. Aschenbrenner, 165 Ill. App. 23; American Motor Car Co. v. Robbins, 181 Ind. 417, 103 N. E. 641; Rump v. Woods, 50 Ind. App. 347, 98 N. E. 369; McLaughlin v. Griffin, 155 Ia. 302, 135 N. W. 1107; Miller v. Jenness, 84 Kan. 608, 114 Pac. 1052, 34 L.R.A. (N.S.) 782; Creedon v. Galvin (Mass.) 115 N. E. 307; Harnau v. Haight, 189 Mich. 600, 155 N. W. 563; Faulkner v. Payne, 191 Mich. 263, 157 N. W. 665; Daly v. Curry, 128 Minn. 449, 151 N. W. 274; Dugan v. Arthurs,

230 Pa. St. 299, 79 Atl. 626, 34 L.R.A.(N.S.) 778; *Hiscock v. Phinney*, 81 Wash. 117, Ann. Cas. 1916E 1044, 142 Pac. 461. And see the reported case.

In *Faulkner v. Payne*, supra, the court said: "It is the contention of the defendant's counsel that the witnesses who testified as to speed had not shown sufficient knowledge or experience to qualify them to testify as they did. Mrs. Faulkner, who was about sixty-two years of age at the time of the accident, testified that she had been in the habit of meeting automobiles on the road for years, that she had been driving horses all her life, had ridden on railroad trains, and had observed the rate at which the ordinary vehicles traveled, and stated that she first saw the defendant when he was about ten or twelve rods away. Witness Lulu Lake, who was about forty-five years of age, testified that in her opinion the defendant's automobile was being driven from twenty-five to thirty miles an hour at the time of the accident.

. . . The accident occurred in broad daylight, at a point where the respective parties could observe one another as they approached for a distance of from fifteen to twenty-five rods. . . . The witnesses had ample opportunity to judge of the speed, and therefore there was no error in submitting their testimony for the consideration of the jury."

In *Dugan v. Arthurs*, 230 Pa. St. 299, 79 Atl. 626, 34 L.R.A.(N.S.) 778, it was said: "On the trial of the cause two witnesses were called by the plaintiff and, after testifying that the automobile was running at a high rate of speed at the time of the accident, were asked to give the rate of speed at which the machine was traveling. The question was objected to by the defendant, the objection was overruled and the witnesses were permitted to answer. This ruling of the court is the subject of the first and second assignments of error. . . . We think both witnesses were competent, and that their testimony was properly admitted by the court. They were not offered as experts but as ordinary witnesses without having any special or peculiar knowledge which would especially fit them to testify to the speed of the machine. Their competency to express an opinion did not require them to possess technical or scientific knowledge. An intelligent person having a knowledge of time and distance is capable of forming an opinion as to the speed of a passing railroad train, a street car or an automobile. His conclusion is the result of a comparison with the speed of other moving objects of which he has knowledge by constant experience. There is no more reason why such a witness should not be permitted to testify to the speed of an automobile than to the speed of a carriage or other vehicle which travels the public high-

ways. His everyday experience gives him sufficient knowledge to form an intelligent judgment upon the subject. He simply compares the speed of one moving object with that of another with which he is made familiar by the daily affairs of life. Aside from any other sufficient reason, the necessity of the case requires that such testimony be admitted in trials involving the wanton and dangerous speeding of automobiles. To hold otherwise and to compel the production of expert testimony in such cases would in almost every instance defeat the ends of justice. . . . The authorities on the subject seem to be in accord with the views expressed above. We have been referred to no case, and after diligent search we have not been able to find one which holds such testimony to be incompetent."

In *Miller v. Jenness*, 84 Kan. 608, 114 Pac. 1052, 34 L.R.A.(N.S.) 782, the court said: "Probably no person can stand and look at a moving vehicle of any kind and tell the exact rate of speed at which it is moving, but people generally, in this country, are accustomed to seeing moving trains, automobiles, street cars and horse conveyances, and any intelligent person, who has given attention thereto, can give a reasonably accurate estimate of the rate of speed at which any such vehicle is moving when observed by him. The extent of his observation goes to the weight of his testimony; but the matter does not seem to be one of expert knowledge only."

In *Shimoda v. Bundy*, 24 Cal. App. 675, 142 Pac. 109, it appeared that the plaintiff, while riding on a motorcycle, saw the defendant's automobile the instant before he was struck by it, and that after he was knocked down he watched the automobile and estimated its speed while it was running half a block. It was held that he had sufficient opportunity to observe the rate of speed of the automobile, and was competent to testify thereto.

In *Harnau v. Haight*, 189 Mich. 600, 155 N. W. 563, it appeared that a witness, a railroad engineer accustomed to observe moving objects, on a dark night saw an automobile move through a space of but twenty feet before the accident in question. He was nevertheless permitted to give his opinion as to its rate of speed.

In *Galloway v. Perkin* (Ala.) 73 So. 956, persons riding in the automobile which killed the plaintiff's intestate were allowed to give their opinions as to its speed at the time of the accident.

In *Daly v. Curry*, 128 Minn. 449, 151 N. W. 274, it was held that an adult business man who saw the defendant's automobile in motion was competent to give his opinion as to its rate of speed, although he had never before attempted to estimate the velocity of an automobile.

However, in *Colebank v. Standard Garage Co.* 75 W. Va. 389, 84 S. E. 1051, it was held that witnesses could not express an opinion as to whether the speed of an automobile was "unreasonable." In *Priebe v. Crandall* (Mo.) 187 S. W. 605, testimony characterizing the speed of an automobile as "fast," "pretty fast," and "awful fast" was held to have been improperly admitted. And in *Everart v. Fischer*, 75 Ore. 316, 145 Pac. 33, 147 Pac. 189, it was held to be error to allow a witness to give her opinion as to the speed of an automobile where such opinion was based merely on her observation of marks made by it on the pavement.

STATE

v.

LEHMAN.

Minnesota Supreme Court—December 17, 1915.

151 Minn. 427; 155 N. W. 399.

Assault — Indictment — Charge of Wilfulness.

The term "wilfully" imports designedly and intentionally; and an indictment for an assault which follows the language of the statute and charges that defendant wilfully assaulted another and wilfully inflicted grievous bodily harm upon him sufficiently charges an intent to inflict such harm.

What Constitutes Assault — Shooting with Intent to Frighten.

Unlawfully discharging a firearm to frighten another, although intending not to hit him, is an assault and battery if the other be hit.

[See note at end of this case.]

Criminal Law — Harmless Error — Instruction as to Degree Not Found by Jury.

An instruction which was proper in defining an assault in the third degree, but which was given as defining an assault in the second degree, was without prejudice, even if erroneous in respect to the second degree, where defendant was found not guilty in the second degree, but guilty in the third degree.

(Syllabus by court.)

Appeal from District Court, Goodhue county: CONVERSE, Judge.

Criminal action. Ben Lehman convicted of assault in third degree and appeals. The facts are stated in the opinion. **AFFIRMED.**

A. J. Rockne and Andrew Finstuen for appellant.

Lyndon A. Smith, John O. Nethaway, Thomas Mohn and Albert Mohn for respondent.

[428] TAYLOR, C.—Defendant was indicted for an assault in the second degree and was convicted of an assault in the third degree. He made a motion in arrest of judgment and also for a new trial. These motions were denied; sentence was imposed, and he appealed.

1. Defendant contends that the indictment fails to charge an intent on his part to injure Carl Mogren, the complaining witness, and is insufficient for that reason. Its sufficiency in all other particulars is not attacked. The indictment is substantially in the language of the statute; and charges that defendant wilfully and wrongfully committed an assault upon Carl Mogren and wilfully and wrongfully inflicted grievously bodily harm upon him by shooting him with a pistol in the manner therein stated. The term "wilfully" imports that the acts were committed designedly and intentionally. *State v. Bell*, 26 Minn. 388, 5 N. W. 970; 30 Am. & Eng. Enc. (2d ed.) 525; 8 Words & Phrases, 7468; 3 Bouvier's Law Dictionary 3454; Webster's Dictionary; Century Dictionary; Standard Dictionary. The indictment is sufficient in both form and substance.

2. Defendant was village marshal of the village of Kenyon. On Hallowe'en night in 1914, a party of young men had a supper in the rooms of some of their number located over a store in the village. After the [429] meal, several of them went down upon the street, and at the foot of the stairway met defendant who went up to the room and had some of the supper. All in the party were well known to defendant and on friendly terms with him. Some of them ran a manure spreader and an old wagon into the street and took some other articles from nearby buildings which they also placed in the street. Soon afterward, while a group of the young men were standing in an alley a short distance from the street talking about going home, defendant came toward them from the other end of the alley and when about 50 feet distant called out to them: "Why don't you fellows go home?" and fired his revolver. The bullet struck Mogren in the upper part of the leg. Defendant claims that he shot into the ground for the purpose of frightening the boys and that the bullet must have struck something which caused it to glance. The prosecution claim that the fact that the bullet entered the upper part of the leg and continued in a downward course nearly to the knee, shows that it did not glance upward from the ground, but this is not important upon the present appeal. Neither Mogren nor any of

his associates were engaged in any unlawful or improper act at the time of the shooting.

The above statement of facts is given to show the bearing of that portion of the charge which defendant urges as error. In this portion of the charge, the jury were told in substance that, if they found beyond a reasonable doubt that defendant, knowing the position of the boys, "recklessly or carelessly discharged his pistol against the ground," and further found "that such action on the part of the defendant was of such a reckless or careless nature as to show indifference as to whether another person was thereby injured," and further found that such action resulted in the ball so discharged striking Mogren and inflicting grievous bodily harm upon him, they should find defendant guilty of assault in the second degree. The jury found him not guilty of an assault in the second degree, but guilty of an assault in the third degree. Therefore assuming, without conceding, that this instruction was error as applied to the second degree, it is not cause for reversal unless also error in respect to the third degree. The statute defines what constitutes an assault in both the first and second degrees, and then provides: "Every person who shall commit an assault, or an assault and battery, [430] not amounting to an assault in either the first or second degree, shall be guilty of an assault in the third degree." The statute does not define what constitutes an "assault" nor what constitutes a "battery" within the meaning of this section, and these terms still retain their common law meaning.

In discharging his revolver at the time and place and under the circumstances stated, defendant committed an unlawful act. G. S. 1913, § 8803. It is the general rule that a person who intentionally commits an unlawful act, and in doing so inflicts an unforeseen injury, is criminally liable for such injury. Discharging a firearm without justification to frighten another, although intending not to hit him, is an assault and battery if the other be hit. *State v. Triplett*, 52 Kan. 678, 35 Pac. 815; *Com. v. Mann*, 116 Mass. 58; *Com. v. Hawkins*, 157 Mass. 551, 32 N. E. 862; *Malone v. State*, 77 Miss. 812, 26 So. 968; *Smith v. Com.* 100 Pa. St. 324; *State v. Baker*, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863; *Tyner v. U. S.* 2 Okla. Crim. 689, 103 Pac. 1057; *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

In view of the admitted fact that defendant intentionally discharged his revolver for the purpose of frightening the boys, the instruction complained of was proper in defining what would constitute an assault in the third degree. As defendant was found guilty in the third degree, and was found not guilty in the second degree, no prejudice resulted to

him even if the court erred in applying the instruction to the second degree. Upon the conceded facts, defendant was clearly guilty of an assault in the third degree.

Judgment affirmed.

BROWN, C. J. (*dissenting*).—Defendant was a police officer. Late at night on the day charged in the indictment, he discharged his revolver against the ground, for the purpose of frightening some young men or boys who had been about the streets engaged in Hallowe'en pranks, thus to induce them to go to their homes. The bullet from the revolver struck an object on the ground and was deflected and one of the young men received an injury therefrom. The officer was not actuated by malice or evil intent. Defendant [431] was indicted for an assault in the second degree. The court charged the jury that, if the act of discharging the revolver was reckless or careless, defendant might be convicted of an assault in the third degree; an assault and battery under our statutes. I am unable to concur in the conclusion of the court that, as applied to the facts stated, the instruction was not erroneous. A reckless act, committed without regard to the life or safety of others and resulting in the death of another, may, under certain circumstances, constitute the crime of manslaughter. But an act of mere carelessness or negligence, though it result in injury to another, does not constitute a crime, though the guilty party may be liable in a civil action for damages. On the facts here stated the criminal intent is wholly lacking. In a similar case it has been held that there is even no civil liability. *Degenhardt v. Heller*, 93 Wis. 662, 68 N. W. 411, 57 Am. St. Rep. 945; *Donner v. Graap*, 134 Wis. 523, 115 N. W. 125. If there be no civil liability in such case, clearly there can be no conviction in a criminal prosecution. The authorities cited in the opinion do not, as I read them, justify the conclusion that *mere negligence* is a crime. Reckless shooting of firearms is made a misdemeanor by G. S. 1913, § 8803, and, had defendant been charged with a violation of that statute, the instructions of the court would have been less objectionable. However, neither that statute nor section 8606, can be referred to in support of the conviction in the case at bar. Neither statute has any application to an assault and battery. The act of defendant in discharging his revolver to frighten the boys was not an unlawful act in itself; if unlawful at all it was so because prohibited by section 8803, *supra*. But the violation of such a statute will not justify a conviction of assault and battery upon the ground of negligence. It might be otherwise if the act was unlawful in itself and without reference to the statu-

tory prohibition. *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362.

For these reasons I respectfully dissent.

NOTE.

Discharging Firearm to Frighten Person as Assault.

In several cases the rule is laid down without qualification that one discharging a firearm to frighten another is guilty of assault. *Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449; *Edwards v. State*, 4 Ga. App. 849, 62 S. E. 565; *Smallwood v. State*, 9 Ga. App. 300, 70 S. E. 1124; *State v. Triplett*, 52 Kan. 678, 35 Pac. 815; *State v. Baker*, 20 R. I. 275, 38 Atl. 653, 78 Am. St. Rep. 863; *Pastrana v. State*, 48 Tex. Crim. 224, 87 S. W. 347. See also *State v. Murphy*, 14 Mo. App. 73; *Lanier v. State*, 57 Miss. 102; *Catling v. State* (Tex.) 72 S. W. 853.

Thus in *State v. Baker*, *supra*, the defendant was convicted of an assault with a dangerous weapon and petitioned for a new trial on the ground that the trial judge refused to give the following instruction to the jury, viz.: "If the jury believe from the testimony that the defendant fired the pistol for the purpose of scaring the [prosecuting witness] and for no other purpose, the defendant was not guilty of an assault with a dangerous weapon, as charged in the indictment, but only guilty of a simple assault." The appellate court in denying the petition for a new trial said: "To constitute an assault with a dangerous weapon it is necessary that the weapon should be presented at the party intended to be assaulted, within the distance at which it may do execution. 1 *McLain Crim. Law*, § 232 (p. 199), and cases cited in note 4. There is evidence that that was done in this case;—that the defendant stood at the fence and deliberately fired a pistol at or in the direction of the complainant, who was about sixty feet away, the ball just missing him, as before stated. But the defendant says he did not intend to hit him, but only to scare him. Assuming this to be true, as we must do in order to sustain the refusal to charge as requested, did it constitute an assault with a dangerous weapon under the statute? We think it did. The act of firing the pistol at the complainant, or in the direction where he was standing, with the intent to frighten him, was not only wholly inexcusable, but unlawful and reckless as well. It was an act which was well calcu-

lated to inflict serious personal injury; and from such an act the law implies malice. That it was an assault the defendant's counsel did not deny; but he contends it was not an assault with a dangerous weapon. Let us see. There was an assault—this is admitted. It was made with a loaded pistol. A loaded pistol is a dangerous weapon. Without the use of the pistol there would have been no assault. It logically as well as necessarily follows, therefore, that the offense committed was that of an assault with a dangerous weapon."

In *State v. Triplett*, 52 Kan. 678, 35 Pac. 815, an appeal from a conviction for assault, the following instruction to the jury by the trial judge was held not to be erroneous: "If one person should shoot in the direction of another without any intention of injuring the other, but only for the purpose of frightening him, tending thereby to create the impression that he would do injury by the shot, he is guilty of an assault."

In *Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449, a prosecution for assault with intent to murder, the following charge by the court to the jury was held to be proper: "If, when he presented the pistol, he intended to fire, and actually fired, it makes no difference whether malice is proven or not, the law presumes malice. In fact, he may not have had any malice against Jesse—his intention may have been to divert himself by frightening Jesse; yet, if, under such circumstances, he shot at him, intending, at the time, to shoot at him, not caring whether he hit him or not, he is guilty of an assault with intent to murder."

But in *Degenhardt v. Heller*, 93 Wis. 662, 68 N. W. 411, 57 Am. St. Rep. 945, it was held that there was no civil liability in an action for damages against the defendant, who discharged a revolver without any intent to hurt the plaintiff but merely to frighten him.

In the reported case the rule heretofore stated is apparently qualified by the statement that the person whom it is intended to frighten by the discharge of firearms must be hit, in order that there may be a legal assault and battery. See also in this connection *State v. Surry*, 23 Wash. 655, 63 Pac. 557, and *Com. v. Mann*, 116 Mass. 58. So in *Smith v. Com.* 100 Pa. St. 324, it was held that shooting in a railway car in a spirit of frolic and with intent to frighten the passengers therein constituted an assault where one passenger was hit.

STREUDLE ET AL.

v.

LEROY ET AL.

Arkansas Supreme Court—January 31, 1916.

122 Ark. 189; 182 S. W. 393.

Pleading — Reply to Counterclaim — Waiver.

Where a decree for complainants is rendered dismissing the cross-complaint for want of prosecution and is afterwards opened on defendant's motion and testimony heard and the cause tried as if the issues had been made up by the pleadings and tried on the merits, defendant thereby waives complainant's failure to answer the counterclaim.

[See note at end of this case.]

Damages — Loss of Profits — Performance of Contract Prevented.

Where plaintiff agrees to perform certain work for defendant and is prevented from doing so by defendant's failure, he is entitled to recover the profits which the evidence makes it reasonably certain that he would have made if the defendant had carried out his contract.

[See 8 R. C. L. tit. *Damages*, p. 501 et seq.]

Appeal and Error — Scope of Review — Evidence to Sustain Finding of Chancellor.

A finding of the chancellor with reference to a state of accounts between the parties, not against the preponderance of the evidence, must be upheld and his decree affirmed.

Appeal from Crittenden Chancery Court: FRIERSON, Chancellor.

Action by L. B. Leroy et al., plaintiffs, against O. T. Streudle et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

Wright, Miles, Waring & Walker for appellants.

Brown & Anderson for appellees.

[190] HART, J.—On November 25, 1913, appellants and appellees entered into a written contract whereby the former agreed to furnish the latter with a saw mill and the latter agreed to supply its own hoop machine and appliances at Proctor, Arkansas. Appellants agreed to furnish appellees logs and strips of timber necessary for the manufacture of hoops and appellees agreed to manufacture hoops for appellants at a stipulated price. The contract provided that the transactions and moneys paid out or received under the agreement should be under the personal control and custody of John Reichert, one of the appellants for which appellees

should pay \$3 per day. It was also agreed that L. B. Leroy, one of the appellees, should receive out of the pay roll \$5 per day for his services as manager of the mill when in operation. The contract provided that all of the operating expenses and repairs should be at the expense of appellees; and also provided the basis on which appellants and appellees should share the profits and bear the losses of the enterprise.

Other provisions were incorporated into the contract which the views we shall herein-after express render it [191] unnecessary for us to incorporate in the statement of facts.

Appellees filed a bill against appellants in which they sought an accounting. They alleged that there were 182 working days in the period covered by the contract; that the mill had a capacity to manufacture 40,000 hoops per day; that appellants failed to furnish them with material sufficient to enable them to run at full capacity; and that appellants and appellees became partners in the enterprise by the terms of the contract.

The complaint was filed on the 20th day of April, 1914; on the 26th day of April, 1914, appellants filed what they termed an answer and cross-complaint. They denied that they became partners with appellees under the terms of the contract; denied that they failed to carry out the contract on their part; denied that the mill had a capacity of 40,000 hoops per day; alleged that they furnished to appellees the logs and strips of timber called for by the contract; alleged that appellees failed to comply with the terms of the contract on their part; alleged that in order to keep the business going they furnished to appellees large sums of money which they were not required to furnish under the contract, and, by way of counterclaim, asked judgment for the amount found to be due them.

Appellees did not file an answer to the counterclaim of appellants.

On June 11, 1914, appellants filed a motion in which they asked for judgment against appellees in the sum of \$3,119.04 because of the failure of appellees to answer their counterclaim. On the 27th day of January, 1915, the court heard the case upon the pleadings and the depositions on the part of appellees. The court found that the cross-complaint or counterclaim of appellants should be dismissed for want of prosecution and rendered judgment in favor of appellees.

On January 30, 1915, appellants filed a motion to vacate the decree entered of record January 27, 1915, and stated the grounds therefor in their motion.

[192] On February 6, 1915, the court took under consideration the motion to vacate the decree until April 1, 1915, and time was given each party within which to take proof.

On the 26th day of April, 1915, the court entered a decree opening the decree of January 27, 1915, and after hearing the motion of appellants for a decree in their favor filed June 11, 1914, overruled the same. The case was heard on the depositions taken by both parties and a decree was entered in favor of appellees for the sum of \$1,201.85, being a smaller amount than was awarded them by the former decree. The case is here on appeal.

(1) It is first contended by counsel for appellants that the court erred in not rendering judgment in their favor when they moved for judgment on June 11, 1914, for failure of appellees to answer their counterclaim. They rely upon the case of *Young v. Gaut*, 69 Ark. 114, 61 S. W. 372, to sustain their contention.

It will be remembered that the court opened the decree rendered on January 27, 1915, and gave the parties leave to take proof in the case. A great volume of testimony was taken and the state of accounts between the parties was thoroughly gone into. There could be no mistake whatever as to the issues between the parties. The issues were thoroughly made up and both parties introduced testimony to support their claim. The motion for judgment for failure to answer their counterclaim was made by appellants in June, 1914. When the court opened the decree in 1915 and gave appellants leave to take testimony, they proceeded to take their testimony and the case went to trial as if the issues had been made up by the pleadings. Under these circumstances appellants will not be allowed any advantage from this defect in the pleadings, but are deemed to have waived it by going to trial on the merits of the case. This holding, we think, is in accord with the rule laid down in *Young v. Gaut*, *supra*, and other decisions of this court bearing on the question.

(2) This brings us to a consideration of the case on its merits. In the case of *Ford Hardwood Lumber Co. v. Clement*, 97 Ark. 522, 135 S. W. 343, the court said that where plaintiff agreed to perform certain work for defendant [193] which he was prevented from doing by defendant's fault, he is entitled to recover the profits which the evidence makes it reasonably certain that he would have made had the defendant carried out his contract.

In the case of *Alf Bennett Lumber Co. v. Walnut Lake Cypress Co.* 105 Ark. 421, 151 S. W. 275, the court held that where a party to a contract is prevented from performing same by fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made had the other party carried out his contract.

The court below was governed by these principles of law in its finding in favor of appellees.

The record contains about 675 pages of typewritten matter. The whole state of accounts between the parties was gone into by the testimony of witnesses taken in the form of depositions and exhibits attached thereto. Nothing could be gained by a statement in detail of the evidence relating to these questions; nor would it serve any useful purpose to enter into a protracted discussion of them. We have carefully considered the evidence as disclosed by the record and are of the opinion that the finding of fact by the chancellor with reference to the state of accounts between the parties is not against the preponderance of the evidence. Therefore, under the settled rules of this court, the finding of the chancellor must be upheld and the decree will be affirmed.

NOTE.

Waiver of Failure to Reply to Counterclaim.

Generally.

The doctrine of waiver from a failure to object to the want of necessary pleadings includes, as of course, a reply to a counterclaim; and it is well settled that where a defendant voluntarily goes to trial without taking advantage of the plaintiff's failure to reply to his counterclaim, the failure to reply will be considered as waived. *Keator Lumber Co. v. Thompson*, 144 U. S. 434, 12 S. Ct. 669, 38 U. S. (L. ed.) 495; *Gibbs v. Dickson*, 33 Ark. 107; *Winters v. Fain*, 47 Ark. 493, 1 S. W. 711; *Young v. Gaut*, 69 Ark. 114, 61 S. W. 372; *McAlister v. Howell*, 42 Ind. 15; *Jones v. Hathaway*, 77 Ind. 14; *Medland v. Walker*, 96 Ia. 175, 64 N. W. 797; *Warren v. Chandler*, 98 Ia. 237, 67 N. W. 242; *Arrowsmith v. Durell*, 14 La. Ann. 849; *Romano v. Insch*, 7 Misc. 147, 27 N. Y. S. 246, *affirming* 4 Misc. 621, 23 N. Y. S. 967; *Clinchy v. Appgar*, 16 Misc. 374, 38 N. Y. S. 79; *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L.R.A. 328; *Floyd v. Floyd*, 46 S. C. 184, 24 S. E. 100; *Grant v. Whorton*, 28 S. D. 599, 134 N. W. 803; *Northern Supply Co. v. Wangard*, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984. And see the reported case. See also *Conant v. Jones*, 3 Idaho 606, 32 Pac. 250; *Nooner v. Short*, 20 Kan. 624; *Matthews v. Torinus*, 22 Minn. 132; *Van Valen v. Lapham*, 13 How. Pr. (N. Y.) 240.

In *Keator Lumber Co. v. Thompson*, *supra*, which was an action of assumpsit, the defendant pleaded nonassumpsit and set-off, the latter being for an amount exceeding that

sued for by the plaintiff. When the trial began there had been no replication to the defendant's pleas, but during the progress of the trial the plaintiff, without notice to the defendant or its attorney, and without leave of court, filed with the clerk replications to the pleas. Justice Harlan delivering the opinion of the court said: "The defendant was bound to know, when the court ordered the parties to proceed with the trial, that replications had not been filed to its first and third pleas. It should then have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the pleadings were concerned, might be commenced. The objection that replications were not filed when the trial commenced, nor before judgment, with leave of the court, came too late after judgment was entered."

In *Grant v. Whorton*, 28 S. D. 599, 134 N. W. 803, it was said: "It appears from the record that plaintiff brought suit against defendant to recover a balance of one hundred dollars, claimed to be due plaintiff under a contract for work and labor performed for and board furnished to defendant. Defendant by answer admitted the contract and performance of the work and labor and furnishing of board, and pleaded three counterclaims: (1) For the value of grain furnished by defendant to plaintiff to feed plaintiff's chickens, ducks, geese, and cow, of the value of \$115.50; (2) for services performed by one Barber in furnishing plaintiff an opportunity to contest certain land, for which plaintiff agreed to pay defendant twenty-five dollars; (3) for certain potatoes furnished plaintiff of the reasonable worth of twelve dollars. It appears that no reply was made to said counterclaims in justice court, but that the cause proceeded to trial, without objection on the part of defendant, the same as if a reply had been made, no objection having been made to the introduction of testimony on that ground, and after the case had been tried and both sides had rested the defendant moved for judgment on his counterclaims for want of reply thereto. The motion was denied, and defendant excepted, and now urges as error the said ruling of the court. . . . The plaintiff having brought suit to recover the sum of one hundred dollars balance due upon a contract, which was admitted by defendant in his answer, and the justice court having rendered a verdict and judgment in favor of plaintiff for only nine dollars, conclusively shows that in the trial before the justice issues presented by the counterclaims of defendant were litigated and tried out before the court, without a reply, just the same as if a reply had been made to the counterclaims. Having waived the default and necessity of a reply to the counterclaims in the justice

court, plaintiff was not required to reply in the circuit court, unless some appropriate procedure was taken by defendant to compel such reply."

So in *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L.R.A. 328, the court holding that a defendant might waive his right arising from the failure of the plaintiff to reply to his counterclaim, applied the rule to the pleadings involved as follows: "No reply to the answer was served, nor did defendant move for judgment as for want of a reply. The trial was manifestly conducted upon the theory that all the allegations of the answer which were pleaded as a counterclaim were at issue. Testimony was offered, without objection; to prove and disprove the averments of the answer, and the court, without objection or protest, made its findings of facts and conclusions of law upon the subject-matter of the counterclaim. In this court the claim is made by defendant's counsel that, inasmuch as plaintiff did not reply to the counterclaim, he admitted all the facts stated therein; citing §§ 4919, 4933, Comp. Laws. Counsel say: 'The question to be determined on the appeal then is, do the facts stated in the defendant's counterclaim entitle him to the relief demanded?' We think the new matter pleaded in the answer constitutes a counterclaim, within the meaning of subdivision 1, § 4915, Comp. Laws. The new matter constitutes a cause of action in defendant's favor and against the plaintiff, and such new matter is 'connected with the subject of the action.' . . . A reply was requisite under the statute, but a reply may be waived, and we are of the opinion defendant waived a reply by proceeding at the trial to treat the new matter in the answer as being traversed and at issue without a reply."

In *Jones v. Hathaway*, 77 Ind. 14, it appeared that the parties went to trial in the absence of a reply to the defendant's counterclaim and without objection on his part. The court said: "This omission to complete the issues would not vitiate or avoid the verdict, nor prejudice the rights of any of the parties in any respect; for, in such cases, this court has often decided that it would consider the record as if an answer or reply in denial had been filed."

Likewise, where a motion for judgment for want of a reply to a counterclaim was not made until after all the evidence had been submitted to the jury and the plaintiff had made a motion to exclude the defendant's evidence, it was held that the defendant had waived his right arising from the failure to reply. *Slaydon v. McDonald*, 82 Miss. 504, 34 So. 357, wherein the court said: "The record shows that a jury was impaneled and accepted by the parties, and that the counsel

stated their respective contentions to the jury, and plaintiff's evidence and defendants' evidence were offered, and then counsel for plaintiff moved to exclude all of the evidence for defendants. At this period, before the court acted, counsel for defendants, for the first time, announced that they had a motion which they desired to present, which was on the motion docket, but not before called to the attention of the court. This motion was for judgment for defendants for want of replication to their plea as set-off. The court properly overruled this motion at this stage of the proceedings, especially as defendants had had the benefit of the plea by stating their contentions to the jury, and the evidence showed there was nothing in them. We feel sure that no case can be found, with the same presentation exhibited by this record, holding adversely to our conclusion."

In *Randolph v. New York*, 53 How. Pr. (N. Y.) 68, wherein it appeared that no reply had ever been filed to certain counterclaims set up by the defendant, the court stated the rule as follows: "This was an admission that they were due and owing by plaintiff, and defendants might have availed themselves of such admission; they did not, but offered on the trial proof in support of each item of set-off or recoupment. If they failed to support their claims by the proof offered they lose the benefit of the admission. . . . If defendants intend to rely upon the admission made by the failure to serve a reply, they should rest upon it at the trial, and plaintiff having notice of their intention may then apply to the court for leave to serve a reply, which leave the court has power to grant. But if they waive the admission and go into proof of their counterclaim, it seems only just to give such judgment as the proof may warrant."

In *Campbell v. Genet*, 2 Hilt. (N. Y.) 290, it was said: "It was said on the argument that this set-off or counterclaim was set up in the answer, and that, not being denied by the plaintiff, it must be admitted to be due. The answer to that proposition is, that, assuming the defendant's conclusion on the pleadings to be correct, he has waived his advantage by going into the proof of the counterclaim, and by such proof showing that it could not have been properly set off against the plaintiff's demand."

So, where a defendant failed to object to the want of a reply to his counterclaim and proceeded to trial without producing any evidence in support of his claim, it was held that he would be deemed to have consented to the trial on the pleadings as they were, and his failure to introduce evidence in support of his claim could not be urged as a ground for reversal of the verdict. *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148, wherein the court said: "It would seem from

the record that no evidence was introduced in support of this plea; at least no evidence appears. Had the defendant offered testimony in its support, it would doubtless have been received, and its rejection would have been proper ground for an exception, but having tendered his plea, with the full knowledge that it had not been traversed by the plaintiff, he permits the trial to proceed without introduction of evidence in its support, and the jury could not have found any other verdict than that which it rendered. Having taken the chances of a verdict in his favor upon an uncontroverted demand set up by his plea, and having been disappointed in that expectation, he then moved the court to remedy the consequences of his own act, and set aside and annul the verdict of the jury. He had not been injured by the failure of the plaintiff to deny his right of action. That omission, so far as it affected the defendant, placed him in a better position, and he is here asking to have a proceeding reversed for an informality which certainly did not redound to his disadvantage, and if it had any effect whatever was a benefit to him. Had issue been joined upon his plea, the burden of proof would have been upon him. No issue having been tendered, his right of action was admitted." Commenting on the rule as laid down in *Keator Lumber Co. v. Thompson*, 144 U. S. 434, 12 S. Ct. 669, 36 U. S. (L. ed.) 495, the court said further: "In the case just cited it is true that the cause having been submitted to the court, judgment was entered before the motion was made, but the delinquency of the defendant was as great in this case as in that. He stood by and permitted the trial to proceed, and the verdict to be rendered, ready to avail himself of the situation as it might develop. It is true also that in *Keator Lumber Co. v. Thompson*, replications had been tendered, but this had been done without the knowledge of the defendant, and without leave of the court. In the case before us, as in that, the defendant should have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the pleadings were concerned, might be commenced. The objection that replications were not filed when the trial commenced, nor before verdict, came too late after the verdict was rendered."

Objection on Appeal.

Applying the well-established rule that a party failing to object on the trial of a case cannot raise the point for the first time on appeal, it is generally held that where a defendant goes to trial without taking advantage of the plaintiff's failure to file a reply to his counterclaim he cannot raise the objection for the first time in the appellate court.

Slaughter v. Marlow, 3 Ariz. 429, 31 Pac. 547; *Daniels v. Brodie*, 54 Ark. 216, 15 S. W. 467, 11 L.R.A. 81; *Burnett v. Loughridge*, 87 Ia. 324, 54 N. W. 238; *Warren v. Chandler*, 98 Ia. 237, 67 N. W. 242; *Jordan v. National Shoe, etc. Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *Muldoon v. Blackwell*, 84 N. Y. 646; *Penny v. Huebener*, 50 Hun 600 mem. 2 N. Y. S. 641; *Lush v. Adams*, 10 Civ. Pro. (N. Y.) 60; *Killman v. Gregory*, 91 Wis. 478, 65 N. W. 53. In *Burnett v. Loughridge*, supra, wherein it appeared that no objection was made in the lower court to the failure of the plaintiff to reply to a counterclaim set up by the defendant in an amendment to his answer, the court stated the rule as follows: "We are satisfied that the claim that the amendment was not denied is made for the first time in this court. It is a familiar rule of practice, of general application, that objections which should have been made in the court below will not be sustained when made for the first time in this court. And the rule has been extended to the failure to plead to a counterclaim."

PARTRIDGE

v.

UNITED STATES.

District of Columbia Court of Appeals—
February 3, 1913.

39 App. Cas. (D. C.) 571.

False Pretenses — Evidence of Other Offenses.

The extent to which evidence of other similar offenses may be received on a prosecution for obtaining money under false pretenses to show guilty knowledge or intent rests largely in the discretion of the trial court, and its decision will not be reversed unless the evidence admitted appears clearly to be irrelevant and prejudicial.

[See 10 Ann. Cas. 906; 17 Ann. Cas. 464; 25 Am. St. Rep. 387.]

Evidence of Fraud — Concealment of Documents by Accused.

Where the false pretenses on which an indictment is based related to the financial condition of a corporation, evidence that the accused secreted its records and endeavored to prevent an examination of its affairs is admissible.

Control by Accused of Subject-matter of Pretenses.

Where the false pretenses charged were with respect to the financial condition of a corporation, evidence tending to show that the accused controlled the corporation and

that its ostensible officers acted under his direction is admissible.

Witnesses — Impeachment — Inconsistent Statements — Foundation.

To permit the impeachment of a witness by showing inconsistent averments in a bill filed by him in another proceeding, his attention must have been called thereto when he was on the stand.

False Pretenses — Note as Property.

A promissory note is "property" or a "thing of value" within a statute against false pretenses.

[See note at end of this case.]

Pretense as Sole Inducement.

It is not essential to the offense of obtaining property by false pretenses that the pretense shall be the sole inducement moving the prosecutor to part with his property.

Instructions — Applicability to Evidence.

An instruction is not erroneous because it is based on one of the possible interpretations of an ambiguous document in evidence, particularly where there is other evidence which unequivocally bears that interpretation.

False Pretenses — Instructions.

On the trial of an indictment for obtaining property by false pretenses an instruction which in effect singles out one of several representations shown by the evidence and tells the jury to acquit if they find it to be true is properly refused.

Falsity of Representation — Ownership of Land.

A representation of ownership of land is not shown to be true by proof of the possession of a contract for the purchase thereof.

Nature of Pretense.

It is not necessary that the false pretense should be direct, definite and positive; it is sufficient if it is so worded as reasonably to deceive a person of ordinary intelligence.

[See 25 Am. St. Rep. 379.]

Appeal from Supreme Court of District of Columbia

Criminal action. Robert H. Partridge convicted of procuring promissory note and money by false pretenses and appeals. **AFFIRMED.**

[573] Robert H. Partridge appeals from a conviction and sentence to three years' confinement in the penitentiary, under an indictment for procuring a certain promissory note and money by false pretenses.

The indictment is in two counts. The first charges that he, [574] on August 19, 1905, obtained from Eugene Hannan a promissory note for \$6,500, payable in sixty days to the order of said Partridge as trustee. The second charges that on August 21, 1905, he procured from said Hannan, \$9,000 in money.

The false pretenses are charged in each count substantially as follows: 1. That the

National Lumber Company, a corporation, owned a certain patented process for recovering certain named products from vegetable matter. 2. That said company owned thousands of acres of valuable timber land in the states of Virginia, West Virginia, and Kentucky. 3. That said company owned buildings and machinery for recovering said vegetable products, of the value of \$118,000. 4. That the stock of said corporation was secured by interest-bearing certificates, secured by first mortgages on city property and guaranteed by the Granite Securities Company, a corporation. 5. That said National Lumber Company owned over a million dollars' worth of marketable timber. 6. That said company had only \$15,000 of treasury stock for sale at par. 7. That the said company had acquired and owned large interests in a valuable deposit of nickel. The truth of each representation was expressly denied. The representation as to the nickel deposit was eliminated on the trial, the prosecuting witness admitting that he attached no importance thereto.

The United States offered evidence tending to show that on the respective dates alleged in the indictment, the said Eugene Hannan, in payment for \$15,000 of the treasury capital stock of the National Lumber Company, delivered the note described, which was later paid, and the \$9,000 in money to the defendant; and that the said delivery and payment were induced by belief in the truth of the several representations alleged in the indictment, made to himself by defendant orally and through printed pamphlets, save and except the seventh one, relating to the nickel deposit.

Eduard L. Gies for appellant.

Clarence R. Wilson and *Charles H. Turner* for appellee.

[575] SHEPARD, C. J. (after stating the facts).—Numerous exceptions were reserved on the trial, and the errors assigned on these have been grouped by the appellant under three general heads, for discussion. Group 1 relates to the evidence of representations made to others. Group 2 relates to evidence of statements, etc., in connection with an equity suit brought by the prosecuting witness against defendant. Group 3 embodies exceptions taken to special instructions given and refused. These will be considered in their order.

1. William R. Tulloss, who lived at Haymarket, Virginia, was introduced by the government, and testified that he knew defendant in 1903 or 1904, and sold him some timber land for stock in the National Lumber Company,—100 shares at \$5 per share. This was objected to as irrelevant. Defendant

represented that the stock was guaranteed and as good as gold. The same objection was reserved and overruled. Witness then produced two letters of defendant to him, both dated April 18, 1905. Witness had written to the Granite Securities Company, of Los Angeles, California, and the first letter by defendant followed the same. It reads as follows:

April 18, 1905.

W. R. Tulloss,
Haymarket, Va.

Dear Sir:—

Your letter to the Granite Securities Company of March 27th was referred to me by them. In reply, beg to say our company canceled the underwriting contract with the Granite Securities Company, it being mutual, we finding a way in which we obtained the securities and investment certificates, saving to our company a brokerage, and having purchased such securities, etc., direct, placing them in escrow with trustees in Washington, D. C.—depositing them in the safety vaults of the Washington Loan & Trust Company, giving us a much securer business for all interested parties.

[576] The Granite Company could not furnish, under the law, the agreement that they thought they could at first, thirty-year bonds, and we did not want their twenty-year bonds, they being too expensive, so changed the method and practically did the same work, obtaining the securities and saving the company 25 per cent, or thereabouts.

I am,
Robert H. Partridge,
Per Palmer.

The second letter of same date was to the effect that if Tulloss had written to defendant originally about what he wished to know, he might have saved time. This evidence was objected to on the ground that it was irrelevant, because too remote, and disconnected from the issue. Motion to exclude was made on the same ground.

The rule that excludes evidence not directly comprehended in the issue has its well-established exceptions; "or rather perhaps," in the language of Mr. Justice Story, "it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule." *Wood v. U. S.* 16 Pet. 342-360, 10 U. S. (L. ed.) 987-994.

Where the question is one of guilty knowledge, or fraudulent intent, as was said in the same case, "it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.

... Cases of fraud present a still more stringent necessity for the application of the same principle." A case there cited with approval (*Irving v. Motley*, 7 Bing. 543, 20 E. C. L. 233, 5 M. & P. 380, 9 L. J. C. P. 161) was an action of trover to recover goods obtained through fraudulent conduct, and it was held permissible to prove other instances in which the same party procured goods under similar circumstances. The question has been discussed by this court in several cases in attempting to point out the applicability or inapplicability of the exception to the particular issue involved. [577] See *Fearson v. U. S.* 10 App. Cas. (D. C.) 536-538; *Funk v. United States*, 16 App. Cas. (D. C.) 478-493; *Ryan v. U. S.* 26 App. Cas. (D. C.) 74-83, 6 Ann. Cas. 633; *Gassenheimer v. U. S.* 26 App. Cas. (D. C.) 433-443; *Burge v. U. S.* 26 App. Cas. (D. C.) 524-534. We shall not review the many authorities cited in the briefs of the parties which present applications of the rule and its exceptions to particular circumstances, for the reason that no one involves facts and circumstances so nearly like those in the present case as to furnish a certain guide to its proper determination. The difficulty is neither in the rule of evidence nor in its exceptions, but in applying them to the facts and circumstances of the particular case.

The undue zeal of the prosecutor often leads him to attempt the introduction of evidence of a distinct crime under the contention that it is relevant as tending to prove identity, motive, or intent. In such cases it is the function of the trial court to enforce the just rule of law for the protection of the accused. In determining the often difficult boundary line of the exception to the rule, the trial court, who hears all of the witnesses, and who is familiar with all the circumstances of the case, is necessarily vested with unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. *Moore v. U. S.* 150 U. S. 57-60, 37 U. S. (L. ed.) 996, 997, 14 S. Ct. 26, 37 U. S. (L. ed.) 996

We are not prepared to say that the court exceeded its discretion in this case. The mere fact that the defendant may have made a similar misrepresentation of the stock guaranty to another, if it stood alone, may have been so separate and independent as not to be relevant to the direct issue involved. But it does not stand alone; it was an appropriate introduction to the letter of defendant, which was an admission that his representation to Hannan, some months later, of the guaranty of the stock of the National Lumber Company, was untrue. This admission of the fact, though made to another pur-

chaser of the stock, and before the sale to Hannan, was pertinent evidence [578] to show his knowledge and intent at the time he made his representations to the latter as one of the inducements to his purchase.

2. Several exceptions were taken to the evidence of J. S. Easby-Smith and others, who were introduced on behalf of the prosecution.

(1) The first witness, who is a member of the bar, testified substantially that he had been retained by Eugene Hannan to investigate the affairs of the National Lumber Company, and called upon defendant, who refused to give him any information. That defendant said: "He (Hannan) will not dare to do anything public in this matter. He took the money from his church to invest in this affair, and he don't dare let anything become public. I am not afraid of you. I will not give you any information now; that is the end of it." That in May, 1908, Hannan filed a bill to have a receiver appointed for the National Lumber Company, and obtained a rule to show cause, to which there was no response.

Defendant, who had not objected to this evidence when introduced, then moved to exclude it as incompetent and irrelevant. This was overruled with exception reserved.

Witness further testified that he visited defendant in company with the receiver Quinn when a rule had been served on defendant to produce the records of said corporation, which he denied having. That, on being brought before the equity court and informed that he would be held in contempt if he did not produce the records within ten days, he produced the same within the time, saying that he had obtained them from one Kinchelow, in Virginia. Certain questions that had been propounded to defendant in the equity court were then offered, and it appears from the bill of exceptions that the answers to two of them were admitted; but the answers are not recited. Exceptions on the same ground were noted.

(2) The receiver Quinn was then introduced and testified to his failure to get the records for defendant. That later he visited Broad Run to look at the property of the corporation there. Defendant was there, and refused him admission to the premises, and threatened violence. All that he saw was some old [579] "junk stuff" worth in Washington about 35 cents per hundred. This was excepted to as immaterial.

In considering the relevancy of this evidence it is to be remembered that one of the false representations charged was that the National Lumber Company owned buildings and machinery, for recovering the products, such as tar, turpentine, alcohol, creosote, and other articles from vegetable matter, of the value of \$118,000; and another, that said

company had a patent for the process of recovery. This patent, the nonexistence of which was then unknown to the witnesses, and, if existent, should properly have been among the records and papers of the company which defendant was asked to produce. The value of the building and machinery was one of the facts in issue. The conduct of the defendant, in secreting the records and preventing the examination of the value of the property, was an attempt to prevent the obtaining of knowledge pertinent to the charges against him, and shows circumstances proper for the consideration of the jury in accord with established principles. See *Funk v. U. S.* 16 App. Cas. (D. C.) 478-493, and cases there cited.

(3) Two other witnesses were introduced, who testified that they were notified by defendant in 1907 that they had been chosen as president and secretary, respectively, of the National Lumber Company; that they executed a mortgage at defendant's request, and then at his request resigned. This evidence was objected to, but the ground of the objection was not stated. It had some tendency to show that defendant was the controller and manager of the corporation, and as such familiar with its properties and claims; and with its records and papers. We need not discuss it further; for if of little or no weight in the bearing suggested, we cannot perceive how any harm could result to defendant.

(4) The defendant offered to introduce the bill of Eugene Hannan in the equity case in order to show that the complaints of said Hannan therein were in conflict with his statements as a witness. The bill is not incorporated in the record, so that we have no knowledge what the nature of its allegations are, and [580] cannot pass upon their relevancy. If the bill did contain allegations of fact different from facts testified to by the witness, the proper practice would be to call the attention of the witness to them and thus lay a foundation for his contradiction.

3. The first special instruction of defendant refused is that the jury should return a verdict of not guilty, because the first count of the indictment does not charge an offense. The contention is that a promissory note is not a thing of value within the meaning of the Code, Sec. 842 [31 Stat. at L. 1326, chap. 854], defining "false pretenses." We perceive no foundation for the construction of the section as contended for. Defendant was not charged with obtaining the signature of a maker, indorser, or guarantor of a note for a purpose by false pretenses, but with procuring the delivery of the note itself to him as a representative of value. It was a thing of value within the meaning of the first clause of the section, and was paid at maturity.

Ann. Cas. 1917D—40.

But if the first count was defective, no error was committed for which the judgment could be reversed; for the remaining count was unquestionably good. *Glaassen v. U. S.* 142 U. S. 140, 35 U. S. (L. ed.) 966, 12 S. Ct. 169; *Posey v. U. S.* 26 App. Cas. (D. C.) 302-305. The verdict and judgment were general, and the penalty was no greater than could be imposed under one count.

4. The defendant prayed a lengthy instruction to the effect that the specific charges of the indictment were to be observed, and a verdict of guilty could not be found unless the jury were satisfied beyond a reasonable doubt on the following points: 1. That the defendant induced Eugene Hannan to part with the money and note described by means of one or more of the specific representations set out in the indictment. The three other points need not be stated, because they were all given, after the court had amended the paragraph above recited inserting the words, "in whole or in part," between the words "described," and "by means." To this amendment the exception is directed. In the general charge the court supplemented the amended instruction, after charging that the false pretenses must be proved beyond a reasonable doubt, etc., with these [581] words: "It is not meant by this that the alleged false pretense or pretenses should have been the sole inducement which moved him to part with his promissory note and money. It is enough if, in co-operation with other inducements and representations if any, disclosed by the evidence, the alleged fraud would not have been accomplished, if you believe it was accomplished, but for one or more of the alleged false pretenses set out in the indictment."

There was no error in the amendment of defendant's instruction, and with the addition above quoted, its meaning could not possibly have been misunderstood by the jury. Wharton (Crim. Law, sec. 1176) states the rule of law as follows: "But it is not necessary to a conviction that the false pretenses alleged should have been the sole inducement by which the property in question is parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party. And this is true even though the prosecutor would not have surrendered the goods solely on the pretense alleged. To require that the belief should be the exclusive motive would exclude conviction in any case; for in no case is any motive exclusive."

This proposition is maintained by the overwhelming weight of decided cases, some of which are here cited. *Com. v. Coe*, 115 Mass. 481-494; *Morgan v. Skiddy*, 62 N. Y. 319-328, 7 Mor. Min. Rep. 74; *Therasson v. People*, 82 N. Y. 238, 239; *Donohoe v. State*, 59

Ark. 375, 27 S. W. 226; *Morris v. State*, 54 Fla. 80-85, 45 So. 456, 14 Ann. Cas. 285.

The fourth special instruction, to the refusal of which exception was taken, is to the effect that if the representations made to Eugene Hannan in the printed pamphlet or folder were that the Lumber Company owned thousands of acres of timber, this would not sustain the charge that defendant represented the ownership of "timber land." Without pausing to analyze the artful statements of the pamphlet, and determine whether they were not calculated to be understood as referring to the ownership of the timber land, and not uncut timber merely, it is sufficient to say that if the statements in the pamphlet were [582] unambiguous it was not error to refuse the charge. The representations of the pamphlet were not the sole reliance of the prosecution. The indictment charged the representation of the ownership of timber land, and the witness Hannan testified that this was the representation made by defendant to him orally.

6. The seventh special instruction asked by the defendant and refused by the court reads as follows: "Before the defendant can be convicted you must believe from the evidence beyond a reasonable doubt that the representations made to the said Eugene Hannan by the defendant were the inducing cause of his parting with his money and with the note in question, and if you shall find that the said Eugene Hannan did not rely upon the representations so made to him, but that before paying the money and delivering the note he visited the premises at Broad Run, Virginia, and there inspected the property of the company, both real and personal, and was informed by the defendant that he should satisfy himself by observation and by inquiry, and not rely upon the printed folders or the representations heretofore made; and further find from the evidence that the said Eugene Hannan, upon such occasion, was provided with the minute book of the National Lumber Company, and requested to read the same so that he might inform himself fully in the premises, and that he then and there read, or was given by the defendant full opportunity to read, the minute entry of October 11, 1904, which has been read in evidence, then you are instructed that your verdict should be for the defendant."

The foregoing instruction was based upon evidence offered by the defendant, tending to show, in contradiction of Hannan, that the latter had visited Broad Run, Virginia, prior to paying over his money and note, and had been given an opportunity to inspect the property there and the minute book of the corporation, which would show that the guaranty of the bonds had been changed from the Granite Securities Company, a corporation, to the Realty Syndicate of San Fran-

cisco; and that he had been told by defendant not to rely upon the printed folders or the representations made to him, but to satisfy himself by [583] observation and inquiry. The refusal of the instruction was not error. It falls short, it will be observed, in presenting the issue whether Hannan actually accepted the withdrawal of the representations by defendant upon which their previous negotiations had been conducted, and assumed to act entirely upon his own judgment. The mere statement of defendant that he should do so, and the opportunity to make examination to the extent afforded, would not authorize a verdict of not guilty, without the ascertainment of the further fact. Moreover, the evidence pointed out but two grounds of misrepresentation into which opportunity for inquiry and examination were offered; namely, the mill machinery and buildings at Broad Run, and the recital of the minute book relating to the Granite Securities Company and the Realty Syndicate. As conceded by the defendant in one of the instructions asked and given, a conviction could be had if one only of the misrepresentations had been proved, provided Hannan was induced by it to part with his money. It is not pretended that an opportunity was given Hannan to examine or inspect the thousands of acres of timber or timber lands of Virginia, West Virginia, and Kentucky, represented as owned by the corporations whose stock he was induced to purchase; or that he was shown any titles, or sources of titles thereto. Moreover, no reference whatever was made to the patent which it was represented the company had for reducing vegetable matter and extracting the valuable products thereof, and upon which reliance was had for the great future profits of the concern. This patent, as the evidence conclusively shows, had never been issued, and could not, therefore, have been exhibited. The court was not bound to segregate the two independent features of misrepresentation from the others, and permit the jury, upon their failure, to find a verdict of not guilty as to all. The instruction should have been limited, at least, to the two grounds of misrepresentation; and the court was not bound to reduce it to proper form, and then give it to the jury.

7. It was not error to refuse the eighth instruction asked by the defendant. The alleged false representation charged and [584] proved was that the Lumber Company owned thousands of acres of timber lands in Virginia, West Virginia, and Kentucky. There was evidence tending to show that the company in fact owned 5 acres of land at Broad Run, Virginia. The effect of the instruction was that if the company owned 5 acres of land in Virginia, defendant should be acquitted of the falsity of that representation. The allegation of the indictment denying the

truth of the representation applied properly to the same as charged. What has been said here applies also to instruction No. 9 and to No. 10, which were refused.

8. The fourteenth special instruction was rightly refused. It is subject to the same objection that has been pointed out in the discussion of special instruction No. 7, hereinabove. It singles out one of the misrepresentations of fact, and instructs the jury, in the event of finding that to be true, to return a verdict of not guilty in general.

While correct, too, in the statement that lands held by defendant under deeds as trustee for the Lumber Company, would constitute it the owner of the same, it went too far in saying that contracts or agreements for title not yet perfected would, without something more, answer a representation of ownership.

9. The last assignment of error is on an exception taken to the granting of the following instruction requested on behalf of the prosecution: "The jury are instructed that it is not necessary, to constitute the crime of obtaining money by false pretenses, that the false representations, wilfully made by the defendant, and in fact relied upon by his victim, should be direct, definite, and positive statements of fact; it is enough if the said false statements and representations are artfully and indirectly drawn, so that they are sufficient to deceive a person of ordinary intelligence, and in fact did deceive in the case at bar."

The representations charged in the indictment as falsely made were supported by the recitals of printed pamphlets and folders, and by evidence that they were orally made. The foregoing instruction was directed to the printed matter, which inspection shows to have been ambiguously, and apparently, [585] artfully worded. All that is requisite is that the representations shall have been so worded as reasonably to deceive a person of ordinary intelligence; and that they did in fact deceive the party to whom they were addressed, and exercised a preponderating influence, inducing him to deliver his money. *People v. Haynes*, 11 Wend. (N. Y.) 557, 558; *Colbert v. State*, 1 Tex. App. 314-320; *Buckalew v. State*, 11 Tex. App. 352-354.

We have discovered no reversible error in the record, and the judgment is affirmed.

Affirmed.

NOTE.

Bill or Note as "Property," etc., within Statute against False Pretenses.

General Rule.

The recent cases are in accord with the holding in *Clawson v. State*, 129 Wis. 650, 9

Ann. Cas. 650, that a promissory note is within the meaning of a statute making it a crime to obtain any property or thing of value by false pretenses. *Bonner v. State*, 8 Ala. App. 236, 62 So. 337; *People v. Bowman*, 24 Cal. App. 781, 142 Pac. 495; *People v. Cassou*, 27 Cal. App. 23, 148 Pac. 810; *People v. Rippe* (Cal.) 163 Pac. 506; *State v. Donaldson*, 243 Mo. 460, 148 S. W. 79; *State v. Gibson*, 169 N. C. 318, 85 S. E. 7; *State v. Switzer*, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789. And see the reported case. See also *Com v. Lacey*, 158 Ky. 584, 165 S. W. 971; *Coblentz v. State*, 84 Ohio St. 235, 95 N. E. 768; *Abeles v. Rex*, 24 Can. Crim. Cas. 308, 24 Quebec K. B. 260.

In *People v. Bowman*, *supra*, the court said: "In the information it appears that by false representations the defendant induced said Giacomini to perform two separate acts, namely, to execute or sign the note and to deliver it to said Bowman. It is manifest that if either one of these was superinduced by said fraudulent pretenses and thus appellant was enabled to obtain possession of said note to the prejudice of Giacomini the offense would be complete. It might be true that the signature was obtained without fraud but if the delivery was caused by false representations a verdict of guilty might follow. . . . If defendant made the said false representations knowingly and with the intention of obtaining said note and he did thereby obtain the note to the prejudice of Giacomini he committed the crime whatever might have been his intentions as to his repayment of the money. The fraudulent intent contemplated by section 532 of the Penal Code is the intent, by means of the false representations, to secure the property which is sought by the party charged."

In *People v. Rippe* (Cal.) 163 Pac. 506, the court referring to an amendment whereby the delivery of the note was averred, said: "While the information as originally filed did not state facts sufficient to constitute an offense known to the law (*People v. Cassou*, 27 Cal. App. 23, 148 Pac. 810), nevertheless it did attempt to charge the crime of 'obtaining property by false pretenses,' and the amended information did no more than show by a proper allegation that the note which was the subject-matter of the false pretenses had become 'property' within the meaning of section 532 of the Penal Code, which defines the offense of obtaining property by false pretenses."

In *State v. Donaldson*, 243 Mo. 460, 148 S. W. 79, the court said: "There was testimony tending to prove that the defendant, under the false pretenses charged, obtained from Downs the note described, also the value of the note and its payment by Downs. That was all that was necessary for the state to prove to show that Downs was defrauded."

It has been held also that where one obtains a check or a draft by false pretenses he is guilty of a crime under a statute against false pretenses. *People v. Bertsche*, 265 Ill. 272, Ann. Cas. 1916A 729, 106 N. E. 823; *People v. Miller* (Ia.) 116 N. E. 131; *State v. Holmes*, 98 Kan. 174, 157 Pac. 412, L.R.A. 1916A 1104; *People v. Perry* (Mich.) 163 N. W. 478. See also *Stoltz v. People*, 59 Colo. 342, 148 Pac. 865; *State v. Gerhardt*, 248 Mo. 535, 154 S. W. 722; *State v. Talley*, 77 S. C. 99, 57 S. E. 618, 122 Am. St. Rep. 559, 11 L.R.A. (N.S.) 938; *State v. Jackson*, 87 S. C. 407, 69 S. E. 883.

In *People v. Bertsche*, supra, it appeared that the defendants, by a pretense of fortune telling, defrauded the prosecuting witness of a number of drafts. It was held that the drafts were property. The court said: "It is urged that no crime was proved because the drafts were not property. It would make no difference if that were so, for the reason that the defendants obtained \$100 in cash. The drafts, however, were property. They were domestic bills of exchange drawn by one bank upon another and were in the hands of the payee. A check in the hands of the maker is not property, because delivery is an essential part of the complete execution of the instrument (*Lory v. People*, 229 Ill. 268, 82 N. E. 261; *People v. Warfield*, 261 Ill. 293, 103 N. E. 979; 3 *Ruling Case Law* 859); but a delivered check or draft is property."

In *People v. Miller* (Ia.) 116 N. E. 131, the court said: "The word 'property,' as commonly used and understood in the commercial world, and as defined by lexicographers, includes checks and drafts and all commercial paper. That word, as interpreted under our attachment and revenue acts, has been held to include checks or drafts. There is nothing in the confidence game statute that in any way indicates that the word 'property' is used in the restricted sense contended for by plaintiffs in error's counsel. We are not inclined to hold that the common-law definition of property, as defined in connection with common-law larceny, should be applied to this statute, in the absence of an intent in the legislature to so restrict it. We consider that this question was practically settled in the case of *People v. Talmage*, 233 Ill. 560, 84 N. E. 655, where this court held an indictment good, on motion to quash, in which the only charge was the obtaining of a certain draft, an instrument in writing, of the value of five hundred dollars, etc."

In *State v. Holmes*, 98 Kan. 174, 157 Pac. 412, L.R.A.1916E 1104, it was said: "In the present case it was alleged and proven that a check was fraudulently obtained. There was money on deposit in the bank on which it was drawn sufficient to have paid it. It was property, a thing of value, and was taken as

the equivalent of money. When it was obtained the injury was inflicted, the fraud accomplished and the offense was complete."

In *Lewis v. Com.* (Va.) 91 S. E. 174, the court said: "We are of opinion that, upon the facts in the case at bar, the ultimate offense of obtaining money by false pretenses is supported by the evidence that such money was fraudulently obtained by means of a check fraudulently acquired. In every real sense money was paid to the accused, and therefore the charge in the indictment was substantially proved. The check was but an incident of the transaction by which the fraud was perpetrated, and but one of the steps leading to the ultimate crime of obtaining money under false pretenses." And in the same case the court said further, after reviewing the authorities: "We recognize the rule that certainty to a reasonable extent is an essential requirement of criminal pleading. One of its objects is to give notice to the party of the nature of the charge. We are unable, however, to see how there can be any danger of surprise in the present case, where the prisoner is charged with stealing \$174 from the Home Beneficial Association. The substance of such a charge is that the accused has fraudulently converted that sum of money to his own use, and whether it was done by means of a larceny at common law or by obtaining, by false pretenses, a check representing the money, which he has cashed, can make no difference in regard to taking the accused by surprise."

Limitation of Rule.

Merely to induce a person, by false pretenses, to indorse a bill or note or to become a comaker with the defendant on his note, and to deliver the same to the defendant, does not constitute obtaining property within the meaning of a criminal statute. *People v. Casson*, 27 Cal. App. 23, 148 Pac. 810; *Johnson v. State*, 57 Tex. Crim. 347, 123 S. W. 143; *Hubbert v. State* (Tex.) 147 S. W. 267. Compare *People v. Pindar*, 159 App. Div. 12, 144 N. Y. S. 242.

In *Hubbert v. State*, supra, the court said: "However, the indictment in this case sets out the note, with the signatures thereto, and then follows a statement of the alleged facts, and alleges that by appellant presenting the note, already signed by himself and Johnson, to Moss for Moss' signature, and by Moss signing it, it (the note) became the property of Moss, and that appellant obtained the note from Moss, which is alleged to be the property of Moss; and the charge of swindling in the indictment is based on the allegations that, by signing the note as surety, Moss became the owner of the note, and appellant obtained such property from Moss by the

false representations. Moss, by signing the note as surety, did not become the owner of the note, and the indictment is contradictory in its allegations. The supreme court has established the rule of law in this state to be that one who signs a note as surety never becomes the owner of the note, even though he is compelled to pay it. If he pays the note, he is not such an owner even as can bring suit thereon against his principal and co-sureties on the note, but must bring his suit on an implied promise to reimburse for the amount paid."

In *People v. Cassou*, 27 Cal. App. 23, 148 Pac. 810, it appeared that the defendant, by false representations, induced another person to indorse a note signed by the defendant. The court held that the defendant was not guilty of obtaining property within the meaning of a statute against false pretenses.

In *Johnson v. State*, 57 Tex. Crim. 347, 123 S. W. 143, it appeared that the defendant, by false statements, induced one F to sign a note as comaker with the defendant and then to deliver the same to the latter. It was held that F was not the owner of the note and, therefore, that the defendant could not be guilty of obtaining property within the meaning of a statute against false pretenses.

In *People v. Pindar*, 159 App. Div. 12, 144 N. Y. S. 242, it appeared that the defendant, by false statements, induced the prosecuting witness to indorse a worthless check. A bank cashed the check on the strength of the indorsement. It was held that the defendant obtained property within the meaning of a statute against false pretenses.

NEW YORK CENTRAL RAILROAD COMPANY

v.

WHITE.

United States Supreme Court—March 6,
1917.

243 U. S. 188; 37 S. Ct. 247.

Master and Servant — Federal Employers' Liability Act — Employees within Act.

A night watchman in the employ of a railway company, injured while in the performance of his duty to guard tools and materials intended to be used in the construction of a new railway station and new tracks, is not then engaged in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (Fed. St. Ann. 1009 Supp. p. 584), § 8657, although such

station and tracks were designed for use, when finished, in interstate commerce.

[See Ann. Cas. 1914C 164; Ann. Cas. 1916E 472.]

Workmen's Compensation Acts — Validity.

The compulsory compensation scheme of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316), which, in lieu of the common-law liability confined to cases of negligence, imposes a liability upon employers to make compensation for disabling, or fatal accidental personal injuries received by, employees in the course of their employment in certain gainful occupations denominated "hazardous employments," without regard to fault as a cause, except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty, graduating the compensation for disability according to a prescribed scale based upon loss of earning power, having regard to the previous wage and the character and duration of the disability, and measuring the death benefits according to the dependency of the surviving wife, husband, or infant children,—does not contravene U. S. Const. 14th Amend. as taking property without due process of law, or unwarrantably limiting freedom of contract, whether considered from the standpoint of employer or employee, but is a valid exercise of the police power of the state.

[See note at end of this case.]

Jury — Constitutional Right to Jury Trial — Fourteenth Amendment.

Trial by jury is not embraced in the rights secured by the 14th Amendment to the Federal Constitution.

Workmen's Compensation Act — Validity.

The exclusion of farm laborers and domestic servants from the compulsory compensation scheme of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316) is not such an arbitrary classification as to contravene the equal protection of the laws clause of U. S. Const. 14th Amend., since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar.

[See note at end of this case.]

Same.

The requirement of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316), § 50, that the employer shall secure payment of the compulsory compensation prescribed by that act either by (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by furnishing satisfactory proof of his financial ability to pay the compensation, and depositing securities for that purpose, cannot be said to contravene U. S. Const. 14th Amend., since self-insurance under the third method presumably is open to all solvent employers on reasonable terms.

[See note at end of this case.]

Error to New York Supreme Court, Appellate Division, Third Judicial Department.

Claim for compensation under Workmen's Compensation Act. Sarah White, claimant, and New York Central Railroad Company, defendant. Claim allowed by Workmen's Compensation Commission. Decision affirmed by Appellate Division of Supreme Court and by Court of Appeals. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

William L. Visscher, Frank V. Whiting, Robert E. Whalen and H. Leroy Austin for plaintiff in error.

Harold J. Hinman, E. Clarence Aiken and Egburt E. Woodbury for defendant in error.

[190] PITNEY, J.—A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that State,¹ to recover compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the Appellate [191] Division of the Supreme Court for the Third Judicial Department, whose order was affirmed by the Court of Appeals, without opinion. 169 App. Div. 903; 216 N. Y. 653. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the Appellate Division, to which the record and proceedings had been remitted by the Court of Appeals. *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 200, 35 S. Ct. 57, 59 U. S. (L. ed.) 193.

The errors specified are based upon these contentions: (1) That the liability, if any, of the railroad company for the death of Jacob White is defined and limited exclusively by the provisions of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Fed. St. Ann. 1909 Supp. p. 584) and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the

equal protection of the laws, in contravention of the Fourteenth Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

The admitted fact that the new station and tracks were [192] designed for use, when finished, in interstate commerce does not bring the case within the federal act. The test is, "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Shanks v. Delaware, etc. R. Co.* 239 U. S. 556, 558, 36 S. Ct. 188, 60 U. S. (L. ed.) 436. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, etc. R. Co.* 229 U. S. 146, 152, Ann. Cas. 1914C 153, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125. And see *Chicago, etc. R. Co. v. Harrington*, 241 U. S. 177, 180, 36 S. Ct. 517, 60 U. S. (L. ed.) 941; *Raymond v. Chicago, etc. R. Co.* this day decided, 243 U. S. 43, 37 S. Ct. 268. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes 42 groups of hazardous employments, defines "employee" as a person engaged in one of these employments upon the premises or at the plant or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines "employment" as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause

¹Chap. 816, Laws 1913, as re-enacted and amended by c. 41, Laws 1914, and amended by c. 316, Laws 1914.

except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely [193] from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By § 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in § 50, an injured employee, or his legal representative in case death results from the injury, may at his option elect to claim compensation under the act or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death the compensation is known as a death benefit, and includes funeral expenses not exceeding one hundred dollars, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. [194] Provision is made for the establishment of a Workmen's Compensation Commission¹ with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the commission is made subject to an appeal, on questions of law only, to the Appellate Division of the Supreme

Court for the Third Department, with an ultimate appeal to the Court of Appeals in cases where such an appeal would lie in civil actions. A fund is created, known as "the state insurance fund," for the purpose of insuring employers against liability under the law and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total payroll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By § 50, each employer is required to secure compensation to his employees in one of the following ways: (1) by insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the State; or (3) "By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposits with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his [195] liability to pay the compensation provided in this chapter." If an employer fails to comply with this section he is made liable to a penalty in an amount equal to the *pro rata* premium that would have been payable for insurance in the state fund during the period of non-compliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by § 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. Laws 1910, Chap. 674. This was held by the Court of Appeals in *Ives v. South Buffalo R. Co.* 201 N. Y. 271, Ann. Cas. 1912B 150, 94 N. E. 431, 34 L.R.A.(N.S.) 162, to be invalid because in conflict with the due process of law provisions of the state constitution and of the Fourteenth Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

"Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection

¹By Chap. 674, Laws 1915, §§ 2 and 8, this Commission was abolished and its functions were conferred upon the newly created Industrial Commission.

of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all [196] other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount for such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, c. 816), and in 1914 re-enacted it (Laws 1914, c. 41) to take effect as to payment of compensation on July 1 in that year. The act was sustained by the Court of Appeals as not inconsistent with the Fourteenth Amendment in *Jensen v. Southern Pac. Co.* 215 N. Y. 514, Ann. Cas. 1916B 276, 109 N. E. 600, L.R.A.1916A 403, and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) that the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their

liberty to acquire property by being prevented from making such [197] agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 S. Ct. 359, 58 U. S. (L. ed.) 713; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 S. Ct. 167, 59 U. S. (L. ed.) 364), yet, as pointed out by the Court of Appeals in the *Jensen* case, 215 N. Y. 526, Ann. Cas. 1916B 276, 109 N. E. 600, L.R.A.1916A 403, the exemption from further liability is an essential part of the scheme, so that the statute is invalid as against the employee as well as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights [198] of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *Munn v. Illinois*, 94 U. S. 113, 134, 24 U. S. (L. ed.) 77; *Hurtado v. California*, 110 U. S. 516, 532, 4 S. Ct. 111; *Martin v. Pittsburgh*, etc. R. Co. 203 U. S. 284, 294, 8 Ann. Cas. 87, 27 S. Ct. 100, 51 U. S. (L. ed.) 184; *In re Second Employers' Liability*

Cases, 223 U. S. 1, 50, 32 S. Ct. 169, 56 U. S. (L. ed.) 327; Chicago, etc. R. Co. v. Transbarger, 238 U. S. 67, 76, 35 S. Ct. 678, 59 U. S. (L. ed.) 1204. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. St. Louis, etc. R. Co. v. Taylor, 210 U. S. 281, 295, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061; Texas, etc. R. Co. v. Rigsby, 241 U. S. 33, 39, 43, 36 S. Ct. 482, 60 U. S. (L. ed.) 874.

The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim *respondiat superior*. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the *alter ego* while acting within the scope of his duties be negligent—in disobedience, it may be, of the employer's positive and specific command—the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's [199] negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are *Murray v. South Carolina R. Co.* (1841) 1 McMull. L. (S. C.) 385, 398, 36 Am. Dec. 268; *Farwell v. Boston, etc. R. Corp.* (1842) 4 Metc. (Mass.) 49, 57, 38 Am. Dec. 339; *Hutchinson v. York, etc. R. Co.* (1850) 5 Exch. (Eng.) 343, 351, 19 L. J. Exch. 296, 299, 14 Jur. 837, 840; *Wigmore v. Jay* (1850) 5 Exch. (Eng.) 354, 19 L. J. Exch. 300, 14 Jur. 841; *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. (Sc.) 266, 284, 295. And see *Randall v. Baltimore, etc. R. Co.* 109 U. S. 478, 483, 3 S. Ct. 322, 29 U. S. (L. ed.) 755; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 647, 6 S. Ct. 590, 27 U. S. (L. ed.) 1003. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice-principal or *alter ego* of the master, turning sometimes upon refined distinctions as to

grades and departments in the employment. See *Knutter v. New York, etc. Telephone Co.* 67 N. J. L. 646, 650-653, 52 Atl. 565, 58 L.R.A. 808. It needs no argument to show that such a rule is subject to modification or abrogation by a State upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them, in either of which cases he does assume them, if he continue in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not in ordinary cases assume the special risk. *Seaboard Air Line Ry. v. Horton*, 233 [200] U. S. 492, 504, Ann. Cas. 1915B 475, 34 S. Ct. 635, 58 U. S. (L. ed.) 1062, L.R.A.1915C 1, 239 U. S. 595, 599, 36 S. Ct. 180, 60 U. S. (L. ed.) 458. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the State.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the States differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 208, 8 S. Ct. 1161, 32 U. S. (L. ed.) 107; *Minneapolis, etc. R. Co. v. Herrick*, 127 U. S. 210, 8 S. Ct. 1176, 32 U. S. (L. ed.) 109; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 598, 26 S. Ct. 159, 90 U. S. (L. ed.) 322; *Tullis v. Lake Erie, etc. R. Co.* 175 U. S. 348, 20 S. Ct. 136,

44 U. S. (L. ed.) 192; Louisville, etc. R. Co. v. Melton, 218 U. S. 36, 53, 30 S. Ct. 676, 54 U. S. (L. ed.) 921, 47 L.R.A.(N.S.) 84; Chicago, etc. R. Co. v. Hackett, 228 U. S. 559, 33 S. Ct. 581, 57 U. S. (L. ed.) 966; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 73, 27 S. Ct. 412, 51 U. S. (L. ed.) 708; Missouri Pac. R. Co. v. Castle, 224 U. S. 541, 544, 32 S. Ct. 606, 56 U. S. (L. ed.) 875. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in *In re Second Employers' Liability Cases*, 223 U. S. 1, 32 S. Ct. 169, 56 U. S. (L. ed.) 327. And see *El Paso, etc. R. Co. v. Gutierrez*, 215 U. S. 87, 97, 30 S. Ct. 21, 54 U. S. (L. ed.) 106; *Baltimore, etc. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619, 31 S. Ct. 621, 55 U. S. (L. ed.) 878.

[201] It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage-earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employ-

ee's assumption of ordinary risks at common law presumably was taken into account in fixing [202] the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling [203] or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and ordinarily nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any

there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, [204] by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the inn-keeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault

have been sustained. *St. Louis, etc. R. Co. v. Mathews*, 165 U. S. 1, 22, 17 S. Ct. 243, 41 U. S. (L. ed.) 611; *Chicago, etc. R. Co. v. Zerneck*, 183 U. S. 582, 586, 22 S. Ct. 229, 46 U. S. (L. ed.) 339.

We have referred to the maxim *respondent superior*. In a well-known English case, *Hall v. Smith*, 2 Bing. 156, 9 E. C. L. 160, this maxim was said by Best, C. J., to be "bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And this view has been adopted in New York. *Cardot v. Barney*, 63 N. Y. 281, 287, 20 Am. Rep. 533. The provision for compulsory compensation, in the act under consideration, [205] cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case, no criticism is made on the ground that the compensation

prescribed [206] by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." *Coppage v. Kansas*, 236 U. S. 1, 14, 35 S. Ct. 240, 59 U. S. (L. ed.) 441. And this is the other: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U. S. 33, 41, Ann. Cas. 1917B 283, 36 S. Ct. 7, 60 U. S. (L. ed.) 131, L.R.A. 1916D 545.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State [207] must suffer." *Holden v. Hardy*, 169 U. S. 366, 397, 18 S. Ct. 383, 42 U. S. (L. ed.) 780. It cannot be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable;" and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear. *Chicago, etc. R. Co. v. McGuire*, 219 U. S.

549, 571, 31 S. Ct. 259, 55 U. S. (L. ed.) 328; *In re Second Employers' Liability Cases*, 223 U. S. 1, 52, 32 S. Ct. 169, 56 U. S. (L. ed.) 327.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 U. S. (L. ed.) 819; *Missouri Pac. R. Co. v. Castle*, 224 U. S. 541, 545, 32 S. Ct. 606, 56 U. S. (L. ed.) 875.

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the Fourteenth [208] Amendment. The denial of a trial by jury is not inconsistent with "due process." *Walker v. Sauvinet*, 92 U. S. 90, 23 U. S. (L. ed.) 678; *Frank v. Mangum*, 237 U. S. 309, 340, 35 S. Ct. 582, 59 U. S. (L. ed.) 969.

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. *Missouri, Kansas, etc. R. Co. v. Cade*, 233 U. S. 642, 650, 34 S. Ct. 678, 58 U. S. (L. ed.) 1135, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in

error chose the third method, and, with the sanction of the commission, deposited securities to the amount of \$300,000, under § 50, and \$30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the State, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been, and presumably will [209] not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its payroll (about \$50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the State might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the State to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

NOTE.

The reported case sustains the validity of the Workmen's Compensation Act of New York, an act of the compulsory type. The court upholds the principle on which acts of that character are founded, deeming that the

imposition on employers of a liability without reference to negligence is not unjust, or arbitrary, or a denial of due process of law, in view of the correlative advantage conferred by the limitation of the amount recoverable in cases where actionable negligence exists. With the decision in the reported case opinions were handed down in two other cases involving the same subject-matter, *Hawkins v. Bleakly*, reported in full, immediately following, upholding the elective Workmen's Compensation Act of Iowa, and *Mountain Timber Co. v. Washington*, reported in full, post, this volume, at page 642, sustaining the Washington Act which provides for compensation to injured employees from an insurance fund which employers are required to maintain. The three decisions therefore put at rest the entire question of the validity of workmen's compensation acts. The earlier decisions of the courts of the several states and the lower federal courts on that subject are reviewed in the notes to *Ives v. South Buffalo R. Co.* Ann. Cas. 1912B 156; *Deikeikis v. Link-Belt Co.* Ann. Cas. 1915A 241; and *Kentucky State Journal Co. v. Workmen's Compensation Board*, Ann. Cas. 1916B 1273.

HAWKINS

v.

BLEAKLY ET AL.

United States Supreme Court—March 6, 1917.

243 U. S. 210; 37 S. Ct. 255.

Workmen's Compensation Acts — Validity.

There is no denial of due process of law in the provisions of the Iowa elective Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), that an employer rejecting the compensation features of that act shall not escape liability for personal injury sustained by an employee arising out of, or in the usual course of, the employment, because the employee assumed the risk of the employment, or because of the employee's negligence, unless this was wilful and with the intent to cause the injury, or was the result of intoxication, or because the injury was caused by the negligence of a coemployee, and that in an action against such rejecting employer it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut such presumption.

[See note at end of this case.]

Evidence — Statute Establishing Presumption — Validity.

A state may, consistently with the due process of law clause of U. S. Const. 14th Amend., establish by statute presumptions and rules respecting the burden of proof, provided that the statute be not unreasonable in itself, and not conclusive of the rights of a party.

[See 36 Am. St. Rep. 682.]

Workmen's Compensation Act — Validity.

There is nothing repugnant to U. S. Const. 14th Amend. in the provision of the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147) that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and that if it be found that the employer or his agent made such request or suggestion, the employee shall be conclusively presumed to have been unduly influenced and his rejection of the act shall be void.

[See note at end of this case.]

Same.

The scheme adopted by the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), for the adjustment of compensation when the employer accepts its provisions, is not in contravention of U. S. Const. 14th Amend. as clothing an administrative body with an arbitrary discretion inconsistent with due process of law, where the act provides the measure of compensation, the circumstances under which it is to be made, establishes administrative machinery for applying the statutory measure to the facts of each particular case, and provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental jurisdictional questions.

[See note at end of this case.]

Jury — Constitutional Right to Jury Trial — Fourteenth Amendment.

Trial by jury is not embraced in the rights secured by the 14th Amendment to the Federal Constitution.

Effect of Ordinance of 1787.

Iowa was not a part of the northwest territory, and was therefore unaffected by the guaranty in the Ordinance of July 13, 1787 (1 Stat. at L. 51, note, 8 Fed. St. Ann. 17), for the government of that territory, that the inhabitants thereof shall always be entitled to the benefits of trial by jury.

[See Ann. Cas. 1916D 942.]

Same.

The admission of Iowa to the Union under the Acts of March 3, 1845 (5 Stat. at L. 742, 789, chaps. 48 and 76); August 4, 1846 (9 Stat. at L. 52, chap. 82); and December 28, 1846 (9 Stat. at L. 117, chap. 1), upon an equal footing with the original states, and the adoption of a state constitution, abrogated any extension to Iowa of the guaranties of the Ordinance of July 13, 1787 (1 Stat. at L. 51, note, 8 Fed. St. Ann. 17), for the government of the northwest territory, including the right to trial by jury, which may have been affected by the Act of June

12, 1838 (5 Stat. at L. 235, chap. 96), establishing a territorial government for Iowa.

Workmen's Compensation Act — Validity.

Employers are not denied the equal protection of the laws, contrary to U. S. Const. 14th Amend. by the provisions of the Iowa Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), § 5, that where both employer and employee reject the act, the liability of the employer shall be the same as though the employee had not rejected it, thus leaving a rejecting employer liable, whether the employee on his part accepts or rejects the act, for personal injuries sustained by an employee arising out of and in the usual course of the employment, with no right to avail himself of the fellow-servant rule or the defenses of contributory negligence or assumption of risk, while by § 3b, if the employee rejects the act and the employer accepts it, the latter may avail himself of such common-law rules and defenses.

[See note at end of this case.]

Constitutional Law — Persons Entitled to Attack Statute.

The question of the constitutionality of the compulsory insurance provisions of the Iowa elective Workmen's Compensation Act (Iowa Laws 35th Gen. Assem. chap. 147), § 42, will not be considered by the Federal Supreme Court at the instance of an appealing employer who has not accepted the act, where the highest state court construes such act as not compelling an employer to insure unless he has accepted and thus become subject to the act.

[See 19 Ann. Cas. 175; Ann. Cas. 1915C 57.]

Appeal from United States District Court, Southern District of Iowa.

Action by J. C. Hawkins, plaintiff, against John L. Bleakly et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Robert Ryan, James P. Hewitt and F. G. Ryan for appellant.

Henry E. Sampson, John T. Clarkson and George Gosson for appellees.

[211] PITNEY, J.—This is a suit in equity, brought by appellant in the United States District Court, to restrain the enforcement of an act of the General Assembly of the State of Iowa, approved April 18, 1913, relating to employers' liability [212] and workmen's compensation; it being c. 147 of Laws of Iowa, 35 G. A.; embraced in Iowa Code, Supp. of 1913, § 2477m. The bill sets forth that complainant is an employer of laborers within the meaning of the act, but has rejected its provisions, alleges that the statute is in contravention of the federal and state constitutions, etc., etc. A motion to dismiss was sustained by the District Court (220

Fed. Rep. 378), and the case comes here by direct appeal, because of the constitutional question, under § 238, Jud. Code (5 Fed. St. Ann. 2d ed. 794).

Since the decision below, the Supreme Court of Iowa, in an able and exhaustive opinion, has sustained the act against all constitutional objections, at the same time construing some of its provisions. *Hunter v. Colfax Consol. Coal Co.* 175 Ia. 245, 154 N. W. 1037, 157 N. W. 145. Hence no objection under the state constitution is here pressed, and we of course accept the construction placed upon the act by the state court of last resort.

As to private employers, it is an elective workmen's compensation law, having the same general features found in the recent legislation of many of the States, sustained by their courts. See Opinion of Justices, 209 Mass. 607, 96 N. E. 308; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209, 37 L.R.A. (N.S.) 489; *State Yarle v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A. (N.S.) 694; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 35 S. Ct. 167, 59 U. S. (L. ed.) 364; *Sexton v. Newark Dist. Tel. Co.* 84 N. J. L. 85, 86 Atl. 451, 86 N. J. L. 701, 91 Atl. 1070; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, Ann. Cas. 1915A 241, 104 N. E. 211; *Crooks v. Tazewell Coal Co.* 263 Ill. 343, Ann. Cas. 1915C 304, 105 N. E. 132; *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173; *Mathison v. Minneapolis St. R. Co.* 126 Minn. 286, 148 N. W. 71, L.R.A. 1916D 412; *Shade v. Ash Grove Lime, etc. Cement Co.* 92 Kan. 146, 139 Pac. 1193, 93 Kan. 257, 144 Pac. 249; *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 340; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648; *Middleton v. Texas Power, etc. Co. (Tex.)* 185 S. W. 556. The main purpose of the act is to establish, in all employments except those of household servants, farm laborers, and casual employees, [213] a system of compensation according to a prescribed schedule for all employees sustaining injuries arising out of and in the course of the employment and producing temporary or permanent disability, total or partial, and, in case of death resulting from such injuries, a contribution towards the support of those dependent upon the earnings of the employee; the compensation in either case to be paid by the employer in lieu of other liability, and acceptance of the terms of the act being presumed unless employer or employee gives notice of an election to reject them. To this main purpose no constitutional objection is raised, the attack being confined to particular provisions of the law.

Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to com-

pel him to accept the compensation features of the act; since it is provided that an employer rejecting these features shall not escape liability for personal injury sustained by an employee arising out of and in the usual course of the employment because the employee assumed the risks of the employment, or because of the employee's negligence unless this was willful and with intent to cause the injury or was the result of intoxication, or because the injury was caused by the negligence of a co-employee. But it is clear, as we have pointed out in *New York Cent. R. Co. v. White*, decided this day, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247, that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit, and that the Fourteenth Amendment does not prevent a State from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to.

The same may be said as to the provision that in an action against an employer who has rejected the act it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of [214] proof to rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. *Mobile, etc. R. Co. v. Turnipseed*, 219 U. S. 35, 42, Ann. Cas. 1912A 463, 31 S. Ct. 136, 55 U. S. (L. ed.) 78, 32 L.R.A. (N.S.) 226.

Objection is made to the provision in § 3, that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and if it be found that the employer or his agent made such a request or suggestion, the employee shall be conclusively presumed to have been unduly influenced, and his rejection of the act shall be void. Passing the point that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees (*Hatch v. Reardon*, 204 U. S. 152, 160, 27 S. Ct. 188, 51 U. S. (L. ed.) 415; *Rosenthal v. New York*, 226 U. S. 260, 271, Ann. Cas. 1914B 71, 33 S. Ct. 27, 57 U. S. (L. ed.) 212; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 S. Ct. 359, 58 U. S. (L. ed.) 713; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 S. Ct. 167, 59 U. S. (L. ed.) 364; *Hendrick v. Maryland*, 235 U. S. 610, 621, 35 S. Ct. 140, 59 U. S. (L. ed.) 385), it is sufficient to say that the criticised provision evidently is intended to safeguard

the employee from all influences that might be exerted by the employer to bring about his dissent from the compensation features of the act. The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common-law rules of employer's liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

It is said that there is a denial of due process in that part of the act which provides for the adjustment of the compensation where the employer accepts its provisions. In case of disagreement between an employer and an [215] injured employee, either party may notify the Industrial Commissioner, who thereupon shall call for the formation of an arbitration committee consisting of three persons, with himself as chairman. The committee is to make such inquiries and investigations as it shall deem necessary, and its report is to be filed with the Industrial Commissioner. If a claim for review is filed, the commissioner, and not the committee, is to hear the parties, may hear evidence in regard to pertinent matters, and may revise the decision of the committee in whole or in part, or refer the matter back to the committee for further findings of fact. And any party in interest may present the order or decision of the commissioner, or the decision of an arbitration committee from which no claim for review has been filed, to the district court of the county in which the injury occurred, whereupon the court shall render a decree in accordance therewith, having the same effect as if it were rendered in a suit heard and determined by the court, except that there shall be no appeal upon questions of fact or where the decree is based upon an order or decision of the commissioner which has not been presented to the court within ten days after the notice of the filing thereof by the commissioner. With respect to these provisions, the Supreme Court of Iowa held (154 N. W. 1064): "Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. . . . We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the court all jurisdiction in the premises. . . . We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the act was being enforced against one who had rejected it, whether [216] the claiming employee was an employee, whether he was injured at all,

whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act." Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545, 34 S. Ct. 359, 58 U. S. (L. ed.) 713.

Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth Amendment. *Walker v. Sauvinet*, 92 U. S. 90, 23 U. S. (L. ed.) 678; *Frank v. Mangum*, 237 U. S. 309, 340; *New York Cent. R. Co. v. White*, 243 U. S. 188, 37 U. S. (L. ed.) 247.

It is elaborately argued that, aside from the Fourteenth Amendment, the inhabitants of the State of Iowa are entitled to this right, because it was guaranteed by the Ordinance of July 13, 1787, for the government of the Northwest Territory, 1 Stat. 51 (8 Fed. St. Ann. 17) in these terms: "The inhabitants of the said territory, shall always be entitled to the benefits of . . . the trial by jury." The argument is rested, first, upon the ground that Iowa was a part of the Northwest Territory. This is manifestly untenable, since that Territory was bounded on the west by the Mississippi River, and Iowa was not a part of it, but of [217] the Louisiana Purchase. But, secondly, it is contended that the guaranties contained in the Ordinance were extended to Iowa by the Act of Congress approved June 12, 1838, establishing a territorial government (c. 96, § 12, 5 Stat. 235, 239), and by the acts for the admission of the State into the Union. Acts of March 3, 1845, chaps. 48 and 76, 5 Stat. 742, 789; Act of August 4, 1846, c. 82, 9 Stat. 52; Act of December 28, 1846, c. 1, 9 Stat. 117; 1 Poor, Chart. & Const. 331, 534, 535, 551. This is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal like any such regulation; and the act for admitting the State, so far

from perpetuating any particular institution previously established, admitted it "on an equal footing with the original States in all respects whatsoever." The regulation, although embracing provisions of the Ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a State and the adoption of a state constitution, than other acts of Congress for the government of the Territory. All were superseded by the state constitution. *Permoli v. New Orleans*, 3 How. 589, 610, 11 U. S. (L. ed.) 739; *Coyle v. Smith*, 221 U. S. 559, 567, 570, 31 S. Ct. 688, 55 U. S. (L. ed.) 853; *Cincinnati v. Louisville*, etc. R. Co. 223 U. S. 390, 401, 32 S. Ct. 267, 56 U. S. (L. ed.) 481. The State of Iowa, therefore, is as much at liberty as any other State to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration.

Section 5 is singled out for criticism, as denying to employers the equal protection of the laws. It reads: "Where the employer and employee elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employee had not rejected the terms, conditions and provisions thereof." As we have shown, if the employer rejects the act he remains liable for personal injury sustained by an [218] employee, arising out of and in the usual course of the employment, and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a co-employee, or even by showing that the plaintiff was negligent, unless such negligence was wilful and with intent to cause the injury or was the result of intoxication on the part of the injured party. This is the result whether the employee on his part accepts or rejects the act. But where the employee rejects it and the employer accepts it, then, by § 3b, "the employer shall have the right to plead and rely upon any and all defenses including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act;" with a proviso not material to the present point. We cannot say that there is here an arbitrary classification within the inhibition of the "equal protection" clause of the Fourteenth Amendment. All employers are treated alike, and so are all employees; and if there be some difference as between employer and employee respecting the inducements that are held out for ac-

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cepting the compensation features of the act, it goes no further than to say that if neither party is willing to accept them the employer's liability shall not be subject to either of the several defenses referred to. As already shown, the abolition of such defenses is within the power of the State, and the legislation cannot be condemned when that power has been qualifiedly exercised, without unreasonable discrimination.

Section 42 of the act provides: "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. . . . [219] And if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one (1) of this act." The Supreme Court of Iowa, in the *Hunter Case*, said of § 42, 154 N. W. 1056: "This clearly shows that no employer is compelled to insure unless he has accepted, and thus become subject to, the act;" proceeding, however, to discuss the case further upon the hypothesis that all employers named in the act were compelled to maintain insurance. In view of the construction adopted, it is unnecessary for us to pass upon the question of compulsory insurance in this case, appellant not having accepted the act.

Other contentions are advanced, but they are without merit and call for no particular mention.

Decree affirmed.

NOTE.

The reported case, holding to be constitutional the Workmen's Compensation Act of Iowa, sustains the principle on which are based the so-called "elective" compensation acts, whereby an election is afforded to employers as to accepting the provisions of the act, but employers not so electing are deprived, in actions for negligence, of the benefit of certain common-law defenses. The validity of other aspects of workmen's compensation laws was settled in the opinions handed down at the same term in *New York Central R. Co. v. White*, reported in full, ante, this volume, at page 629, and *Mountain Timber Co. v. Washington*, reported in full, post, this volume, at page 642, wherein two different types of compulsory acts were sustained. The earlier cases are discussed in the notes to *Ives v. South Buffalo R. Co.* Ann. Cas. 1912B 156; *Deikeikis v. Link-Belt Co.* Ann. Cas. 1915A 241; and *Kentucky State Journal Co. v. Workmen's Compensation Board*, Ann. Cas. 1916B 1273.

MOUNTAIN TIMBER COMPANY

v.

STATE OF WASHINGTON.United States Supreme Court—March 6,
1917.

243 U. S. 219; 37 S. Ct. 260.

Workmen's Compensation Act — Validity.

Rights of employees under U. S. Const. 14th Amend. are not invaded by the abolition, under the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), of private rights of action for damages in case of disabling or fatal accidental personal injuries received by employees in certain employments denominated "extra hazardous" (and in any other industry, at the option of employer and employees), and the substitution of a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazards of each class of occupation.

[See note at end of this case.]

Constitutional Law — Republican Form of Government — Judicial or Political Question.

Whether or not a state has violated the provision of U. S. Const. art. 4, § 4, guaranteeing to every state in the Union a republican form of government, is not a judicial question, but is a political one, which is solely for Congress to determine.

Workmen's Compensation Act — Validity.

The right to trial by jury, guaranteed by U. S. Const. 7th Amend., cannot be said to be infringed by the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), on the theory that if such act be valid, it must be followed in the federal courts in cases that are within its provisions, where there is nothing in such act that excludes trial by jury in any private rights of action which are preserved, and, as between employer and employee, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by a jury.

[See note at end of this case.]

Same.

A state may consistently with U. S. Const. 14th Amend. substitute a system of compulsory compensation for disabling or fatal accidental personal injuries received by employees in the course of their employment in certain so-called hazardous employments without regard to fault of the employer, in lieu of the existing right to maintain actions for damages in cases of the employers' negligence, in which the latter may assert immunity for the negligence of a fellow servant and the defenses of contributory negligence and assumed risk.

[See note at end of this case.]

Same.

The exaction, under the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), from employers in certain industries denominated "extra hazardous," without regard to any wrongful act on their part, or to whether injuries have befallen their own employees or not, of periodical contributions based upon percentages of pay rolls to a state fund from which compensation shall be made for disabling or fatal injuries received by employees in the course of their employment in such industries, is not inconsistent with the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., but such exaction is a valid exercise of the state's police power, there being no claim that the scale of compensation is unduly large, and the schedule of contribution evidencing an intent to proportion the various percentages according to the hazard of each of the groups into which the industries are divided, and to limit the burden to the requirements of each industry.

[See note at end of this case.]

Same.

The evident purpose of the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), to classify the various occupations according to the respective hazard of each, is a sufficient answer (there being no particular showing of erroneous classification) to the objection, founded on U. S. Const. 14th Amend. that the statute goes too far in classifying as hazardous large numbers of occupations that are not hazardous in their nature.

[See note at end of this case.]

Same.

The Federal Supreme Court will not assume, in the absence of an actual decision of the state court, that the provision of the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), making it unlawful for the employer to deduct any part of his compulsory contribution to the state fund created by that act from the wages or earnings of his workmen, will be so broadly construed as to bring it in conflict with the Federal Constitution.

[See note at end of this case.]

Error to Washington Supreme Court.

Action by State of Washington, plaintiff, against Mountain Timber Company, defendant. Judgment for plaintiff in Superior Court, Cowlitz County. Judgment affirmed by Washington Supreme Court. Defendant brings error. The facts are stated in the opinion. **AFFIRMED.**

F. Markoe Rivinus, Theodore W. Reath, Ooy Burnett and Edmund C. Strode for plaintiff in error.

W. V. Tanner for defendant in error.

[227] **PITNEY, J.**—This was an action brought by the State against plaintiff in

error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the State of Washington, to recover under c. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated pay-roll of the workmen employed by plaintiff in error during the three months beginning October 1, 1911. Plaintiff in error by demurrer raised objections to the act based upon the Constitution of the United States. [228] The Supreme Court of Washington overruled them, and affirmed a judgment in favor of the State, 75 Washington 581, following its previous decision in *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L.R.A. (N.S.) 486, and the case comes here under § 237, Judicial Code, 5 Fed. St. Ann. 2d ed. 723.

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death. We will recite its provisions to an extent sufficient to show the character of the legislation.

The first section contains a declaration of policy, reciting that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, and in practice proves to be economically unwise and unfair; that the remedy of the workman has been uncertain, slow and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; and that the welfare of the State depends upon its industries, and even more upon the welfare of its wage-workers. "The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this [229] act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are

hereby abolished, except as in this act provided."

The second section, declaring that while there is a hazard in all employment, certain employments are recognized as being inherently constantly dangerous, enumerates those intended to be embraced within the term "extra hazardous," including factories, mills, and workshops where machinery is used, printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, water works, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; logging, lumbering, and shipbuilding operations; logging, street, and interurban railroads; steamboats, railroads, and a number of others; at the same time declaring that if there be or arise any extra hazardous occupation not enumerated, it shall come under the act, and its rate of contribution to the accident fund shall be fixed by the Department created by the act upon the basis of the relation which the risk involved bears to the risks classified, until the rate shall be fixed by legislation. The third section contains a definition of terms, and, among them, "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer;" with a proviso giving to a workman injured while away from the plant through the negligence or wrong of another not in the same employ, or, if death result from the injury, to his widow, children, or dependents, an election whether to take under the act or to seek a remedy against the third party. "Injury" [230] is defined as an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total pay-roll for the year, "the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." The application of the act as between employers and workmen is made to date from the first day of October, 1911, the payment for that year to be made prior to that date and upon the basis of the pay-roll of the last preceding three months of operation. At the end of each year an adjustment of accounts is to be made upon the

basis of the actual pay-roll. The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being $1\frac{1}{2}\%$, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10%, in the case of powder works. The same section establishes 47 different classes of industry, and declares:

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December 1911. Provided, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet [231] the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund. The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act. *In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.*¹ . . . If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance

with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. . . . If, at the end of any [232] year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year."

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided such payment shall be in lieu of any and all rights of action against any person whosoever. Where death results from the injury, the compensation includes the expenses of burial, not exceeding \$75 in any case, a monthly payment of \$20 for the widow or invalid widower, to cease at remarriage, and \$5 per month for each child under the age of 16 years until that age is reached, but not exceeding \$35 in all, with a lump sum of \$240 to a widow upon her remarriage; if the workman leaves no wife or husband, but a child or children under the age of 16 years, there is to be a monthly payment of \$10 to each child until that age is reached, but not exceeding a total of \$35 per month: if there be no widow, widower, or child under the age of 16 years, other dependent relatives are to receive monthly payments equal to 50% of the average monthly support actually received by such dependent from the workman during the twelve months next preceding his injury, but not exceeding a total of \$20 per month. For permanent total disability of a workman, he is to receive if unmarried \$20, or, if married, \$25 per month, with \$5 per month additional for each child under the age of 16 years, but not exceeding \$35 per month in all. (Section 7 provides that the monthly payment, in case of death or permanent total disability, may be converted into a lump sum payment, not in any case exceeding \$4,000, according to the expectancy [233] of life.) For temporary total disability there is a somewhat different scale, compensation to cease when earning power is restored. For permanent partial disability

¹ By Sess. Laws 1915, c. 188, p. 674, 677, § 4 was amended so as to substitute in the place of the clause italicized the following: "In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates named in this section are subject to future adjustment by the industrial insurance department, in accordance with any rel-

ative increase or decrease in hazard shown by experience, and if in the judgment of the industrial insurance department the moneys paid into the fund of any class or classes shall be insufficient to properly and sufficiently distribute the burden of expense of accidents occurring therein, the department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper."

the workman is to receive compensation in a lump sum equal to the extent of the injury, but not exceeding \$1,500.

By § 6, if injury or death results to a workman from his deliberate intention to produce it, neither he nor his widow, child, or dependents shall receive any payment out of the fund. If injury or death results to a workman from the deliberate intention of the employer to produce it, the workman or his widow, child, or dependent shall have the privilege to take under the act, and also have a cause of action against the employer for any excess of damage over the amount receivable under the act.

By § 19 provision is made for the adoption of the act by the joint election of any employer and his employees engaged in works not extra hazardous. By § 21 the Industrial Insurance Department is created, consisting of three commissioners. By § 20 a judicial review is given in the nature of an appeal to the Superior Court from any decision of the Department upon questions of fact or of the proper application of the act, but not upon matters resting in the discretion of the Department. Other sections provide for matters of detail, and § 11 renders void any agreement by employer or workman to waive the benefit of the act.

From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

[234] While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 S. Ct. 359, 58 U. S. (L. ed.) 713; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 S. Ct. 167, 59 U. S. (L. ed.) 364), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers.

However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *New York Cent. R. Co. v. White*, decided this day, 243 U. S. 188, Ann. Cas. 1917D 629, 37 S. Ct. 247. It is true that in the Washington Act the state fund is the

sole source from which the compensation shall be paid, whereas the New York Act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state commission. But we find here no ground for a distinction unfavorable to the Washington law.

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington Act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid.

Two of the constitutional objections may be disposed of briefly. It is urged that the law violates § 4 of Article IV of the Constitution of the United States, guaranteeing to every State in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts. *Luther v. Borden*, 7 How. 1, 39, 42, 12 U. S. (L. ed.) 581; *Pacific [235] States Telephone, etc. Co. v. Oregon*, 223 U. S. 118, 32 S. Ct. 224, 56 U. S. (L. ed.) 377; *Kiernan v. Portland*, 223 U. S. 151, 32 S. Ct. 231, 56 U. S. (L. ed.) 386; *Marshall v. Dye*, 231 U. S. 250, 256, 34 S. Ct. 92, 58 U. S. (L. ed.) 206; *Davis v. Ohio*, 241 U. S. 565, 36 S. Ct. 708, 60 U. S. (L. ed.) 1172.

The Seventh Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (*Minneapolis, etc. R. Co. v. Bombolis*, 241 U. S. 211, 217, Ann. Cas. 1916E 505, 36 S. Ct. 595, 60 U. S. (L. ed.) 961, L.R.A.1917A 86), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the federal courts in cases that are within its provisions. So far as private rights of action are preserved, this is no doubt true; but with respect to those we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

The only serious question is that which is raised under the "due process of law" and "equal protection" clauses of the Fourteenth Amendment. It is contended that since the act unconditionally requires employers in the enumerated occupations to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property, and of his liberty to acquire property, without compensation and without due process of law. It is pointed out that the occupations covered in-

clude many that are private in their character, as well as others that are subject to regulation as public employments, and it is argued that with respect to private occupations (including those of plaintiff in error) a compulsory compensation act does not concern the interests of the public generally, but only the particular interests of the employees, and is unduly oppressive upon employers and arbitrarily interferes with and restricts the management of private business operations.

The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1 [236] in that year, actions pending and causes of action existing on September 30 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro*.

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in *New York Cent. R. Co. v. White*, supra, where it is pointed out that the common-law rule confining the employer's liability to cases of negligence on his part or on the part of others for whose conduct he is made answerable, the immunity from responsibility to an employee for the negligence of a fellow employee, and the defenses of contributory negligence and assumed risk, are rules of law that are not beyond alteration by legislation in the public interest; that the employer has no vested interest in them nor any constitutional right to insist that they shall remain unchanged for his benefit; and that the States are not prevented by the Fourteenth Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries to their employees, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon particular injured employees and their dependents.

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from accidental [237] injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors.

In the present case the Supreme Court of Washington (75 Wash. 581, 583), sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case*, 65 Wash. 156, 203, 207, 117 Pac. 110, 37 L.R.A. (N.S.) 466, which was rested principally upon that power, but also (pp. 203, 207), sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect. *Henderson v. New York*, 92 U. S. 259, 268, 23 U. S. (L. ed.) 543; *Stockard v. Morgan*, 185 U. S. 27, 36, 22 S. Ct. 576, 46 U. S. (L. ed.) 785; *Galveston, etc. R. Co. v. Texas*, 210 U. S. 217, 227, 28 S. Ct. 638, 52 U. S. (L. ed.) 1031; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 28, 30, 30 S. Ct. 190, 54 U. S. (L. ed.) 355; *Ludwig v. Western Union Tel. Co.* 216 U. S. 146, 162, 30 S. Ct. 280, 54 U. S. (L. ed.) 423; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 35 S. Ct. 99, 59 U. S. (L. ed.) 265. And the Federal Constitution does not require a separate exercise by the States of their powers of regulation and of taxation. *Gundling v. Chicago*, 177 U. S. 183, 189, 20 S. Ct. 633, 44 U. S. (L. ed.) 725.

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of [238] its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. Co. v. Williams*, 233 U. S. 685, 699, 3 S. Ct. 761, 58 U. S. (L. ed.) 1155, 51 L.R.A. (N.S.) 1097. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3)

whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

As to the first point: The authority of the States to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. *Lawton v. Steele*, 152 U. S. 133, 136, 14 S. Ct. 499, 38 U. S. (L. ed.) 385. "The police power of a State is as broad and plenary as its taxing power." *Kidd v. Pearson*, 128 U. S. 1, 26, 9 S. Ct. 6, 32 U. S. (L. ed.) 346. In *Barbier v. Connolly*, 113 U. S. 27, 31, 5 S. Ct. 357, 28 U. S. (L. ed.) 923, the court, by Mr. Justice Field, said: "Neither the [fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—[239] for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." It seems to us that the considerations to which we have adverted in *New York Cent. R. Co. v. White*, supra, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of

men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A [240] familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the Supreme Court of Washington said: "Under our statutes the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises." *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the Fourteenth Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large: and it is evident that unless it be [241] so the corresponding burden upon the industry

cannot be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in *New York Cent. R. Co. v. White*, that in sustaining the law we do not intend to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question—the distribution of the burden—there is no criticism upon the act in its details. As we have seen, its fourth section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay-roll of the industry cannot be deemed an arbitrary adjustment, in view of the legislative declaration that it is “deemed the most accurate method of equitable distribution of burden in proportion to relative hazard.” It is a matter of common knowledge that in the practice of insurers the pay-roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that [242] the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are non-hazard-

ous. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 S. Ct. 359, 58 U. S. (L. ed.) 713. But further, the question whether any of the industries enumerated in § 4 is non-hazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, quoted in the margin, above, which, however, cannot affect the decision of the present case. But in the absence of any particular showing of erroneous classification—and there is none—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

[243] There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the first section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in *New York Cent. R. Co. v. White*, the State is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the State from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay-roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate

the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Cent. R. Co. v. White*, *supra*, or by publicly administering [244] the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue [245] proportioned to the special injury attributable to the activities taxed is not novel. In *Noble State Bank v. Haskell*, 219 U. S. 104, Ann. Cas. 1912A 487, 31 S. Ct. 299, 55 U. S. (L. ed.) 112, 32

U. S. (L. ed.) 1002, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In *Hendrick v. Maryland*, 235 U. S. 610, 622, 35 S. Ct. 140, 59 U. S. (L. ed.) 385, and *Kane v. New Jersey*, 242 U. S. 160, 169, 37 S. Ct. 30, we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see *Charlotte, etc. R. Co. v. Gibbes*, 142 U. S. 386, 394, 395, 12 S. Ct. 255, 35 U. S. (L. ed.) 1051, and cases cited. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep-owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog-owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey v. Brown*, 42 N. H. 373, 375; *Tenney v. Lenz*, 16 Wis. 566; *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183, 186, 9 N. W. 246, 41 Am. Rep. 159; *Longyear v. Buck*, 83 Mich. 236, 240, 47 N. W. 234, 10 L.R.A. 43; *Cole v. Hall*, 103 Ill. 30; *Holst v. Roe*, 39 Ohio St. 340, 344, 48 Am. Rep. 459; *McGlone v. Womack*, 129 Ky. 274, 283 et seq. 111 S. W. 688, 17 L.R.A. (N.S.) 855.

[246] We are unable to find that the act, in its general features, is in conflict with the Fourteenth Amendment. Numerous objections are urged, founded upon matters of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in § 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain (*sic*) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed

so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether as thus construed it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution. *Bachtel v. Wilson*, 204 U. S. 36, 40, 27 S. Ct. 243, 51 U. S. (L. ed.) 357; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 34 S. Ct. 359, 58 U. S. (L. ed.) 713.

Judgment affirmed.

The Chief Justice and McKenna, Van Devanter and McReynolds, JJ., dissent.

NOTE.

The reported case holds to be constitutional the Workmen's Compensation Act of Washington, which establishes a state fund for the compensation of injured employees and requires all employers within its terms to contribute thereto. Compensation acts, both elective and compulsory, providing for compensation by the employer were sustained by decisions at the same term. See *New York Central R. Co. v. White*, reported in full, ante, this volume, at page 629, and *Hawkins v. Bleakly*, reported in full, ante, this volume, at page 637. The principal objection to the Washington act which was not involved in the other decisions referred to was that by its provisions an employer who by special care prevents any accidental injury to his employees is compelled to contribute to the compensation paid to the employees of others. In the reported case, however, the court holds that such a method of securing the payment of compensation is a legitimate exercise of the police power of the state. The earlier cases discussing the constitutionality of workmen's compensation acts are reviewed in the notes to *Ives v. South Buffalo R. Co.* Ann. Cas. 1912B 156; *Deikeikis v. Link-Belt Co.* Ann. Cas. 1915A 241; and *Kentucky State Journal Co. v. Workmen's Compensation Board*, Ann. Cas. 1916B 1273.

STATE

v.

SAWYER.

Maine Supreme Judicial Court—July 21, 1915.

113 Me. 458; 94 Atl. 886.

Fish and Game — Federal Regulation of Migratory Birds.

Act Cong. March 4, 1913, c. 145, 37 Stat. 847 (3 Fed. St. Ann. 2d ed. 412), declaring that all migratory and insectivorous birds shall be deemed within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations provided for, and providing for regulations of the taking of such game, purports to regulate exclusively the matter and to deprive the states of control over such game.

[See note at end of this case.]

Constitutional Law — Power to Declare Statute Invalid — State Court Invalidating Federal Act.

While the Federal Supreme Court has the authority to make the final determination of the question of the constitutionality of an act of Congress, the state courts may, where the enforcement of a state statute depends upon the constitutionality of a federal law, determine the question.

Fish and Game — Federal Regulation of Game.

As the states retained all powers not granted to the federal government, the states, as sovereignties, have the exclusive right to regulate the taking and capturing of wild game, unless such right is conferred upon the federal government.

[See note at end of this case.]

Same.

The commerce clause of the Constitution, giving Congress the right to regulate commerce with foreign nations, among the several states, and with the Indian tribes, does not warrant Act Cong. March 4, 1913, purporting to regulate the killing and taking of migratory and insectivorous birds within the several states; the killing or taking of such birds not being an act of "commerce."

[See note at end of this case.]

Same.

Nor does the general welfare clause, declaring that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, for wild game is not property belonging to the federal government.

[See note at end of this case.]

Enforcement of Game Law — Power of Fish Warden — Service of Warrant.

Accused, who was charged with unlawfully shooting ducks from a point in the open sea near an island within the jurisdiction of the

state, cannot complain that the warrant against him was directed to and served by a fish warden, for Laws 1913, c. 206, § 45, declares that the general supervision of the sea and shore fisheries is extended to islands and to game and birds found thereon, and that such department shall have charge of the enforcement of laws relating to sea and shore fisheries and fish wardens, who are empowered to enforce all laws relating thereto, and have the same power to serve criminal process as sheriffs.

On report from Supreme Judicial Court, Hancock County.

Criminal action. Chester Sawyer convicted in Bar Harbor Municipal Court for violating game law, and appealed to Supreme Judicial Court, Hancock county. Case reported to Law Court on agreed statement of facts. The facts are stated in the opinion. **AFFIRMED.**

Herbert L. Graham for State.

George R. Hadlock for respondent.

[459] KING, J.—The respondent was tried before the Bar Harbor Municipal Court and found guilty of shooting two migratory game birds or wild ducks on Sunday, October 4, 1914, in violation of a provision of the fish and game laws of the State of Maine. He appealed and the case is reported to this court on an agreed statement of facts. The alleged offense was committed while the respondent was in a boat on the open sea one-fourth of a mile from Baker's Island which forms a part of the town of Cranberry Isles, Hancock County, Maine.

It is not contended that the respondent did not violate a law of the State prohibiting the killing of wild ducks, for Sunday is a closed time when it is unlawful to hunt, kill or destroy game or birds of any kind, under the penalties imposed therefor during other closed seasons, Chap. 206, P. L. 1913, Sec. 50, and there is an annual closed season on all varieties of ducks from January 1 to August 31 of each year, with a specified penalty for its violation, Sec. 43, Chap. 206, *supra*. Nor is it contended, as we understand the agreed statement, that the place where the act was committed is not within the State of Maine, for it was only one-fourth of a mile from an island "within its jurisdiction." It is claimed, however, that any power which the States had to make and enforce laws and regulations concerning the killing of migratory game birds became suspended and inoperative by reason of the Act of Congress of March 4, 1913 (3 Fed. St. Ann. 2d. ed. 412) and the regulations thereunder. That Act contains the following provisions:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern

and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate [460] suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons, and any person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than \$100 or imprisoned not more than 90 days, or both, in the discretion of the court.

The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of three months in which said regulations may be examined and considered before final adoption, permitting, when deemed proper, public hearings thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval: Provided, however, That nothing herein contained shall be deemed to affect or interfere with the local laws of the States and Territories for the protection of non-migratory game or other birds resident and breeding within their borders, nor to prevent the States and Territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute."

In pursuance of the authority of the Act the Department of Agriculture adopted suitable regulations which have been approved by the President, one of which fixes a closed season on wild ducks in Maine between December 16 and September 1 next following.

If Congress had the power to control and regulate the killing of migratory game birds within the State, and if in the exercise of that power it has made regulations that are exclusive of, or in conflict with, the State regulations, then the federal regulations must be regarded as supreme, and to have suspended the power of the State to make and enforce regulations respecting the same subject matter.

The federal Act provides that wild ducks and other specified migratory game birds

"shall hereafter be deemed to be within the custody and protection of the Government of the United States; and shall not be destroyed contrary to the regulations hereinafter provided for." This language indicates a legislative purpose that the federal regulations were to be exclusive. And this idea seems to be further indicated in the provision, "That nothing herein contained shall be deemed to affect or interfere with the local laws of the States and Territories for the protection of non-migratory game or other birds [461] resident and breeding within their borders, nor to prevent the States and Territories from enacting laws and regulations to promote, and render efficient the regulations of the Department of Agriculture provided under this statute." We do not, therefore, feel inclined to hold in this case that the federal regulations as to migratory game birds, if valid, are not to be regarded as exclusive of and in conflict with the State regulations which the respondent violated. Accordingly it becomes necessary we think to consider, whether the Act of Congress of March 4, 1913, and the regulations thereunder adopted are valid as against the State regulations for the preservation of wild ducks within its borders.

Notwithstanding the well recognized principle, that the authority to make a final and controlling determination of the question of the constitutionality of an Act of Congress is in the Supreme Court of the United States, and for that reason a State court does not ordinarily assume the consideration of such question; nevertheless, if as in this case, before the question is finally decided by the Supreme Court, the enforcement of a State law depends upon whether Congress had power under the Constitution to pass an Act the effect of which is to suspend the State law, then it becomes the duty of the State court to act in accordance with its own decision of that question until such time at least as it may be otherwise finally determined by the supreme tribunal.

In considering this question, these fundamental and universally admitted principles should be kept in mind, that the federal government is one of enumerated powers, possessing such powers only as have been actually granted to it, and that all other powers of legislation, though not enumerated and defined because it was unnecessary and perhaps inexpedient that they should be, were retained by the States and remained in the States after the adoption of the Federal Constitution as before, except so far as they were abridged by it. It must also be admitted as fundamental, that before the federal government was created the States had the right to exercise almost every legislative power, and among them, undoubtedly, that of establish-

ing laws and regulations for the preservation of the wild game within their borders for the common good of their people, a doctrine which seems never to have been questioned in any jurisdiction.

[462] In *State v. Snowman*, 94 Me. 99, 111, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L.R.A. 544, our court said: "The fish in the waters of the State and the game in the forests belong to the people of the State in their sovereign capacity who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking." This doctrine is recognized by all the American courts and has had the uniform approval of the Supreme Court of the United States whenever the question has been considered by it. In *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 U. S. (L. ed.) 793, the leading case perhaps on the subject, Mr. Justice White (now the Chief Justice) learnedly analyzed the principles upon which this doctrine rests and exhaustively reviewed the precedents in which it is securely established. And it would be needless indeed to cite here the many authorities supporting this unquestioned principle, that the States, prior to the formation of the national legislature, had the power to make laws and regulations for the protection and preservation of the wild game within their borders.

Has that power been granted to the federal government? If so it must be found in either what is called the commerce clause, or the general welfare clause, of the federal Constitution.

The commerce clause authorizes Congress, "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Certainly the passage of wild birds in their flight from one State to another is not commerce between the States. However difficult it may be to define with precision the term commerce as used in that clause of the national Constitution, it is undoubtedly limited to the acts of man, and does not include the natural and uncontrolled movements of wild game. Nor can we perceive any reasonable ground for a contention that the commerce clause confers on Congress power to regulate the taking of wild game within the States. Indeed it would seem that all possible contention on this score has been already held untenable by the Supreme Court of the United States in several cases where the question has been exhaustively considered. In the case of *Geer v. Connecticut*, supra, the validity of a statute of that State, which prohibited the transportation of game out of the State, was involved. The case was carried to the Supreme Court of the United States on the sole ground that as the game in question was killed in the State lawfully, the statute prohibiting its transportation out of

the State was in violation of the commerce clause of the national Constitution. But the Court [463] decided otherwise, holding that the wild animal and bird life within a State belongs to the State in trust for the people of the State, and that the State has the authority to legislate for its protection and preservation for the common good, and that such power of legislation embraces game that has been reduced to the possession of an individual by lawfully killing it in the State; or, in other words, that in view of the peculiar nature of such property and its ownership by the State for the benefit of all its citizens, the State may prohibit its transportation out of the State although lawfully killed within the State, because such a prohibition may tend to restrict its lawful killing within the State, and the better preserve it for its own people. And it was there held that while game, taken lawfully, might be considered a subject of commerce within the State where taken, it did not become the subject of interstate commerce within the commerce clause of the federal Constitution. See also *New York v. Hesterberg*, 211 U. S. 34, 29 S. Ct. 10, 53 U. S. (L. ed.) 75, where it is held that a statute of New York prohibiting the possession of certain game during closed time did not violate the commerce clause of the federal Constitution. In *Judson on Interstate Commerce*, Sec. 11, the author says: "Thus the wild game within a State, at common law, belongs to the sovereign, and in this country to the people in their collective capacity, and the state, therefore, has a right to say that it shall not become the subject of commerce." Our conclusion therefore is that the power to legislate respecting the protection and preservation of wild game within the States was not conferred upon Congress through the commerce clause of the Constitution.

Nor do we find such power in the general welfare clause, which reads as follows: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims of the United States, or of any particular state."

We have already hereinbefore pointed out as the universally accepted doctrine, that the ownership of wild game, so far as it is capable of ownership, is in the States for the benefit of all their people in common. It follows, therefore, that Congress acquired no power under the general welfare clause to make regulations concerning wild game, because wild game is not "property belonging" to the United States. And we need here only repeat what has been before said in [464] substance, that the basic principle on

which all the decisions of both the State and Federal Courts upholding the State game laws rest is, that the State is the owner of the wild game within its borders, and that principle has been consistently adhered to.

The question of the constitutionality of the Act of March 4, 1913, and the regulations thereunder, has been directly considered in two recent cases in the Federal Courts, viz.: *U. S. v. Shauver*, 214 Fed. 154, decided by the District Court for the Eastern District of Arkansas, and *U. S. v. McCullagh*, 221 Fed. 288, decided by the District Court for the District of Kansas. In each of those cases, in an exhaustive opinion, the court reaches the same conclusion here reached, that Congress has not the power to regulate the taking of migratory game birds within the States, and that therefore the Act of March 4, 1913, is unconstitutional. In each of those cases the respondent was prosecuted in the Federal Court for a specific violation of the federal regulations.

Our conclusion therefore is, that the power of the State of Maine to enact laws and regulations for the protection and preservation of wild game within her borders, including migratory game birds, was in no way suspended or abridged by the Act of Congress of March 4, 1913, and the regulations adopted thereunder, and that the provision of the game laws of the State of Maine which the respondent violated was operative and enforceable against him.

There is no merit in the respondent's suggestion that because the warrant against him in this case was directed to a fish warden and served by him the proceedings were defective. Fish wardens are empowered by statute to "enforce all laws and the rules and regulations relating to sea and shore fisheries, arrest all violators thereof, and prosecute all offenses against the same; they shall have the same power to serve criminal processes against such offenders, and shall be allowed the same fees as sheriffs for like services; they shall have the same right as sheriffs to require aid in executing the duties of their office."

Sec. 45, of Chap. 206, Public Laws, 1913, reads as follows:

"The general supervision of the department of sea and shore fisheries as heretofore fixed by law is hereby extended to embrace all the islands in the sea within the jurisdiction of the state, the deer and other game and birds found thereon, and said department shall have charge of the enforcement of the laws relating to all ducks, shore and [465] other birds on the sea-coast of the state one mile inland, including all bays and inlets so far as the tide ebbs and flows, except the Kennebec river above the city of Bath."

We entertain no doubt that the fish warden to whom the warrant against the respondent was directed and by whom it was served had ample authority conferred upon him by statute to act in the premises.

Judgment of lower court affirmed.

NOTE.

Validity and Construction of Federal Statutes Protecting Game.

By a statute known as the "Lacey Act" (Act Cong. May 25, 1900, 3 Fed. St. Ann. 2d ed. 412, carried into the Penal Code as section 242) it is provided that the bodies of game animals or birds shipped from one state into another shall immediately, on arrival in the latter state, become subject to its police power. The purpose of the statute obviously was to remove any question as to the validity of state statutes prohibiting the possession of imported game, as to which see the note to *People v. Bootman*, 2 Ann. Cas. 226. The validity of the act was sustained in *People v. Hesterberg*, 184 N. Y. 126, 6 Ann. Cas. 353, 76 N. E. 1032, 128 Am. St. Rep. 523, 3 L.R.A.(N.S.) 163, *affirmed* on other grounds 211 U. S. 31. The "Lacey Act" added no prohibition and created no new illegality with regard to the killing and shipment of game. Its effect was merely to subject to the regulatory power of the state shipments which might otherwise be regarded as interstate commerce. See *Jonesboro, etc. R. Co. v. Adams*, 117 Ark. 54, 174 S. W. 527. In *People v. Hesterberg*, *supra*, it was said: "By the 'Lacey Act' Congress determined to aid the states in the enforcement of their game laws, but did not deem it wise to enact a game law of its own, and this for the very obvious reason that the game laws of the different states vary greatly, a variation justified in no small degree by varying climatic conditions. It would be unwise to entirely prohibit the importation of game into the country during a part of the year during which in some of the states the taking and consumption of such game is lawful. So Congress practically said to the citizen: We do not prohibit the importation of foreign game, but subject it to the local laws, and you must see to it, at your risk, that you do not violate those laws." See to the same effect *State v. Heger*, 194 Mo. 707, 93 S. W. 252.

By a later act (Act March 4, 1913, 3 Fed. St. Ann. 2d ed. 414) it was enacted that all migratory game birds shall be deemed to be within the custody and protection of the federal government and that they shall not be taken or killed except in accordance with regulations to be made by the department of agriculture. That act has been held to be

invalid in all cases which have passed on it, on the ground that it is not within the enumerated powers of Congress. *U. S. v. Shauver*, 214 Fed. 154; *U. S. v. McCullagh*, 221 Fed. 288; *State v. McCullagh*, 96 Kan. 786, 153 Pac. 557. And see the reported case. In *U. S. v. Shauver*, *supra*, it was said: "It may be, as contended on behalf of the government, that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the people who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary. All the courts are authorized to do when the constitutionality of a legislative act is questioned is to determine whether Congress, under the Constitution as it is, possesses the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the act void. The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional."

In *State v. McCullagh*, *supra*, the court said: "The natural flight of wild fowl from one point to another does not constitute 'commerce,' unless that word be expanded beyond any significance heretofore given it. Whatever other element may be spared from a definition of the term, it has not been heretofore applied to processes or occurrences not directed or affected by human intelligence. But if the fact were otherwise, the circumstance that birds of a particular species do not habitually remain throughout the year in the same state would hardly bring them within the control of Congress on the theory that they were thereby impressed with a national character as the subjects of interstate commerce. This court once decided that the legislature could not prohibit the shipment out of the state of prairie chickens, lawfully caught or killed in Kansas, because such a prohibition was an interference with interstate commerce. (*The State v. Saunders*, 19 Kan. 127.) The Supreme Court of the United States explicitly disapproved the decision, saying that its reasoning was inconclusive because it overlooked the authority of the state over property in game within its confines. (*Geer v. Connecticut*, 161 U. S. 519, 534.) The argument for federal control based upon the power given to Congress to make regulations respecting the property of the United States fails because in our judgment the habit of migration does not vest in the federal government the title to the animal possessing it. In the case last cited, and in

many others, wild animals are declared to be subject to the control of the state—to belong to the people of the state—and the rule has been repeatedly applied to migratory birds. The authority of a state to grant hunting privileges to its citizens to the exclusion of those of other states is generally recognized, and is based upon the same principle. (19 Cyc. 1008; Note, 26 L.R.A.(N.S.) 794. See also 3 C. J. 18.) Doubtless the general government could, if it had the authority, give game birds more effective protection than they now enjoy, or than could be afforded them by the separate action of the states. But Congress can derive no power to legislate on a particular subject from the fact that it can handle the matter more efficiently than the legislatures of the various states."

—
HOWELL

v.

BEE PUBLISHING COMPANY ET AL.

Nebraska Supreme Court—June 3, 1916.

100 Neb. 39; 158 N. W. 358.

Injunctions — Against Publication of False Political Matter.

The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by the following constitutional provisions: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Const. art. 1, § 5.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Douglas county: SEARS, Judge.

Action by Robert B. Howell, plaintiff, against Bee Publishing Company et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

Rosewater & Ootner and W. J. Connell for appellants.

Brome & Brome for appellee.

[39] ROSE, J.—This is a suit in equity to enjoin the publication of an article relating to the candidacy of plaintiff for the office of governor of Nebraska. At the primary elec-

tion August 18, 1914, plaintiff aspired to be the republican nominee, but before becoming a candidate he had made and published the following statement:

"I have felt very much complimented by the suggestion of my name for governor, and as much as I should like to serve this state in that honorable capacity, yet I am more strongly inclined to carry on the work of public ownership in this city. As a result I will not be a candidate at the coming primary, but will devote my energies to the water plant and to a campaign for lower electric rates through the development of a public lighting and power plant under the control of the Metropolitan Water District. Omaha, June 16, 1914. R. B. Howell."

[40] Afterward plaintiff departed from the purpose thus announced and became an active candidate. August 17, 1914, the day before the primary election, the statement quoted, including the date, "June 16, 1914," was reproduced in the Omaha Evening Bee, under the following head-lines:

"HOWELL WILL NOT RUN.

"HIS ANNOUNCEMENT EXPLAINING WHY HIS
"FRIENDS SHOULD NOT CAST THEIR
"VOTES FOR HIM."

Defendants are the publisher and the editor of the Omaha Evening Bee, a daily newspaper. On plaintiff's petition they were restrained by the district court August 17, 1914, as follows:

"It is hereby ordered that the defendants, and each, be and they hereby are restrained and enjoined from printing, publishing, circulating, delivering or mailing any newspaper or other publication to the voters of Nebraska, or to any person or persons within said state, or copy or edition of said newspaper containing any notice or statement of any kind or nature whatsoever, the publication of which states or declares that the plaintiff is not a candidate for the republican nomination for governor of the state of Nebraska, at the primary election to be held August 18, 1914, until the further order of the court."

On appeal defendants take the position that the censorship thus exercised by the trial court is forbidden by the following provisions of the state Constitution:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Const. art. I, sec. 5.

Was the restraining order properly granted? The answer depends on the meaning of the Constitution. The freedom of the press was not a liberty enumerated in the Magna

Charta, but was a subsequent growth of several [41] centuries. After the printing press became a means of disseminating information and opinions relating to the church and the state, all printed matter was subjected to censorship or supervision. This power was first exercised by the church and afterward by the crown. A printer was required to obtain a license. For publishing seditious opinions such punishment as mutilation, whipping, imprisonment, banishment and death was inflicted. The practice of supervising manuscripts in advance of publication was finally abandoned, but the press was subsequently restricted by vigorous prosecutions for libel and by cruel interpretations of the law on that subject. The doctrine that the truth was no justification for its publication originated in the Star Chamber. Trials for seditious libels became a reproach to the Anglo-Saxon civilization. The use of governmental power in England to limit the activity of the press extended to the American Colonies. In replying to an inquiry by English commissioners concerning the condition of Virginia in 1670, Governor Berkeley said:

"I thank God there are no free schools, nor printing; and I hope we shall not have, these hundred years, for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."

The use of the printing press in Virginia was prohibited or restricted until Revolutionary times. In New England official licensors exercised a censorship over the press in the seventeenth century, and in Massachusetts printing was hampered by legal restraints until a few years before the Declaration of Independence. The evils calling for a different attitude toward printing were fresh in the public mind when the first American Constitutions were framed. The first amendment of the Constitution of the United States contains the provision that Congress shall make no law abridging the freedom of the press. The powerful agency of the press in the evolution of just [42] and efficient government and the indefensible restrictions imposed upon publishers were understood generally when provisions similar to those quoted from the Nebraska Constitution were inserted in the fundamental law of many of the states. In the light of history, some of the leading purposes disclosed by the language of the Constitution cannot be misunderstood. The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government. The truth when pub-

lished with good motives and for justifiable ends, contrary to the doctrine of the Star Chamber, is a defense in an action for libel, either civil or criminal. It follows that a court cannot use its equity powers to prevent the publication of political matter merely on the ground that it is untruthful or misleading, its truthfulness and its publication for good motives and for justifiable ends being a defense in an action at law.

The power of a court of equity to protect from improper publications the administration of justice and property, contract, personal or other rights guaranteed by either the state or Federal Constitution, is not presented or decided.

The restraining order should not have been granted.

Reversed and dismissed.

Hamer, J., not sitting.

SEDGWICK, J. (*concurring*).—The majority of the court declare in the syllabus:

"The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading," because the Constitution provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published [43] with good motives, and for justifiable ends, shall be a sufficient defense." The opinion does not define what is "political matter," and does not say why the fact that it is a defense in an action for libel to prove that the publication was for good motives and for justifiable ends should prevent a court of equity from interfering. I do not recall any more important proposition than the one that is so decided in this opinion. No provision of our Constitution has been more litigated and discussed by the courts than the provision that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." The discussion started in the courts before our Constitution was adopted, and, in fact, long before the federal Constitution was adopted, it was much discussed in the courts of England. I suppose that it is the intention of the opinion in this case to hold that publication in a newspaper will not be enjoined under any circumstances because every person may freely speak, write and publish on all subjects. Several hundred years ago this was announced as the law in England, but the English courts have entirely abandoned the doctrine, and at the present time the courts of England deal with injury to personality by writing and publishing in the same manner that they deal with any other torts. There has been a most remarkable growth in this country in the same direction.

In *Francis v. Flinn*, 118 U. S. 385, 6 S. Ct. 1148, 30 U. S. (L. ed.) 165, the supreme court of the United States announced the dictum that "in the eyes of the law" damages are an adequate remedy for all publications; but a very few years later in the famous case of *Gompers v. Buck Stove, etc. Co.* 221 U. S. 418, 31 S. Ct. 492, 55 U. S. (L. ed.) 797, 34 L.R.A. (N.S.) 874, that court sustained an injunction restraining the defendants "from printing, issuing, publishing, or distributing" certain matters which were alleged to be injurious to the plaintiffs. This shows a remarkable growth in the direction of requiring courts of equity to restrain wrongdoing when there is no other remedy to prevent it, and this does not seem to me to be a violation of the Constitution. Those who [44] publish are "responsible for the abuse of that liberty," and it is the abuse of the liberty that is enjoined, and not the liberty itself.

There are other reasons given in the brief for reversing the judgment in this case which seem to call for reversal. I am not satisfied with the discussion in the majority opinion, nor with the statement of the law in the syllabus.

NOTE.

Applying the general rule that the publication of a libel will not be enjoined, the reported case holds that an injunction will not be allowed to restrain the publication of a letter of withdrawal written by a person who afterwards became an active candidate for nomination. The court says that such an injunction is forbidden by a constitutional provision that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." As is pointed out in a concurring opinion the decision as made is broad enough to exclude the doctrine established by many earlier cases that a publication working irreparable injury to property rights may be enjoined. The cases relating to injunction against the publication of a libel or to compel the retraction thereof are reviewed in the note to *Finnish Temperance Soc. Sovittaja v. Riivaaja Pub. Co.* Ann. Cas. 1916D 1087.

STOKES

v.

STATE.

KENNER

v.

STATE.

Arkansas Supreme Court—November 22, 1915.

121 Ark. 95; 130 S. W. 492.

Fish and Game — Rights of Nonresident — Effect of Conveyance of Fishing and Hunting Rights.

Where the right of nonresidents to shoot or fish in the state can exist only as incident of their ownership of land therein on which they hunt or fish, a deed to them granting only the right to hunt and fish, and this to revert on abandonment of the property, gives no right as against the game law.

Deeds — Construction — Estate Limited by Habendum Clause.

Though the granting clause of a deed is "grants, bargains, sells, and conveys the lands," which under Kirby's Dig. § 731, imports a conveyance of a fee simple, "unless limited by express words of such deed," the following provision: "It is understood that said property is to be used as a game and fish preserve only and the conveyors . . . reserve . . . the right to cut and remove all timber . . . and it is a condition . . . should [the grantees] abandon the property . . . said lands shall revert to [the grantors] or its successors," not constituting, strictly speaking, an habendum clause, but clauses descriptive of the interest conveyed and of the purpose of the conveyance, limits the conveyance to the privilege of hunting and fishing; there being no such repugnancy between the granting clause and the succeeding clauses as necessitates a choice between conflicting provisions.

[See note at end of this case.]

Adverse Possession — Sufficiency of Occupancy — Hunting Club.

It is not sufficient basis to support a claim of title by adverse possession to a tract of 27,000 acres, that the grantees in a deed of the right to hunt and fish thereon, have a clubhouse thereon, and two or three acres fenced, have successfully maintained a suit in the federal court enjoining nonmembers from hunting and fishing there, and have keepers and wardens for ejecting nonmembers, and fishing and hunting equipments, and houses for employees, and have posted notices forbidding trespassing.

Appeal from Circuit Court, Mississippi county: DRIVER, Judge.

Criminal actions. Jordan Stokes et al. convicted of unlawful hunting and appeal. The facts are stated in the opinion. **AFFIRMED.**

Mehaffy, Reid & Mehaffy for appellants.

Wallace Davis and *Jno. P. Streepey* for appellee.

[96] SMITH, J.—These cases are identical with the case of *State v. Stokes*, reported in 117 Ark. 192, 174 S. W. 1156, except that it is said that the deed as set out in the opinion in the former case was not correctly copied into the record of that case.

[97] The deed as it appears in the record of the present cases is as follows:

"Know All Men by These Presents:

"That the Paepcke-Leicht Lumber Company and Chicago Mill & Lumber Company, for and in consideration of five dollars to them paid by W. H. Jackson, president, and J. H. Acklen, secretary, as trustees for Big Lake Shooting Club, a social organization, do hereby grant, bargain, sell and convey unto the said W. H. Jackson and J. H. Acklen, trustees as aforesaid, and unto their successors in the offices of president and secretary, respectively, of Big Lake Shooting Club, the following lands and waters lying in the county of Mississippi and State of Arkansas, to wit:

"*First.* Beginning at a point ten feet east of where the original survey of the United States Government, made about the year 1834, defining the shore line of Big Lake, intersects with the line between the States of Missouri and Arkansas, and near the center of section 19, township 16 north, range 10 east, running thence southwardly and always ten feet east of and parallel with the shore line of the original survey as it meanders through sections 19, 20, 29 and 32 in said township, also through sections 5, 8, 17, 18, 19 and 30 of township 15 north, range 10 east, also through sections 25 and 36 of township 15 north, range 9 east, to the north line of section 1, in township 14 north, range 9 east, together with all accretions to each of said sections and fractional sections westward to the thread of Little River, in Big Lake.

"*Second.* Beginning at a point ten feet west of where the half section line running east and west of section 33, of township 15 north, range 9 east, intersects the shore line of Big Lake in the original survey of the United States Government, running thence southwardly and always ten feet west and parallel with the shore line of the said survey, as it meanders through said section 33, and also through sections 4 and 9, of township 14 north, range 9 east, to the north line of section 16, of said township 14 north, range 9 east, together with all accretions to

each [98] of said sections and fractional sections eastward to the thread of Little River in Big Lake.

"It is understood that said property is to be used as a game and fish preserve only, and the conveyors herein reserve to themselves the right to cut and remove all the timber on said lands, and it is a condition of this conveyance that should the Big Lake Shooting Club abandon the property, or said club cease to exist, then and in that event, said lands shall revert to, and the title thereto revert in Paepcke Leicht Lumber Company, or its successors.

"Witness our hands and seals this the 2d day of July, 1901."

By comparison it will be observed that the deeds differ in the following respect: The deed in the present cases contains the clause "do hereby grant, bargain, sell and convey unto the said W. H. Jackson and J. H. Acklen, trustees as aforesaid, and unto their successors in the offices of president and secretary, respectively, of Big Lake Shooting Club," which clause was not contained in the former deed.

It is now urged that because of this difference in the deeds the opinion in the former case is not controlling here. It is admitted, of course, that appellants are nonresidents and were properly convicted upon the charge of unlawful hunting, unless the deed set out above, conveyed such interest in the land as gave to the members of the shooting club the right to hunt and fish thereon.

Appellants state their position as follows: "That, upon careful analysis, nothing is found wanting from the deed presented here to detract from its sufficiency as an effectual conveyance of an estate in the land described. It grants, bargains, sells and conveys unto the grantees 'and their successors' in office, the lands upon which it is admitted the hunting was done. The presence of the granting clause in the deed under consideration vested in the grantees a fee in the lands. The granting clause in the deed now under consideration, both at common law and under the statute, was sufficient to convey a fee [99] simple estate. Does the last paragraph of the deed, which is merely declaratory of the use to which the land is to be put, so control its construction that the grantee takes no ownership whatever in the land?"

Appellants cite the case of *Carllee v. Ellsberry*, 82 Ark. 211, 101 S. W. 407, 118 Am. St. Rep. 60, 12 L.R.A. (N.S.) 956, as sustaining their position. In that case a deed was construed, the granting clause of which conveyed the land described to the grantee in fee simple, but with a proviso in the habendum clause which limited the estate conveyed in certain contingencies to a life estate. After pointing out the repugnancy it was said:

"The conveyance in fee simple carries with it the power to dispose of the estate by deed or will. The power of alienation is an inseparable incident of such an estate. So the deed in question conveyed to Mrs. Ellsberry the estate in fee simple with the power to dispose of it. The limitation of it to a life estate was repugnant to the granting clause, and was void."

(1) But it will be observed that the repugnancy was irreconcilable and the court was called upon to say which of two conflicting clauses should be given effect, and the decision was reached by resort to the common law maxim that "the first deed and the last will shall operate," which maxim finds further expression in the rule of construction that, in case of irreconcilable conflict between the granting and the habendum clause, the former shall prevail.

In so announcing this conclusion the court cited and quoted from the case of *Whetstone v. Hunt*, 78 Ark. 230, 8 Ann. Cas. 443, 93 S. W. 979, in which last mentioned case it was said that resort to this rule of construction would be had only in cases of irreconcilable conflict between the clauses of the deed, and the syllabus there is as follows: "While it is a rule of law that, if there is a clear repugnance between the granting and habendum clauses in a deed, the latter must give way, upon the theory that the deed should be construed most strongly against the grantor, yet it is only where these clauses are irreconcilably repugnant that such a disposition of the question is required to be made."

[100] The court quoted with approval the following statement from 3 Washburn, *Real Property* (6 ed.) section 2360, "If," says Mr. Washburn, 'there is a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former; but if they can be construed so as to stand together by limiting the estate without contradicting the grant, the court always gives that construction, in order to give effect to both.' (Cases cited)."

The discussion of the subject was concluded with the statement that "it is our duty to give all parts of the deed such construction, if possible, as that they will stand together."

The case of *Whetstone v. Hunt*, 78 Ark. 230, 93 S. W. 979, is annotated in 8 Ann. Cases 443 and the case of *Carlee v. Ellsberry*, 101 S. W. 407, 118 Am. St. Rep. 60, is annotated in 12 L.R.A.(N.S.) 956. To each of these cases so reported there is an extended note in which a great many cases are collated. See also the cases of *Fletcher v. Lyon*, 93 Ark. 5, 123 S. W. 801; *Dempsey v. Davis*, 98 Ark. 570, 136 S. W. 975.

In 8 R. C. L. there is an extended statement of the general rules of construction of

deeds and at sections 98, 100 and 101 of this article we find the following statement of the law, applicable to the question now under consideration:

" . . . Applying the doctrine of the ancient common law, that the first deed and the last will shall operate, the technical rule is that where the two clauses are so inconsistent, contradictory or repugnant that they can not be reconciled and both given effect, the first is to be received and the last rejected. It has been declared, however, that the law will hold that part of a deed to precede which ought to take precedence, no matter in what part of the instrument it may be found, wherefore repugnant words must yield to the purpose of the grant clearly ascertained from the premises of the deed, though such words stand first in the grant; and it seems that generally courts of the present day do not feel bound, in any case, to give effect to the first of two repugnant parts of a deed [101] merely because of its position in the instrument, but rather to effectuate the one, be it first or last, which appears, from an examination of the whole deed, most in harmony with the purpose of the grant and the intention of the parties. . . . It is true that there may be cases in which the old, technical rule has to be applied as a last resort, as, where two conflicting intentions are plainly and unequivocally expressed, there is no alternative but to construe it by this rule, even though it may be arbitrary, but in any proper case it gives way to the rules that the deed is to be considered in all its parts and that the intention governs rather than the form of the instrument or the use of particular words. . . . The modern tendency is to ignore the technical distinctions between the various parts of a deed and to seek the grantor's intention from them all, without undue preference to any, giving due effect to all, including both habendum and granting clause, where such can reasonably be done, in order to arrive at the true intention, even to the extent of allowing the habendum to qualify or control the granting clause where it was manifestly intended that it should do so. And while it can not be doubted that the rule according primary significance to the granting clause still obtains, being sometimes treated as a rule of property, and that if two conflicting intentions are expressed, there is no alternative but to construe the deed by the technical rules, even though they may be denominated arbitrary, nevertheless it is only when the clauses are irreconcilably repugnant that such a disposition of the question is required to be made. The plain intention of the grantor as disclosed by the deed as a whole controls the construction, and a deed must be so interpreted as to make it operative and effective in all its provisions, if its terms are susceptible of such interpreta-

tion, for, it has been said, the deed, as the witness to the contract between the parties, should speak the truth, the whole truth, and nothing but the truth. So a construction which requires rejection of an entire clause is not to be admitted, except from unavoidable necessity."

[102] In the notes to the text quoted are found citations to a great many cases, which may be examined for further discussion of this subject.

The Supreme Court of Virginia in the case of *Wolverton v. Hoffman*, 104 Va. 605, 52 S. E. 176, resorted to the rule of construction that a subsequent clause of a deed repugnant to the granting clause was void. But the same court in the case of *Temple v. Wright*, 94 Va. 338, 26 S. E. 844, said:

"The technical common law rule relied on by appellees, that the habendum clause of a deed yields to the granting clause where there is a repugnance between the estate granted and that limited in the habendum, which is a consequence of the rule that deeds are construed most strongly against the grantor, is supported by abundant authority. It is, however, not to be invoked as a rule of construction except in those cases where the repugnance is such that the intention of the grantor can not be determined with reasonable certainty from the whole instrument, for, where that intention can be ascertained, it is controlling if no legal obstacles lie in the way. *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404; *Fogarty v. Stack*, 86 Tenn. 610, 8 S. W. 846; *Bodine's v. Arthur*, 91 Ky. 53, 14 S. W. 904, 34 Am. St. Rep. 164, note; and note to *Berridge v. Glassey*, 112 Pa. St. 442, 56 Am. Rep. 324, 3 Atl. 583."

Applying these rules of construction to the deed in the present cases we find no reason for giving this deed a different construction from that given the deed in the former case, where we said:

"When the deed is construed from its four corners, and especially in reference to language used in the latter part of it, it is evident that there was only an intention to grant the defendants the right to hunt and fish on the land. The deed recites that the property is to be used as a 'fish and game preserve only,' and that the grantors reserve to themselves the right to cut and remove all the timber on the land, and that it is a condition of the conveyance that should the Big Lake Shooting Club abandon the property, or the club cease to exist, the land should [103] revert to and the title thereto be revested in the grantors. We do not think the deed conveyed any interest in the land separate and apart from the right to use it as a fish and game preserve."

The habendum clause is not essential to the validity of a deed and its omission is quite

common. Strictly speaking, there is no habendum clause in this deed. But the deed is made up of the granting clause and clauses descriptive of the interest conveyed, and of the purpose of the conveyance. In the construction of this deed no rule of construction is to be invoked which requires the exclusion of any portion of it from consideration, unless portions of the deed are in irreconcilable conflict with each other. We must rather take the deed and construe it, as was said in the former case, by its four corners if all of its provisions can be given effect, and when this deed is so construed it is not doubtful what its purpose was. It is highly improbable that any controversy will ever arise between the shooting club, the grantee, and the lumber company, the grantor, as to the interest conveyed, and if such controversy should arise we think without doubt that it would be held to have conveyed only the privilege of hunting and fishing on the lands there described, and this privilege only for such time as the Big Lake Shooting Club should continue to exist and use the land for the purpose there stated.

The deed does use the words "grant, bargain, sell and convey," and these words do import a conveyance of a fee simple title and operate as a special warranty under the provisions of Section 731 of Kirby's Digest unless limited by express words of such deed." Section 731 Kirby's Digest. But this deed so limits the interest conveyed. *McDill v. Meyer*, 94 Ark. 615, 128 S. W. 364.

We think it would not be seriously contended that the grantor conveyed the timber standing or being on said lands, yet the interest which ordinarily passes by a deed, the granting clause of which uses the words "grant, bargain and sell," would carry the title to the timber with it. Yet if we are to construe the deed as contended [104] by appellants it would necessarily follow that the title to the timber passed to the grantee. It is apparent that the scrivener did not undertake to divide this deed into formal parts, and as has been said there is strictly no habendum clause. The entire deed is devoted to the granting clause and the clauses describing the purpose of the deed and the interest conveyed, and we hold there is no such repugnancy between these recitals as necessitates a resort to rules of construction which require a choice between conflicting provisions.

Having held in the former case (*State v. Stokes*, supra) that a deed to non-residents which grants only the right to hunt and fish on the land, and which right was to revert if the property was abandoned, did not convey any interest therein so as to entitle non-residents to shoot and fish thereon, it follows that appellants did not acquire by this deed

that right to hunt and fish, which is possessed by non-resident owners of land.

(2) It is insisted now, as it was in the former case, that appellants have title to the lands described in the conveyance by adverse possession. The area included within the description contained in said deed is about 27,000 acres, and it is shown by the agreed statement of facts that appellants have a clubhouse located upon lands lying within the meander of said lake, a portion of which is enclosed with a fence, but not to exceed two or three acres, and that no part of the shooting herein complained of was done within any enclosure belonging to said shooting club. It is further recited in the agreed statement of facts that the officers of this club maintained in the Federal court an injunction suit to prevent non-members of the club from hunting and fishing on the lands in controversy, and that an injunction was granted in said case, and it is further stated that said club has its keepers and wardens for the purpose of ejecting non-members from said lands, and that the club has fishing and hunting equipment and paraphernalia consisting of boats, skiffs, fishing tackle, house-boats, blinds, decoys, etc., and several tenant houses in which its employees reside, and that [105] the wardens of the club have kept posted printed notices fastened upon the trees and the buildings of said club forbidding all persons from trespassing, hunting or shooting upon said lands.

Such acts and use of the lands in controversy will not support a claim of title by adverse possession. *Scott v. Mills*, 49 Ark. 266, 4 S. W. 908; *Brown v. Boequin*, 57 Ark. 97, 20 S. W. 813; *John Henry Shoe Co. v. Williamson*, 64 Ark. 100, 40 S. W. 703; *Driver v. Martin*, 68 Ark. 551, 60 S. W. 651; *Earle Imp. Co. v. Chatfield*, 81 Ark. 296, 99 S. W. 84; *Files v. Jackson*, 84 Ark. 587, 106 S. W. 950; *Langhorst v. Rogers*, 88 Ark. 318, 114 S. W. 915; *Connerly v. Dickinson*, 81 Ark. 258, 99 S. W. 82; *Boynton v. Ashabrunner*, 75 Ark. 514, 88 S. W. 568.

The judgments are therefore affirmed.

NOTE.

Construction of Habendum Clause in Deed in Connection with Premises.

Scope of Note, 661.

Generally, 661.

When Habendum Is Repugnant to Premises, 663.

When Premises Are General, 664.

When Premises Are Uncertain or Indefinite, 664.

Scope of Note.

It is the purpose of this note to review the recent cases dealing with the construction of

the habendum clause in a deed in connection with the premises thereof. The earlier cases on the subject are collated in the notes to *Whetstone v. Hunt*, 8 Ann. Cas. 443, and *Wilkins v. Norman*, 111 Am. St. Rep. 767.

Generally.

In case of an apparent inconsistency between the habendum clause of a deed and the premises thereof the court will consider the instrument as a whole and will if it is possible give to it an interpretation which will reconcile the several clauses and express the actual intent of the parties. *Dickson v. Van Hoose*, 157 Ala. 459, 47 So. 718, 19 L.R.A. (N.S.) 719; *Jacobs v. All Persons*, 12 Cal. App. 163, 106 Pac. 896; *Richards v. Richards*, 60 Ind. App. 34, 110 N. E. 103; *Husted v. Rollins*, 156 Ia. 546, 137 N. W. 462, 42 L.R.A. (N.S.) 378; *Yeager v. Farnsworth*, 163 Ia. 537, 145 N. W. 87; *Wood v. Logue*, 167 Ia. 436, Ann. Cas. 1917B 116, 149 N. W. 613; *Crews v. Glasscock* (Ky.) 107 S. W. 237; *Bowe v. Richmond*, 109 S. W. 359, 33 Ky. L. Rep. 173, *Putnam v. Pere Marquette R. Co.* 174 Mich. 246, 140 N. W. 554; *Pack v. Whitaker*, 110 Va. 122, 65 S. E. 496; *Culpeper Nat. Bank v. Wrenn*, 115 Va. 55, 78 S. E. 620.

In *Richards v. Richards*, supra, the court said: "Where the intention of the parties as to the kind of estate conveyed is clearly expressed, such intention will be given effect, regardless of the technical rule that the granting clause will prevail over other portions of the deed which tend to modify or curtail the estate conveyed." In *Jacobs v. All Persons*, 12 Cal. App. 163, 106 Pac. 896, the court, quoting from *Aldridge v. See Yup Co.* 17 Cal. 44, said: "'Much curious learning is to be found in the books as to the effect of deeds, and many subtle and unsubstantial distinctions, and technical and arbitrary rules laid down touching their construction and operation.' It is, however, the tendency of the courts in the later decisions to adopt such construction as will effectuate the manifest intention of the parties. The entire deed must be read to get at the intention of the grantor. Effect, if possible, must be given to the habendum clause as well as to the granting clause. Effect must be given to both consistent with the evident purpose and intent of the grantor. The very purpose and object of the habendum clause is to limit, enlarge and make clear the estate granted by the premises. 'Whether a life estate or an estate in fee is conveyed must be determined by considering the deed as a whole.'"

Where a deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses in the deed will not defeat that intention. *McCombs v. Stephenson*, 154 Ala. 109, 44 So. 867.

The modern tendency is toward the relaxation of the arbitrary rule that the granting clause prevails over the habendum, and that rule is applied only in case of an irreconcilable conflict. If possible the court will discover from the entire deed the intent of the parties and give it effect. *Kendall v. Parsons*, 81 Kan. 192, 105 Pac. 25; *Dyson v. Bux*, 84 Kan. 596, 114 Pac. 1092; *Abbott v. Perkins*, 90 Kan. 45, 132 Pac. 1177; *Wilson v. Moore*, 146 Ky. 679, 143 S. W. 431; *Harkness v. Meade*, 148 Ky. 565, 147 S. W. 10; *Crews v. Glasscock*, 107 S. W. 237, 32 Ky. L. Rep. 913; *Simonds v. Simonds*, 199 Mass. 552, 85 N. E. 860, 19 L.R.A.(N.S.) 686; *Putnam v. Pere Marquette R. Co.* 174 Mich. 246, 140 N. W. 554. And see the reported case.

In *Simonds v. Simonds*, supra, it was said: "The question is as to the meaning of the deed of Lucius Simonds. A cardinal rule in the interpretation of conveyances is that every deed should be so construed as to give effect to the intent of the parties, unless inconsistent with some rule of law or repugnant to the terms of the grant."

In *Wilson v. Moore*, 146 Ky. 679, 143 S. W. 431, referring to a case holding that if there is a clear repugnance between the nature of the estate granted and that limited in the habendum the latter yields to the former, the court said: "While this case has never been overruled, the tendency of the more recent opinions has been to relax the strictness of the technical rule of construction therein announced, and to construe a deed according to the intention of the grantor as gathered from the whole instrument."

The rule governing the construction of inconsistent clauses was discussed in *Putnam v. Pere Marquette R. Co.* 174 Mich. 246, 140 N. W. 554, the court saying: "While the general rule is well settled that, when the habendum is repugnant and contrary to the granting clause, it is void (see cases cited in *Smith v. Smith* [71 Mich. 633], that rule is subject to qualifications, and is not always to be invoked. In *Powers v. Hibbard*, 114 Mich. 533, 552, 72 N. W. 346, it is said: 'But these rules must be understood and taken in connection with other rules of construction, as, where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the habendum performs the office of defining, qualifying, or controlling. *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83. Again, where it is impossible to determine from the deed and the surrounding circumstances that the grantor intended the habendum to control, the granting words will govern; but, if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum, the latter must control.' This court, speaking through Justice Montgomery,

again announced its policy in the case of *Mullreed v. Thumb*, 116 Mich. 440, 74 N. W. 710, in the following language: 'The general rule is that the intention of the parties to an instrument is to be ascertained from a reading of the entire instrument. . . . Another rule is that a repugnancy between different clauses of the deed must be resolved in favor of the first. This latter rule is usually invoked when there has been an attempt to limit the granting clause by the habendum, or where there is an attempt to except something specifically granted. This rule should be acted on only as a last resort, and generally the first inquiry is: What was the intention of the parties as expressed by the instrument? *Bassett v. Budlong*, 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404. It is true that courts have in some cases subordinated this rule of construction to that which gives preference to the first expression of the grantor, and have done so in some cases at the expense of sacrificing the intent of the parties as plainly expressed. . . . This court has, however, not so applied this latter rule as to subvert the intent of the parties, when plainly expressed.'"

It has also been held that it is the modern rule in construing a deed in a case of repugnancy to give effect to every part of the deed, if possible, consistent with the rules of law and the intention of the grantor. Otherwise the part which is repugnant to the intention is rejected. *Koehne v. Beattie*, 36 R. I. 316, 90 Atl. 211.

It has been said that the common-law rule that the granting clause of a deed controls in case of a conflict between it and the other clauses, is merely a rule of construction and not a rule of positive law, and that it must yield to the master rule that the intention of the parties, as drawn from the whole deed, must govern. *Johnson v. Barden*, 86 Vt. 19, Ann. Cas. 1915A 1243, 83 Atl. 721. And the rule that the habendum clause yields to the granting clause when repugnant, does not apply where the intention of the parties can be ascertained with reasonable certainty from the whole instrument. *Culpeper Nat. Bank v. Wrenn*, 115 Va. 55, 78 S. E. 620. If it appears from the whole instrument that it is intended by the habendum to restrict or enlarge the estate conveyed by the words of the grant the habendum clause prevails. *Pack v. Whitaker*, 110 Va. 122, 65 S. E. 496. So it has been held that the courts will reconcile when possible any inconsistency between the granting and habendum clauses. *Wallace v. Hodges*, 160 Ala. 276, 49 So. 312. It has also been pointed out that although any subsequent clause repugnant to the granting clause will be considered void, the rule will not apply where the granting clause itself contains a limitation on the rights of the

grantees. *Hess v. Kernan*, 169 Ia. 646, 149 N. W. 847.

In some jurisdictions statutes have been enacted providing that in construing deeds the intent of the grantor is to be determined from the entire instrument if possible, and such a statute requires a departure from the ancient rule whereby the granting clause was given an arbitrary preference. *McDill v. Meyer*, 94 Ark. 615, 128 S. W. 364; *Dempsey v. Davis*, 98 Ark. 570, 136 S. W. 975; *Mt. Olive Stave Co. v. Handford*, 112 Ark. 522, 166 S. W. 532; *Cobb v. Wrightsville*, etc. R. Co. 129 Ga. 377, 58 S. E. 862; *Bauman v. Stoller*, 235 Ill. 480, 85 N. E. 657; *Buck v. Garber*, 261 Ill. 378, 103 N. E. 1059; *Coogan v. Jones*, 278 Ill. 279, 115 N. E. 877. In *McDill v. Meyer*, supra, the court said: "At common law, a fee could not by deed be granted without words of inheritance; but, by force of our statute (Kirby's Dig. § 733), 'all deeds shall be construed to convey a complete estate of inheritance in fee simple, unless expressly limited by appropriate words in such deed.' This statute does not, however, apply where appropriate words are used in the deed expressly limiting the grant. The habendum is the appropriate place in the deed for such limitation, but it may appear anywhere in the deed. It is only where limitations or reservations in the habendum or subsequent parts of a deed are repugnant to the granting clause that they are held to be void. *Fletcher v. Lyon*, 93 Ark. 5; *Riggin v. Love*, 72 Ill. 553. The office of the habendum clause of a deed is to explain or define the extent of the grant, and is rejected only where there is a clear and irreconcilable repugnance between the estate granted and that limited in the habendum." So in *Cobb v. Wrightsville*, 129 Ga. 377, 58 S. E. 862, it was said: "Since the adoption of the original code, taking effect in 1863, the strictness of the old rule as to repugnant clauses in a deed has been much modified. Substance, rather than technical nicety in the location of clauses, is controlling. The intention of the parties is the cardinal rule of construction. If it be clear, and sufficient words be used to arrive at the intention, and it contravenes no rule of law, it is to be enforced, and is not to be sacrificed to arbitrary rules of construction. Civil Code, § 3673. 'If two clauses in a deed be utterly inconsistent, the former must prevail, but the intention of the parties, from the whole instrument, should, if possible, be ascertained and carried into effect.'"

In *North Carolina* the common-law rule that the habendum part of a deed is not allowed to divest an estate already vested, has apparently been superseded by the rule of construction that the court must ascertain the intent of the parties from the whole deed. *Triplett v. Williams*, 149 N. C. 394, 63 S. E.

79, 24 L.R.A.(N.S.) 514; *Carolina Real Estate Co. v. Bland*, 152 N. C. 225, 67 S. E. 483; *Midgett v. Meekins*, 160 N. C. 42, 75 S. E. 728; *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503. See also *Condor v. Secrest*, 149 N. C. 201, 62 S. E. 921. Compare *Wilkins v. Norman*, 139 N. C. 40, 51 S. E. 797. And if it clearly appears that the grantor's intention was to enlarge or restrict the estate given by the granting clause the habendum clause controls. *Acker v. Pridgen*, 158 N. C. 337, 74 S. E. 335.

When Habendum Is Repugnant to Premises.

Where the habendum is so far inconsistent with and repugnant to the premises or the granting clause that the actual intent cannot be determined and no reasonable interpretation will permit both to stand, the habendum is always to be disregarded in favor of the premises. *Dickson v. Wildman*, 175 Fed. 580; *Dickson v. Wildman*, 183 Fed. 398, 105 C. C. A. 618; *Dickson v. Van Hoose*, 157 Ala. 459, 47 So. 718, 19 L.R.A.(N.S.) 719; *Graves v. Wheeler*, 180 Ala. 412, 61 So. 341; *Mt. Olive Stave Co. v. Hanford*, 112 Ark. 522, 166 S. W. 532; *Morton v. Babb*, 251 Ill. 488, 96 N. E. 279; *Coogan v. Jones*, 278 Ill. 279, 115 N. E. 877; *Lamb v. Medsker*, 35 Ind. App. 662, 74 N. E. 1012; *Adams v. Merrill*, 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36; *Richards v. Richards*, 60 Ind. App. 34, 110 N. E. 103; *Prindle v. Iowa Soldiers Orphans Home*, 153 Ia. 234, 133 N. W. 106; *Hughes v. Hammond*, 136 Ky. 694, 125 S. W. 144, 26 L.R.A. 808; *Land v. Land*, 172 Ky. 145, 189 S. W. 1; *Calloway v. Forest Park Highlands Co.* 113 Md. 1, 77 Atl. 141; *Gaylord v. Barnes*, 128 App. Div. 810, 113 N. Y. S. 605; *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484; *Reese Howell Co. v. Brown* (Utah) 158 Pac. 684; *Purcell v. Tully*, 12 Ont. L. Rep. 5, 7 Ont. W. Rep. 848; *Jamieson v. London*, etc. Loan, etc. Co. 23 Ont. App. 602. See also *Robertson v. Robertson*, 191 Ala. 297, 68 So. 52; *Hamilton v. Sidwell*, 131 Ky. 428, 115 S. W. 204, 29 L.R.A.(N.S.) 961; *Link v. McNabb*, 111 Md. 641, 74 Atl. 825; *Burgess v. McCommas*, 61 Tex. Civ. App. 246, 129 S. W. 382. Compare *Dunlap v. Dunlap*, 6 Ont. 141.

In *Land v. Land*, 172 Ky. 145, 189 S. W. 1, the court said: "The rule is that where, by a deed a fee simple is granted, and the deed as a whole shows an intention to vest the grantee with a fee, an attempted limitation upon the fee will be disregarded. This rule is based upon the principle that a grantor cannot destroy his own grant, however much he may modify it or load it with conditions."

In *Jamieson v. London*, etc. Loan, etc. Co. 23 Ont. App. 602, the court reviewed the

English decisions, concluding thus: "Now the authorities establish that it is only where the estate or interest limited by the habendum is repugnant to an express interest or estate granted by the premises that the former is void. That is established by the case of *Jerman v. Orchard* [Skin (Eng.) 528] already referred to, affirmed in the House of Lords."

It has been held that where the habendum and granting clauses in a deed are conflicting they will be held to be repugnant only where the habendum divests the estate granted and substitutes another. *Marden v. Leimbach*, 115 Md. 206, 80 Atl. 958.

When Premises Are General.

Although where the habendum clause is repugnant to the premises the courts will usually reject it, this will not be done unless it is impossible to reconcile the two parts of the deed, and hence, when the premises of a deed grant an estate in property generally, using no words of inheritance or limitation in the granting clause, but the habendum contains such words only, the estate therein designated will pass. *Dempsey v. Davis*, 98 Ark. 570, 136 S. W. 975; *Georgia State Sav. Assoc. v. Dearing* (Ark.) 193 S. W. 512; *Holmes v. Nelson*, 148 Ill. App. 554; *Adams v. Merrill*, 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36; *Hudson v. Hudson* (Ky.) 121 S. W. 973; *Kelly v. Parsons* (Ky.) 127 S. W. 792; *Virginia Iron, etc. Co. v. Dye*, 146 Ky. 519, 142 S. W. 1057, and see the reported case. See also *Swift v. Harbison-Walker Refractories Co.* 228 Pa. St. 584, 77 Atl. 916; *Freudenberger Oil Co. v. Simmons*, 75 W. Va. 337, 83 S. E. 995.

In *Adams v. Merrill*, 45 Ind. App. 315, 85 N. E. 114, 87 N. E. 36, the court said: "When, however, the grant is indefinite because of its generality in respect to the estate in the lands conveyed, it may be defined, qualified, and controlled by the habendum. So the habendum is useful only when the words of grant leave the subject of the extent of ownership open to explanation. A simple grant to a person named, without any particular words of limitation in the premises, leaves the extent of ownership open to explanation."

In *Virginia Iron, etc. Co. v. Dye*, 146 Ky. 519, 142 S. W. 1057, it was said: "In construing a deed, this court is committed to the doctrine that the intention of the parties, as appears from the whole deed, must control. If the intention appears, technical rules of construction cannot be applied if they lead to a different result. If the granting clause and the habendum are irreconcilable, and the other parts of the deed do not make it apparent which the grantor intended should control, the granting clause will prevail. *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129, 27 Ky. L. Rep. 1185. But if both parts of a deed

may well stand together, consistent with the rules of law, they will be construed to have that effect, rather than be held repugnant."

In *Freudenberger Oil Co. v. Simmons*, 75 W. Va. 337, 83 S. E. 995, the court, in distinguishing the habendum from other clauses and defining it, said: "The habendum has an entirely different office. In logic and purpose it is a continuation of the premises, or rather a definition thereof, and, being so, its terms are subsidiary to those of the premises and must, therefore, yield to them, in case of repugnance or irreconcilable conflict. 'The office of the habendum is to determine what estate or interest is granted by the deed; although this may be, and generally is, stated in the premises. In which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to the estate granted in the premises. In case of such irreconcilable repugnancy, the premises generally prevail, for the habendum cannot divest an estate already vested by the premises.' . . . The habendum can add nothing that is outside of, or beyond, the terms used in the premises. Nor can it take away anything specifically conferred by the granting clause. Thus, if lands are given, in the premises of a deed, to A and his heirs, habendum to A for life, the habendum is void, because it contradicts express terms of the premises, and so goes beyond the work or function of mere definition of those terms. It is not permitted to control, but, on the contrary, is made to yield, in case of irreconcilable conflict, because its legally prescribed office is to define and explain, not to grant, and when the courts come to it, in the construction of a deed, they set up the legal presumption that it was employed by the draftsman only to perform that legal function."

When Premises Are Uncertain or Indefinite.

When the premises of a deed are uncertain, indefinite or ambiguous and it is impossible to ascertain any well-defined intent of the grantor, as expressed therein, the habendum then becomes useful as explanatory of the premises and as showing the grantor's intent. *Yeager v. Farnsworth*, 163 Ia. 537, 145 N. W. 87; *Big Sandy Co. v. Childers*, 148 Ky. 529, 147 S. W. 14; *Grooms v. Morrison*, 249 Mo. 544, 155 S. W. 430; *Garrett v. Wiltse*, 252 Mo. 699, 161 S. W. 694; *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484.

It was said in *Garrett v. Wiltse*, supra: "We think we are on safe ground to say that whatever was the technical function of the habendum clause of a deed in olden times, its present office may be allowed to be to clear up the conveyance by clarifying and removing ambiguities, and smoothing away inconsis-

tencies. It will even control or modify the granting clause when by such control or modification the intent of the grantor as expressed in his words is made plain and effectuated."

The habendum cannot enlarge the grant, yet it may be considered in aid of its construction, where there is a question as to the extent of the estate granted. *De Goosh v. Baldwin*, 85 Vt. 312, 82 Atl. 182.

RUBLE ET AL.

v.

BUSBY.

Idaho Supreme Court—June 9, 1915.

27 Idaho 486; 149 Pac. 722.

Physicians and Surgeons — Malpractice — Leaving Sponge in Surgical Wound.

Where an action is brought to recover damages on account of the wrongful, negligent, and careless leaving of a sponge in the abdomen of a patient, and on account of the negligence of defendant in permitting said sponge to remain in said patient's abdomen an intestinal obstruction was created, resulting in a partial closing of a portion of the intestinal canal, and causing a partial paralysis and obstructions thereof, and by reason of such wrongful and negligent acts, and for no other reason, and as a direct result thereof the patient died, it is incumbent upon the plaintiff to prove said allegations by a preponderance of the evidence, and show that the presence of said sponge in the abdomen of the patient was the direct and proximate cause of the death of the patient.

[See note at end of this case.]

Same.

It is held that the evidence is sufficient to show that the adhesive condition of the intestines of the patient caused her death, and that such adhesive condition was not caused by the presence of a sponge, and that the evidence is sufficient to support the verdict of the jury.

[See note at end of this case.]

Instructions Approved.

It is held that the court did not err in giving or refusing to give certain instructions.

Ruling on Evidence Approved.

It is held that the court did not err in refusing to admit certain evidence.

Appeal from District Court, Kootenai county: DUNN, Judge.

Action by Leonard Ruble et al., plaintiffs, against John Busby, defendant. Judgment

for defendant. Plaintiffs appeal. The facts are stated in the opinion. **AFFIRMED.**

John P. Gray and Frank M. McCarthy for appellants.

Black & Wernette and C. L. Heitman for respondent.

[488] SULLIVAN, C. J.—This action was brought by Ruble, the surviving husband of Dollie May Ruble, and John Grove, the surviving father of decedent, against the respondent, who is a practicing physician at Coeur d'Alene, for malpractice and negligence, and it is alleged that the negligence on the [489] part of the respondent caused the death of Dollie May Ruble.

It is alleged that in performing a surgical operation on said deceased to remove the ovaries, Fallopian tubes and veriform appendix the defendant negligently permitted a gauze or cheese-cloth sponge to remain in the abdomen of the decedent at the conclusion of said operation, and that the negligent leaving of said sponge, as aforesaid, directly resulted in the death of said patient.

In his answer the respondent denied that he negligently or in any manner or at all left the alleged sponge or any sponge in the abdomen of said patient and denied that said sponge being so left or permitted to remain in the abdomen of said Dollie May Ruble was the direct cause of her death, and denied specifically all allegations of negligence in the performance of the operation, as charged in the complaint, and as an affirmative answer and defense alleged the facts as to his education, qualifications, training and experience as a medical practitioner, and recites further facts with reference to the said operation and his dismissal from the case on the ninth day after the operation.

Upon the issues thus made the cause was tried by the court with a jury and a verdict was rendered against the plaintiffs and in favor of the defendant, and judgment was entered accordingly. A motion for a new trial was denied and the appeal is from the judgment and order denying a new trial.

The assignments of error are based on the action of the court in entering judgment and in denying the motion for a new trial, and the giving and refusing to give certain instructions, and also in refusing to admit certain offered evidence.

Appellants state in their brief that there is very little controversy regarding the facts and very little conflict in the testimony of the case, while it is contended by counsel for respondent that upon the principal issue made by the pleadings the evidence is very conflicting.

The record shows that the defendant has been a practicing physician and surgeon for twenty-three years and is a graduate of McGill University, Montreal, Canada, and that

that school is a well-recognized medical institution; that he has [490] taken several post-graduate courses in the leading medical institutions of the country, and that he has been engaged in the practice of his profession as a general practitioner and surgeon for twelve years in Idaho.

The following facts appear from the record:

The respondent was first consulted by Mrs. Ruble, the decedent, and who will hereafter be referred to as the decedent or patient, on October 21, 1911, concerning her malady for which the operation in question was performed. At that time and at the time of the subsequent consultations, she had an anaemic complexion, was emaciated and extremely nervous. She informed the respondent that several years prior to said consultation she had an attack of inflammation of the bowels and peritonitis lasting for several weeks and that she had never been well since; that she had trouble all the time with constipation. The respondent made an examination of the decedent and then advised her that she could not obtain relief until an operation was performed to remove the pus tubes. She informed respondent at that time that other physicians had also advised an operation. She again visited respondent on February 23, 1912, when her physical condition and appearance were about the same as at the first examination. She again consulted respondent on March 9, 1912, and her condition was about the same, and again on May 4, 1913. At that time she stated to respondent that she desired to have an operation performed. On the 6th or 7th of May, 1913, she again consulted respondent and again informed him that she desired to have the operation performed. The matter was thereafter explained to the appellant Ruble and he informed the respondent that he left the matter wholly with the decedent. The decedent arranged to go to the Coeur d'Alene Hospital for the operation, and went there on the evening of May 14, 1913, when the usual preliminary precautions were taken. Doctors Hunter and Dwyer, two regular practicing physicians of Coeur d'Alene, assisted in the operation.

It is not contended that respondent was guilty of any negligence in the performance of said operation, with the exception [491] that he was negligent in that he failed to remove one of the sponges used in said operation from the abdomen of the decedent.

Respondent in his testimony states the condition in which he found the intestines and all of the organs in that part of the abdomen. He found them all bound together by adhesions and testified as follows:

"In this mass of adhesions on the right side there was a loop of the small intestine that came down and was connected into this

mass of adhesions. That showed positively in the first place where the attack of peritonitis that Mrs. Ruble had eight years ago originated from. It originated from the ruptured tube and the tube ruptured was the right tube of the ovary. By this attack of inflammation of the bowels, part of the bowels had become caught in the adhesions and had remained there from the time she had this attack of peritonitis until she had this operation."

Witness then testified that he loosened and broke up said adhesions. But, as before stated, there is no negligence charged as to the performance of said operation except that of not removing said sponge.

After the operation had been performed and the incision was about to be closed, Dr. Dwyer said to the respondent in a low voice that the nurse had reported that a sponge was missing. The respondent testified that he did not hear the nurse make the statement but heard what Dr. Dwyer said, and testified as follows:

"I stopped right then and went over this abdomen carefully, I went over every part of the abdomen; and there was no occasion for any sponge to be in that abdomen at all, but I went—now, remember the bowels in that woman were in a horizontal position as bowels naturally come down and filled the pelvis—filled the lower part of the pelvis and resumed their natural position. I put my hand down and went over the pelvic region—went over the lower part of the abdomen and satisfied myself positively that there was no sponge there. I said to Dr. Dwyer, 'I know there is no sponge [492] there.' I took sufficient time; there was no occasion to be in a hurry. . . . After I satisfied myself positively that there was no sponge there, I proceeded to close the abdomen in the usual way. . . . There was no sponge used in the abdomen unless it had a forceps attached."

"Q. You used forceps that day on every small mop or sop sponge you inserted in the abdomen?"

"A. Yes, it was necessary to do so if you are going to use sponges at all. If you put a sponge in with your hand—if you have the sponge in your fingers it naturally would obstruct the view; it was necessary to use forceps on the sponges because you could not see what you were doing if you used your hand.

"Q. What was the size of those forceps attached to this mop sponge?"

"A. The regular sponge forceps. The sponge forceps used at this hospital; we had two pairs of sponge forceps; they are about 15 inches long; they are the long (Young?) forceps with the Smith opening."

Dr. Dwyer, who assisted in the operation, testified on this point as follows:

"Q. Did Dr. Busby, on the day of this operation, use any of these small sponges without their being used by means of one of these forceps, as you have explained?

"A. None inside of the abdominal cavity.

"Q. If he used them, where did he use them without being fastened to forceps?

"A. On the outside of the abdominal cavity entirely.

"Q. In what part of the operation?

"A. During the opening of the abdominal wall and during the removal of the appendix, when it was brought up outside of the abdomen.

"Q. Did Dr. Busby, at the time of the performance of this operation, at any time place one of these small sponges inside of the abdominal cavity of Mrs. Ruble and leave it there for any length of time?

"A. He did not.

"Q. Did he place one of this kind of sponge in the abdomen of Mrs. Ruble at any time without it being clamped to one of these forceps?

"A. He did not.

"Q. Was your position and were your duties such that you would see what he was doing?

"A. I could see everything and did see everything, I believe."

Dr. Dwyer also testified that the nurse reported about or at the time the incision was about to be closed up that there was one sponge short, and that he did not think the respondent heard what the nurse had said and he, Dwyer, repeated it to him. At that time the operation was practically completed with the exception of closing the incision. Dr. Dwyer further testified as follows:

"Q. State what was done by you or Dr. Busby after that time, after the sponge was reported missing.

"A. Dr. Busby inserted his hand in the abdominal cavity and made a thorough search.

"Q. State what he did.

"A. He made a search of the entire field of operation. All through the pelvic cavity as far as I could see from the position of his hand, he went entirely over the field that had been operated on.

"Q. If you know, how much time did he consume in doing that?

"A. I don't know exactly; probably three to five minutes."

Dr. Dwyer also testified that he was watching Dr. Busby as he was making the search after the sponge had been reported missing and that Dr. Busby made a careful search for it.

The evidence also shows that the patient had been on the operating table about an hour and three-quarters at the time the incision was closed.

The operation was performed on the morning of the 15th of May, 1913, and the evidence shows that the patient continued to do fairly well up to the 24th of May, when the [494] respondent was unceremoniously dismissed from the case and Doctors Scallion, Shaphard and Dorland took charge of the case, and on the morning of the 25th of May Dr. Dorland, assisted by Doctors Shephard and Scallion, performed a second operation upon the decedent, they having prior to that time learned that a sponge was missing that was used during the first operation. They performed the operation by making an incision in the same place it was made at the first operation. They used a number of sponges in this second operation. Immediately after the incision was made Dr. Dorland inserted his hand in the incision and made a search for the lost sponge, and after making a careful search was unable to find it. Then Dr. Shephard inserted first one hand and then the other in the incision and made a careful search for the sponge and failed to find it; then Dr. Dorland inserted his hand again in the incision and made a careful search and failed to find the sponge, and then not satisfied, Dr. Shephard made another search and testified that he found a sponge.

Thus it appears that Doctors Shephard and Dorland made five distinct searches before it is claimed they found said sponge, Dr. Shephard having made one search with one hand and when he made the second search he used first one hand and then the other. Dr. Shephard testified that said sponge was about two-thirds of the size of one's fist. It no doubt seemed remarkable to the jury that five careful searches for a substance of that size in the cavity of an abdomen would need to be made in order to find said sponge, and while the testimony of appellants shows that Dr. Shephard finally discovered the sponge, the jury evidently did not believe that testimony, or if they did believe that the sponge was found, they did not believe that that was the proximate cause of decedent's death, and may have come to the conclusion that the five searches made, covering a considerable period, might have contributed greatly to the cause of her death.

It is sufficient to say that Dr. Busby testified that after the nurse reported the sponge missing, he made a most careful examination and satisfied himself positively that there was no sponge there. And it further appears that no sponge was [495] used in the abdomen unless it had forceps, about fifteen inches in length, attached to it.

Some of the physicians who were witnesses in the case testified that in their opinion the proximate cause of the death of the decedent was the leaving of the sponge in the abdomen.

while others testified that in their opinion the proximate cause of her death was the adhesions of the intestines, and so far as the evidence is concerned, it is amply sufficient to sustain the verdict of the jury.

In the brief of appellants it is stated as follows: "The appellants in presenting this case to the court intend to confine their argument to a discussion of the legal principles involved, rather than to a discussion of the facts in the case;" they then proceed to argue that certain instructions requested and refused by the court contained the correct rules of law as applicable to this case, and that those instructions given by the court were contrary to the law as laid down by the decisions of other courts. The instructions requested and refused were to the effect that it was malpractice and negligence *per se* to leave a sponge in the abdomen of a patient after closing the incision, and when that fact was shown, it devolved upon defendant to show that the sponge was not the proximate cause of the patient's death.

In the complaint, after charging negligence on the part of respondent in leaving the sponge in the abdomen of the decedent, in paragraph 11 it is alleged as follows:

"That on account of the defendant so wrongfully, negligently, unlawfully and carelessly leaving said sponge in the abdomen of said patient and so inclosing the same, and on account of the negligence of the defendant in so permitting said sponge to remain as aforesaid in the said patient's abdomen upon and during the days and each of the days aforesaid, to wit, on and between the 15th day of May, 1913, to and including the 25th day of May, 1913, an intestinal obstruction was created and negligently permitted by defendant to be maintained in the body of said patient caused by the presence of said sponge, resulting in a partial closing of a portion of the intestinal canal, and causing a partial paralysis [496] and irritation thereof, preventing the normal passage of intestinal contents through such canal, and that by reason of the wrongful, unlawful, careless, negligent and unskillful acts of the defendant as hereinbefore stated, and because of no other reason and as a direct result thereof, the said Dollie Ruble died intestate on the 3d day of June, 1913."

It was necessary under those allegations to prove that the respondent left or permitted said sponge to remain in the abdomen of the patient, by reason of his carelessness, negligence or lack of proper skill or care, and it was also incumbent upon appellants, under those allegations, to prove that the presence of the sponge alleged to have been left or permitted to remain in the abdomen of the patient was the direct or proximate cause of the death of the patient.

Plaintiffs' requested instruction No. 5, which was refused by the court, and of which appellants apparently complain most seriously, did not contain a statement in connection with it regarding the sponge being the cause of the death of the patient, hence if the requested instruction were correct in so far as it goes, it would not have been a proper instruction to give under the pleadings and facts and evidence in the case, for the reason that it was incumbent upon appellants to prove, in addition to the leaving of the sponge, that the leaving of the sponge was the direct and proximate cause of the death of the patient. Said requested instruction No. 5 is as follows:

"The court instructs the jury that it is ordinarily malpractice to leave a gauze or cheese-cloth sponge in the body of a patient when closing the incision after an operation, and in this case, if you find from the evidence that the defendant did leave a gauze or cheese-cloth sponge in the body of Dollie May Ruble when closing the incision after the operation, which the evidence shows that he performed upon her, the burden is upon the defendant to show that the so leaving of said gauze or cheese-cloth sponge in her body after said operation was not negligence."

Appellant cites several cases in support of the correctness of said requested instruction, among them *Harris v. Fall*, [497] 177 Fed. 79, 100 C. C. A. 497, 27 L.R.A. (N.S.) 1174. On a careful reading of that case, we do not think it supports the contention of appellant. In fact, it simply holds that whether or not the operating physician was negligent was a question for the jury to determine. Other cases are cited by appellants, but on an examination of them we think they are clearly distinguishable from the case at bar.

In this case the evidence shows what the respondent did in the way of determining whether or not any sponge was actually left remaining in the abdomen of the patient. His testimony is corroborated by the testimony of Dr. Dwyer, which shows that great care was used on the part of respondent. This is a case where the defendant did offer evidence showing the exercise of the care and skill which ought to be exercised by an operating physician in a case like this. The instructions to the jury ought to conform to the facts and evidence as produced on the trial. In the instant case the defendant met by evidence every charge of negligence made against him, and showed the degree of care and skill that he exercised, and it would have been erroneous for the court to instruct the jury, under the evidence, as requested by appellants.

The jury was called upon to determine from the evidence whether the proximate cause of

the death of the patient was the negligence of the respondent in the performance of said operation, and it devolved upon the plaintiffs to prove the material allegations of the complaint by a preponderance of the evidence, and the court correctly instructed the jury that in order for the plaintiffs to recover, they must satisfy the jury by a preponderance of evidence as to the justice of their claim; that they must produce evidence in support of the material allegations of the complaint, which in the judgment of the jury outweighs the evidence of the defendant. In other words, if the testimony was evenly balanced, they must find for the defendant, and the plaintiffs could recover only in case their testimony outweighed that of the defendant. One of the allegations of the complaint was that the respondent negligently and carelessly left in the abdomen of the [498] decedent a certain sponge which caused her death, and it was necessary for them to prove that the result of the alleged negligence was the cause of the death of the patient in order to recover in this case.

Upon a careful review of the instructions given, we are satisfied that they fairly cover the case made by the pleadings and the evidence, and that there was no error in refusing to give certain instructions requested by plaintiffs, or in the giving of certain instructions by the court.

The appellants specifically complain of an alleged error committed by the court in his ruling on the evidence, which was to the effect that the court refused to permit the plaintiff Ruble to prove on rebuttal a conversation which he claimed took place between the respondent and himself about a week prior to the operation, to the effect that the respondent stated that the patient was in excellent condition to submit to an operation. This identical conversation was gone into by appellants in their direct testimony when practically the identical question was asked and the conversation testified to by the plaintiff Ruble.

We cannot see the materiality of this evidence, since negligence is not charged by reason of the performance of the operation when the patient was not in a physical condition to undergo the operation, but by reason of negligence in the performance of the operation in leaving the sponge in the patient's abdomen. The respondent produced competent evidence to show that the death of decedent was caused by intestinal obstructions caused by intestinal adhesions, commonly known in surgery as post-operative adhesions. On cross-examination respondent proved by witness Shephard that these adhesions of this particular kind of intestinal obstruction are frequent following operations, and that they are feared by physicians and

not necessarily caused by foreign substances being present, but are caused, among other things, by raw surfaces of the intestines coming together, which raw surfaces are sometimes caused where old adhesions have been broken up in the performance of an operation. Dr. Shephard testified that he had never had but three cases where there [499] were post-operative intestinal obstructions, and in each case the patient died.

Doctors Dorland and Shephard both testified that when they performed the operation where they claim to have found the sponge, the intestines were all matted together with intestinal adhesions, and that they loosed them in performing this operation, and that when they performed the post-mortem examination ten days later, the adhesions had reformed. It is thus made to appear that after Doctors Dorland and Shephard performed their operation the adhesions again formed and clearly appeared when the post-mortem examination was held. They testified that in their opinion the sponge caused the adhesions. On the other hand, respondent showed by a number of physicians that post-operative adhesions are very common following operations of this kind and that they produce intestinal obstructions which cause death, and the symptoms in this case indicated that the death of the patient was caused by an intestinal obstruction produced by post-operative adhesions, and that even if a sponge had been left in the manner this one was alleged to have been left, it would not have produced the symptoms present.

All of this evidence was presented to the jury under instructions given by the court, which were practically to the effect that if the jury found that the defendant had carelessly or negligently or through failure to exercise ordinary care and skill left a sponge in the said patient which caused her death, then the verdict should be for the appellants.

It is apparent from the evidence in the case that the patient after having been operated on and her intestines found to be one adhesive mass and the adhesions separated, and ten days after another operation was performed when five careful searches were made through her intestines for a sponge that was supposed to be lost and her intestines found at that time to be again an adhesive mass, and the adhesions again broken up and the intestines separated, the jury was fully justified in finding under such evidence in favor of the defendant.

[500] We find no reversible error in the record and the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

Budge and Morgan, JJ., concur.

NOTE.

In the reported case, an action against a physician for malpractice in leaving a sponge in a surgical wound, it is held that the evidence is sufficient to sustain a finding that the defendant was not negligent and that the leaving of the sponge in the wound was not the cause of the death of the patient. The earlier cases discussing the liability of a physician or surgeon for leaving a foreign substance in a wound or opening for a surgical operation, are collated in the notes to *Samuels v. Willis*, 19 Ann. Cas. 190; *Zilke v. Johnson*, Ann. Cas. 1913E 1005; and *Gillette v. Tucker*, 93 Am. St. Rep. 639.

LARKIN ET AL.

v.

SUPERIOR COURT OF SHASTA COUNTY.

California Supreme Court—January 17, 1916.

171 Cal. 719; 154 Pac. 841.

Dismissal and Nonsuit — Grounds — Delay in Bringing Action to Trial.

Code Civ. Proc. § 583, declaring that any action shall be dismissed by the court in which it shall have been commenced, or to which it may be transferred on motion of defendant after due notice to plaintiff, unless it is brought to trial within five years after defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended, is mandatory.

Same.

Under such statute, a stipulation by counsel of the respective parties for an extension of the time of trial is a stipulation of the parties.

Same.

Where the answer was filed June 30, 1909, and the minutes of the court showed that on November 27th, the date set for trial, the parties appeared in court and through their counsel stipulated that trial should be fixed for April 11, 1910, and the court so ordered, that on April 11, 1910, the case was continued until June 29th, and on June 29th the case was again continued until September 19th, but there was no record entry of independent stipulation in writing providing that time of trial should be extended beyond the five-year limit, the action must be dismissed under Code Civ. Proc. § 583, declaring that an action not brought to trial within five years after answer shall be dismissed, unless extended by written stipulation of the parties.

Same.

That the original defendant administrator died within the five-year period after answer in which actions must, under Code Civ. Proc. § 583, be brought to trial, and no other administrator was appointed until after the expiration of that period, will not excuse plaintiff's failure to bring the action to trial and so preclude dismissal.

Same.

After defendant's answer, plaintiff's attorney died, and defendant served no notice on plaintiff in accordance with Code Civ. Proc. § 286, declaring that when an attorney dies or ceases to act a party to an action for whom he was acting must, before any further proceedings are had against him, be required by the adverse party by written notice to appoint another attorney or appear in person. Section 583 provides that if an action is not brought to trial within five years after answer it shall be dismissed. It is held that the defendant's failure to file notice demanding the appointment of an attorney for the plaintiff did not preclude him from claiming a dismissal for plaintiff's failure to bring the case to trial within five years.

Same.

In such case, the fact that one of defendant's counsel died within the five year period and the other ceased to act will not excuse plaintiff from bringing the action to trial within that time, as he could have required defendant to appoint another attorney, or appear in person.

Quietting Title — Cross Bill for Affirmative Relief.

In a suit to quiet title, judgment in defendant's favor protects him against any of plaintiff's claims, so a cross complaint praying that title be adjudged in defendant is effective merely to prevent plaintiff from dismissing it before trial without the consent of defendant.

[See note at end of this case.]

Same.

In a suit to quiet title, though defendant filed a cross complaint asking that his title be adjudged good, the suit may be dismissed under Code Civ. Proc. § 583, for plaintiff's failure to bring it to trial within five years after answer, for the filing of the cross complaint does not make defendant an actor, as it gives defendant no greater rights than he would have had under an answer denying plaintiff's title, but merely precludes plaintiff from dismissing without his consent.

[See note at end of this case.]

Mandamus — Grounds for Relief — To Compel Dismissal of Action.

Where, under the statutes, defendant is entitled to dismissal of plaintiff's action for want of prosecution, mandamus to compel the lower court to order dismissal will not be denied on the ground that the writ is discretionary, and will not be issued where it will cause injustice.

Same.

Where one of several defendants defaulted, and the others were entitled to dismissal for

want of prosecution, and the defendants who answered moved for a dismissal as to them, their application for a writ of mandamus to compel the trial court to order dismissal will not be denied under the rule that a petitioner for mandamus is concluded by the terms of the alternative writ, and, as the alternative writ prayed a dismissal of "the action," it was not wholly authorized.

Right to Peremptory Writ — Alternative Writ Erroneous in Part.

The rule that where an alternative writ is awarded for a purpose, partly proper and partly improper, the court will not grant peremptory mandamus, is not an iron-bound one, but is to be applied with principles of justice.

Original application for writ of mandate.

John Larkin et al., petitioners, and Superior Court of County of Shasta, respondent. The facts are stated in the opinion. WRIT GRANTED.

W. D. Tillotson and Carr & Kennedy for petitioners.

Chenoweth & Leininger and *Goodfellow, Ellis, Moore & Orrick* for respondent.

[720] ANGELLOTTI, C. J.—This is an original application to this court for a writ of mandate to compel respondent to dismiss an action pending therein, instituted by the Potosi Land and Mining Company, a corporation, against a former administrator of the said estate of Alexander Hulsey, N. L. Peterson, James E. Lutman, the Shasta Dredging Co., a corporation, [721] and certain fictitious defendants. The action was one by the plaintiff therein to quiet its alleged title to certain land in Shasta County. The action was commenced May 6, 1907, and summons was served during that year on all the above-named defendants. No appearance was ever made by the Shasta Dredging Company, and it must be accepted as a fact from the record before us that the plaintiff is entitled to a default judgment against that defendant. The other defendants filed their answer on June 30, 1909, denying plaintiff's alleged title, claiming title in themselves, and praying for a judgment establishing and quieting their title to said land. The action has never been tried. On November 3, 1915, these petitioners, being all of the defendants except the Shasta Dredging Company, gave notice of a motion in the superior court for the dismissal of said action as to them, on the ground that the same had not been brought to trial within five years after they had filed their answer. The motion thus noticed was duly heard and denied by the superior court, and this proceeding was then instituted to compel the dismissal asked.

Petitioners' motion in the superior court and their proceeding here are based on the

second paragraph of section 583 of the Code of Civil Procedure, enacted in 1905. The section is as follows:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendants and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

It is obvious from a mere reading of the second paragraph of this section, that a dismissal is mandatory in any case where the facts bring it within its provisions. It was so declared in *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

Various reasons are urged why this law has no application here.

As we have said, the answer of these petitioners was filed June 30, 1909. The following facts are alleged in the answer [722] of respondent, and are not disputed by petitioners: On November 20, 1909, the court ordered that on November 27, 1909, the time of trial should be fixed. The minutes of the court show that on November 27, 1909, the parties appeared in open court by their respective counsel and stipulated that the trial should be fixed April 11, 1910, and the court so ordered; that on April 11, 1910, with the same procedure, the trial was continued to June 29, 1910; and that on June 29, 1910, with the same procedure, the trial was continued to September 19, 1910. Nothing further appears with reference to the proposed trial of the action, other than that after November 3, 1915, more than five years after the date to which it had last been continued, the action was set for trial on December 20, 1915. No stipulation in writing relative to time or continuance of trial was ever made "in writing," unless an agreement of counsel for the respective parties made in open court and entered on the minutes satisfies the provisions of the section in this regard.

We are satisfied that there is no force in the suggestion that "the parties" can be said to have stipulated within the meaning of the section only when they personally do so. It is clear that a stipulation by respective counsel for the parties would be a stipulation of the parties. Whether they can be said to "have stipulated in writing" within the meaning of the section, when they have simply orally agreed in open court and their agree-

ment is entered on the minutes, is a more serious question. However, we regard this question as of minor importance, in view of the fact that we are satisfied that no stipulation of the character described, either oral or written, was ever made. This point, not suggested in the oral argument, has been forcibly made in petitioners' brief filed since, and to their contention we can see no good answer. The stipulations shown by the minutes were, first, one fixing as the time for trial a date within one year from the filing of the answer, and, second, two continuing the trial, the later one carrying it to a date within fifteen months after the filing of the answer. The statute says that the court must dismiss the action "unless such action is brought to trial *within five years* after the defendant has filed his answer, except where the parties have stipulated in writing *that the time may be extended*." This seems to us to say very clearly that unless the parties have, in effect at least, stipulated in writing that [723] the action need not be brought to trial within five years from the date of the filing of the answer, it must be dismissed at the expiration of such five years, if not "brought to trial" within that time. A stipulation in terms waiving the benefit of this section, or one in terms providing that the time fixed by the section within which trial must be had, shall be extended indefinitely or for a definite time, or a series of stipulations continuing the trial to a date beyond the five year period, might any of them suffice as an answer to a motion to dismiss, and constitute a stipulation in writing that the time (*the five year period*) shall be extended. But no such effect can fairly be given to a stipulation fixing a trial date within one year of the filing of the answer, or to two others continuing the trial date to a time within fifteen months of such filing. There is nothing in this that can fairly be taken as indicating any consent on the part of the defendants that the five year period shall be extended by as much as a single minute, or as intimating to plaintiff that any such extension would be permitted. It is a stipulation in writing extending the *five year period* that the statute provides for, and without such a stipulation, certainly in the absence of some element of estoppel, there can be no effective answer to a motion to dismiss, if the action has not been "brought to trial" within such period. The language of the statute is so plain in this regard that no other intent can be attributed to the legislature. We are not concerned here with the exact meaning of the term "brought to trial," for it is manifest that with whatever liberality we construe it in favor of plaintiff here, this action was not brought to trial within five years of the date of the filing of the answer.

It appears that the former administrator of the estate of Hulse, the original defendant administrator, died in February, 1915, and that petitioner Larkin was not appointed administrator until October 30, 1915, and was not substituted herein as a party until November 2, 1915. All this, however, was *after* the expiration of the five year period, and cannot by any possibility affect the determination of this proceeding.

It further appears that one Mr. Isaacs was the original attorney for plaintiff, that he died June 8, 1911, and that from June 8, 1911, to October 19, 1915, plaintiff had no attorney in the action. No notice was served on plaintiff requiring it to appoint another attorney in place of Mr. Isaacs or [724] to appear in person, until September 23, 1915. It is claimed that under these circumstances, the running of the five year period was suspended from June 8, 1911, to September 23, 1915. This contention is based on section 286 of the Code of Civil Procedure, which provides that:

"When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

Clearly, this section has no application here. It means no more than it plainly says, viz., that no *proceedings* may be had against him, no judgment or order or other step in the action taken, until he appoints an attorney, unless the prescribed notice be first given. The mere running of this five year period, which had commenced to run prior to the death of Mr. Isaacs, was not a "proceeding" had against the plaintiff, even under the very liberal definition given that term as used in section 473 of the Code of Civil Procedure, in *Stonesifer v. Kilburn*, 94 Cal. 43, 29 Pac. 332. A good illustration of what is meant by the term "proceedings" as here used is the dismissal sought by motion in the superior court in this very case, prior to the making of which motion the defendants gave the notice contemplated by the section. It must be confessed that the opinion of the district court of appeal of the second district in *Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co.* 13 Cal. App. 115, 109 Pac. 36, supports the claim of respondent as to the effect of section 286 in this regard, but we are satisfied that the views there expressed are erroneous. No petition for a hearing of that matter by this court was ever presented, and the opinion therein has never received our approval. The court might well have refused to dismiss the appeal there involved in the exercise of a wise discretion, thus reaching the same result that it did

reach, but to hold that the death of the appellant's attorney during the time allowed for the filing of the opening brief *ipso facto* extended the time for the filing of such brief is not warranted by anything said in section 286 of the Code of Civil Procedure, or by any other rule of law of which we are aware.

The original attorneys of the petitioners as defendants in said action were the firm of Reed and Dozier. According to the answer, Mr. Reed died shortly after the death of Mr. [725] Isaacs, and Mr. Dozier, in December, 1908, or thereabouts, removed his office from Redding to San Francisco and ceased to act as attorney for any of said defendants. Even assuming that for a portion of the five year period there was no acting attorney of record for any of the defendants, we cannot see that such fact avails plaintiff in that action at all. The plaintiff could nevertheless have brought the case to trial, resorting to the procedure contemplated by section 286 of the Code of Civil Procedure, which we have just referred to.

We see no force whatever in the claim that under the circumstances of this case petitioners are estopped to claim that the action should be dismissed.

Respondent urges as material the fact that the action was one to quiet title, and that the defendants in their answer set up their own alleged title, and asked that they be adjudged the owners. Reliance is placed upon what is said in the opinion of the district court of appeal of the first district in *Hickman v. Lynch*, 27 Cal. App. 354, 149 Pac. 997, to the effect that upon the filing of a cross-complaint by a defendant, the defendant became an aggressive and interested actor in the presentation of at least one phase of the case, and was therefore charged in part with the duty of bringing the case on for trial. The court therefore held that section 583 of the Code of Civil Procedure had no application. That action was one for the recovery of money, in which the defendants, some two years and a half after the filing of the answer, had obtained leave to file, and had filed, a cross-complaint. Whatever may be said as to the correctness of the views of the district court of appeal as applied to such a case as the one before it, it is clear that they have no application here. While it is settled in this state that in an action to quiet title a defendant called upon by plaintiffs' action to quiet title to land to set up his own claim of title may file a cross-complaint setting up his own alleged ownership and asking that he be adjudged the owner, or may do the same thing in his answer, ordinarily no such practice is essential to his protection, as a conclusion against the plaintiff upon the issues raised by the complaint and answer fully determines the title as between the parties,

Ann. Cas. 1917D—43.

and protects the defendant against any claim of the plaintiff as to title as fully as an affirmative decree in his favor would do. There is nothing before us to indicate or suggest that the action here involved is out of the ordinary [726] in this regard. The principal object of such a practice would appear to be to prevent a plaintiff from dismissing his action before trial without the consent of the defendant. (Code Civ. Proc. sec. 581, subd. 1; see *Islais, etc. Water Co. v. Allen*, 132 Cal. 432, 64 Pac. 713.) What a defendant so situated is doing is really and substantially purely defensive. Brought into court by the plaintiff to defend his alleged title, he is simply defending it. It would seem unreasonable to hold that simply by reason of the fact that a defendant whose alleged title is thus assailed by a plaintiff asks for a decree adjudging that it is good as against such plaintiff, becomes an actor in the case in the sense that any duty devolves on him to bring the plaintiff's asserted claim to trial. We do not think that section 583 of the Code of Civil Procedure should be so construed.

It is urged that the issuance of a writ of mandate is not a matter of right, but a matter of discretion, and should never issue where it will work injustice or operate harshly, or where it will not promote substantial justice. If we assume all this to be true, we still have no basis on which to hold that the dismissal of the action here involved will have any such effect. As has been said, as to the matter of discretion in such cases, "where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he is entitled as a matter of right to the writ," and a court cannot lawfully refuse it. (*Gay v. Torrance*, 145 Cal. 144, 148, 78 Pac. 540.) This, in view of what we have said, is such a case.

It is suggested that in no event can the action be dismissed as to the Shasta Dredging Company, and that as petitioners sought a dismissal of "the action," and as the alternative writ heretofore issued required a dismissal of "the action," a writ should not issue requiring a dismissal of the action only as to the petitioners here. The rule invoked is that a petitioner for such a writ is concluded by the terms of the alternative writ, and that where the alternative writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by a peremptory *mandamus* as to that which is proper, but will give judgment for the respondent. (*Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540.) A ruling in favor of respondent on this point would be of little avail to plaintiff in the action, [727] as what we have already said

makes it manifest that the superior court would be compelled to dismiss the action as to these petitioners, either on its own motion or their motion hereafter made. But we think the rule invoked should not be applied under such circumstances as appear here. No such point is made by anything alleged in the answer of respondent. The motion for dismissal already made in the superior court was, as appears from the notice of motion annexed to the petition, simply for the dismissal of the action "as to these defendants," viz., the petitioners here. In the light of all the circumstances, the proceedings here, including the alternative writ, may fairly be regarded as simply looking to the dismissal there sought, a dismissal of the action as to the petitioners, the only thing in which petitioners appear to have any beneficial interest. It may properly be added that the rule invoked is not an iron-bound one, to be enforced by a court regardless of circumstances, but is one to be applied in consonance with principles of fairness and justice.

What we have said disposes of the many points made by learned counsel for respondent. We see no answer to the claim that in view of the provisions of section 583 of the Code of Civil Procedure, the superior court is without authority to take any course in the action referred to, so far as petitioners are concerned, except to order the action dismissed as to them.

Let a peremptory writ of *mandamus* issue requiring respondent to dismiss, as to the petitioners, the action referred to.

Sloss, Melvin, Henshaw, Lawlor and Shaw, JJ., concurred.

NOTE.

Right to Affirmative Relief on Cross Bill in Suit to Quiet Title.

Generally.

In some jurisdictions it seems that where the defendant in a suit to quiet title claims title in himself his right may be established under an answer to the original bill, and a cross bill seeking to have the title quieted in himself is regarded as superfluous. *Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 261, 22 Pac. 195; *Bacon v. Rice*, 14 Idaho 107, 93 Pac. 511; *Sloan v. Rose*, 101 Wis. 523, 77 N. W. 895. And see the reported case. In other jurisdictions a cross bill is essential if the defendant seeks to have the title quieted in himself. *Cheney v. Nathan*, 110 Ala. 254, 20 So. 99, 55 Am. St. Rep. 26; *Rausch v. United Brethren*, etc. 107 Ind. 1, 8 N. E. 25; *Island Coal Co. v. Streitlemier*, 139 Ind. 83, 37 N. E. 340; *Kraus v. Thomas*, 48 Ind. App. 437, 96 N. E. 12; *Vroman v.*

Thompson, 51 Mich. 461, 16 N. W. 808; *McKenzie v. A. P. Cook Co.* 113 Mich. 452, 71 N. W. 868; *Betts v. Signor*, 7 N. D. 399, 75 N. W. 781; *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78. In *Greenwalt v. Duncan*, 16 Fed. 35, answering the objection that the defendants being out of possession must seek relief by ejectment, the court said: "The plaintiffs are in court for the sole reason that they are in possession, and therefore have brought in the defendants, who are out of possession, to answer to the demand made. The defendants, being thus in court at plaintiffs' instance, have a right by answer or cross bill to be fully heard, and not to be denied a full hearing because the sole basis, jurisdictionally, of plaintiffs' bill is true. The defendants are here because they are out of possession, and to say that, therefore, they shall not be heard would be a strange perversion of the rule, and entirely subversive of the only ground on which plaintiffs proceed in equity."

The defendant may by a cross bill assert an affirmative title and ask the cancellation of the conveyance under which the plaintiff claims. *O'Neal v. Prestwood*, 153 Ala. 443, 45 So. 251; *Sloss-Sheffield Steel, etc. Co. v. Lollar*, 170 Ala. 239, 54 So. 272. In the case last cited it was said: "Recognizing the rule that an original bill to remove cloud from title, without actual possession of the land in the complainant, is wanting in equity and cannot be maintained, we are of the opinion that the rule does not extend to cross bills in a statutory bill of the character of the one under consideration. The same reasons do not exist for the application of the rule. Moreover, there is another general rule that, whenever a court of equity acquires jurisdiction for any purpose, it will assume jurisdiction for all purposes necessary to a final determination and full settlement of the controversy between the parties. Here the complainant invited the respondent into court for the purpose of having their controversy determined and settled, and the title to the land quieted. The relief asked in the cross bill was affirmative, and under our decisions, in a statutory bill of this character, in order to obtain such relief a cross bill with appropriate averments was necessary. In *O'Neal v. Prestwood*, 153 Ala. 443, 45 So. 251, the precise question we have here is decided. The bill in that case was filed under the statute to quiet title, and the defendants made their answers cross bills. In that case the land in controversy was, as found by the court, uninclosed, 'in the nature of a common, in the outskirts of Andalusia, which on the record was in the actual possession of no one.' It was said by this court, speaking through *McClellan, J.*: 'The issue, then, as respects the possession at the time the bills

were filed, is one of title, which draws to it the constructive possession of the real estate in question. In other words, title is the inquiry which, when determined will cast the cause.' Such is the case we have before us, and in the cited case this court granted the identical relief prayed by the cross bill in this case; that is, the court canceled the conveyance under which the complainants claimed as clouds upon the respondents' title. That case, as an authority, is conclusive of this one on the immediate question under consideration."

It is proper for the defendant in a suit to quiet title to set up by a cross bill an equitable title in himself and ask to have it decreed to be superior to the legal title of the plaintiff. *Barnes v. Union School Tp.* 91 Ind. 301. So in *Bacon v. Rice*, 14 Idaho 107, 93 Pac. 511, it was said: "In an action to quiet title where defendant relies upon title in himself, a cross complaint is not necessary. . . . However, in an action to quiet title where the defendant seeks to enforce an equitable title against the plaintiff as a holder of the legal title, a cross complaint is proper."

A money judgment for damages arising out of the contract under which the plaintiff claims title may not be sought by a cross bill. *Lewis v. Weitbrec*, 58 Colo. 147, 143 Pac. 1037. And see *Kane v. Borthwick*, 50 Wash. 8, 96 Pac. 516, 18 L.R.A.(N.S.) 486.

Relevancy to Subject-matter of Original Bill.

A cross bill for affirmative relief in a suit to quiet title must be germane to the subject-matter of the original bill. Thus it has been said that a title distinct from that put in issue by the plaintiff cannot be set up. *Meyer v. Calera Land Co.* 133 Ala. 554, 31 So. 938.

So it has been held that on a bill to set aside a particular deed as a cloud on title the defendant cannot by a cross bill assert title in himself under other instruments. *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97, wherein it was said: "The appellant filed a cross bill, in which he alleged that he was the owner of the land in fee simple, under four distinct sources of title: first, under a deed from Herman Lieb, county clerk, dated February 10, 1877; second, under a deed from the same party, dated March 28, 1877; third, under a deed from E. T. C. Klokke, county clerk, dated March 26, 1880; and fourth, under a deed from same party, dated July 2, 1880. The complainant interposed a demurrer to the cross bill, which the court sustained, for the reason that it failed to show any ground for equitable relief; that the cross bill set up a legal title in appellant, and that his remedy was at law. It may be regarded as a well-settled principle, that a court of equity is not the proper tribunal for

the trial of legal titles to real estate. An action of ejectment in a court of law must be resorted to where the parties desire to contest the validity of conflicting titles. An action of ejectment cannot be tried in a court of equity by bill or cross bill. (*Parker v. Shannon*, 114 Ill. 192.) From an inspection of the cross bill, it is apparent that the relief therein claimed was not a proper subject to be determined in a court of equity. Complainant's bill was brought to impeach a tax deed, issued on the 26th day of March, 1880, on the ground that it was void, and hence a cloud upon his title. Any matter or thing having a bearing on the validity of the sale or deed was proper for the appellant to present. But the fact that appellant held other deeds for the property involved, which may have invested him with the fee, could not properly be set up by an affirmative bill. If he holds the fee to the property under such deeds, he has his remedy in an action of ejectment, where his title and that of the complainant may be investigated and determined, as their rights may appear."

The defendant cannot by a cross bill have his title to other property quieted as against the plaintiff. *Naler v. Ballew*, 81 Ark. 328, 99 S. W. 72; *Bulwer Consol. Min. Co. v. Standard Consol. Min. Co.* 83 Cal. 589, 23 Pac. 1102; *Worcester v. Kitts*, 8 Cal. App. 181, 96 Pac. 335.

It has been held that a defendant who has paid a mortgage on the premises cannot by a cross bill be subrogated to the rights of the mortgagee. *Byerly v. Humphrey*, 95 N. C. 151, wherein the court said: "If the defendant was entitled to be subrogated to the rights of the mortgagee of the first mortgage mentioned in the answer, then in that respect he had a distinct cause of action, that he could not set up in this action, but must enforce by a separate and distinct action, if he shall see fit to do so."

The defendant in a suit to quiet title may by a cross bill assert a mortgage or other lien and have it foreclosed. *Jenkins v. Jonas Schwab Co.* 138 Ala. 664, 35 So. 649; *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700; *Morarity v. Calloway*, 134 Ind. 503, 34 N. E. 226; *Switz v. Black*, 45 Ia. 597. In *Jenkins v. Jonas Schwab Co.* supra, the court said: "The motion to strike the cross bill and the demurrer to same were properly overruled. Though the jurisdiction invoked by the bill is statutory, there is nothing in the statute or elsewhere which, in cases brought under such jurisdiction, precludes those who are made defendants therein to seek affirmative relief by cross bill according to the usual chancery practice. *Interstate Bldg. etc. Assoc. v. Stocks*, 124 Ala. 109; *Cheney v. Nathan*, 110 Ala. 254. The original bill drew in question the existence and extent of de-

fendant's claim to the lot, and the cross bill, being founded upon the same subject-matter and seeking only the enforcement of that claim, did not involve a departure from the original case."

In an action to quiet title by a railroad company which has condemned land and paid the condemnation money to an executrix, an after-born child of the testator may by cross bill assert his rights as a tenant in common with the company based on the theory that the will was revoked by his birth. *Chicago, etc. R. Co. v. Wasserman*, 22 Fed. 872.

The defendant in a suit to quiet title may by a cross bill contest for fraud or undue influence a will under which the plaintiff claims title. *Putt v. Putt*, 149 Ind. 30, 48 N. E. 356, 51 N. E. 337; *Curtis v. Burns*, 27 Ind. App. 74, 60 N. E. 963.

In an action to set aside as a cloud on title a second deed by the plaintiff's grantor, the defendant may by a cross bill seek the cancellation of the plaintiff's deed for fraud. *Moody v. Moody*, 16 Hun (N. Y.) 189. In *Griffin v. Jorgenson*, 22 Minn. 92, the allegations of the cross bill were stated as follows: "The answer alleges that Levi H. Griffin was the owner of the land in question prior to November 3, 1858, and on that day conveyed it to his mother, Mary H. Griffin, who, on November 9, 1858, conveyed it to the plaintiff, Eliza J., wife of Levi H.; that such conveyances were without any consideration, without any change of possession, which continued in Levi H., and were made with the sole intent to defraud the creditors of Levi H. and defeat the collection of a judgment which defendant was about to recover against said Levi H.; that at the time of said conveyance there was pending an action by defendant against said Levi H., in which the judgment mentioned in the complaint was entered in Carver county, April 14, 1859, but that the clerk of the court omitted to docket the judgment in that county until April 4, 1864, when he docketed it as of that date, and a transcript of such docket was filed and docketed in Scott county, and execution issued and the land sold, as stated in the complaint. The answer demands judgment, declaring said deeds to be fraudulent and void, and as of no force or effect as against him." The court said: "Upon the facts alleged in the answer the defendant might have brought suit against these plaintiffs to obtain the affirmative relief which the answer demands. They constitute a cause of action connected with the subject of the plaintiffs' action, to wit, the real estate described in the complaint. It is argued that where new matter alleged in an answer constitutes a defense to the cause of action in the complaint, it cannot be the subject of a counter claim. But although it may make a complete defense to plaintiffs' cause of action, if it is also of such

a nature that it entitles defendant to affirmative relief, so that he might have brought an action on it, such relief may be asked for in the answer."

HUNTWORTH .

v.

TANNER ET AL .

Washington Supreme Court—November 6, 1915.

87 Wash. 670; 152 Pac. 523.

Statutes — Construction — Effect of Preamble.

The preamble, which is a clause at the beginning of a constitution or statute, explanatory of the reasons for its enactment and the objects sought to be accomplished, will not govern where the body of the act is broader than the proposition expressed, but if the body of the act can be given a construction consistent with the purpose declared in the preamble it will be so construed.

[See Ann. Cas. 1917C 284.]

Evil to Be Remedied.

Where a new statute is so ambiguous as to incite contrary opinion as to its meaning, the first test is to discover the evil sought to be corrected.

Employment Agencies — Regulation — Scope of Act.

The Employment Agency Law (Laws 1915, p. 1), entitled "An act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof," provides in section 1 that the welfare of the state depending on the welfare of its workers demands that they be protected from conditions that result in their being liable to imposition and extortion. Section 2 makes it unlawful for any employment agent or his representative, or any other person, to demand or receive from any person seeking employment any remuneration or fee for furnishing employment or information leading thereto; while section 3 makes such act an offense. It is held that, as a "worker" is one who performs manual labor, and as the statute, if it applied to agencies for the employment of persons in the professions, might be unconstitutional as exceeding the police power, the statute does not apply to the operator of a teachers' agency whereby, for a percentage of the year's salary and a small filing fee, positions were secured.

[See note at end of this case.]

Statutes — Aids to Construction — Contemporaneous Construction.

In determining the meaning of a statute, contemporary construction may be resorted to, and opinions of the attorney general, which show how he construed the measure, while not binding, are of value.

Penal Acts — Strict Construction.

Where a law is penal and prescribes punishment, acts will be construed as without its operation, rather than within it.

Injunction — Against Enforcement of Penal Statute.

The owner of a teachers' agency who was threatened with prosecution under the Employment Agency Law, and whose business would be greatly injured or destroyed in case of arrest and prosecution, could, where it appeared that he might come within the purview of the law, obtain an injunction against prosecution, and in that way secure a construction of the act and test its constitutionality, not being bound to wait until criminal prosecution under the law prohibiting the charging of fees for obtaining employment had ruined his business.

[See 1 Ann. Cas. 121; 19 Ann. Cas. 459; 35 Am. St. Rep. 677.]

1 Appeal from Superior Court, King county: MITCHELL, Judge.

Action by F. H. Huntworth, doing business as Pacific Teachers' Agency, plaintiff, against W. V. Tanner et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Joseph P. Totten, Wm. D. Totten, Frank H. Huntworth and E. C. Macdonald for appellant.

The Attorney General, L. L. Thompson and C. J. France for respondents.

Brightman, Halverstadt & Clarke and Cannon & Ferris, amici curiae.

[671] CHADWICK, J.—Plaintiff brought this action to restrain a threatened arrest and prosecution for alleged violation of initiative measure No. 8, being popularly known as the employment agency law. Prior to the last general election, there was initiated a measure entitled:

"An act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof."

[672] Upon the initiation of the measure, the Attorney General, as required by law, submitted to the secretary of state a ballot title, in form as follows:

"An act to prohibit the collection of remuneration or fees from workers for the securing of employment or furnishing information leading thereto, and providing a penalty for violation thereof."

This was printed upon each of the ballots and became, under the statute, a notice of

the measure and its provisions to the electors of the state. At the general election, the law was adopted. It is in form as follows:

"Be it enacted by the people of the State of Washington:

"Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The state of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Sec. 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Sec. 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than one hundred dollars and imprisonment for not more than thirty days." Laws 1915, p. 1, ch. 1.

It is alleged by plaintiff that, for many years, he has conducted, by himself and his predecessors in interest, a business known under the trade-name of "Pacific Teachers' Agency;" that the business is successful and remunerative; that its activities are entirely confined to, and that it enjoys the confidence, [673] support and patronage of, school teachers and those either engaged or concerned in educational affairs throughout the states of Washington, Idaho, Oregon, Montana, and the Territory of Alaska, and elsewhere. The character of the business and the manner in which it is conducted is alleged to be as follows:

"That said school teachers have dealt and deal with the plaintiff for the purpose of obtaining employment as school teachers, and use said agency as a medium through and by means of which their qualifications and ability to teach may be enquired into and ascertained by school district officers; and their previous professional records submitted or presented to such officers or to any municipality, school district or other public body desiring to employ teachers for investigation and as a means to facilitate further investigation of their qualifications by such officers or public bodies before entering into contracts of employment.

"That in the performance of services by plaintiff for teachers so seeking employment, he investigates by written or personal communication their professional records and pre-

vious standing in the communities where lately employed; solicits on their behalf and receives reports and confidential information from educational institutions and authorities familiar with their scholarship, professional preparation and attainments, experience, character and personal characteristics, for the purpose of determining their fitness and availability for employment as school teachers. That such information so obtained is indexed by plaintiff and kept in a convenient form in suitable record books and preserved permanently for the use and benefit of such persons; for the inspection of employers of teachers; in carrying on correspondence with teachers and prospective employers, and in making or furnishing copies of such records whenever called upon to do so by such teachers or employers. That for such services plaintiff charges and receives in advance a fee of two dollars from each person soliciting his services. That such sum is usually insufficient to defray the actual cost to plaintiff for the services hereinbefore referred to. The teacher agrees to pay 5 per cent of the first year's salary if a situation is obtained."

[674] The business of plaintiff has been conducted under, and is subject to, an ordinance of the city of Seattle entitled:

"An ordinance to license and regulate certain trades and occupations in the city of Seattle, and providing penalties for the violation thereof."

It is alleged that the defendants, acting in their respective capacities, maintain and contend that plaintiff is guilty of violating the provisions of initiative measure No. 8, and that they declare that they will subject him to arrest and prosecution in the courts of the state. Plaintiff contends that his business is a legitimate business; that it has been carried on and operated in an honest and fair manner, and has contributed to the welfare of the people who deal with and through him; that he has at no time been guilty of any impositions or frauds or extortions, but has rendered faithful and efficient service, to the entire satisfaction of his patrons. These things being true, he insists that initiative measure No. 8 is not, either by its terms or intendment, applicable to his business; and further, if it be so held, that the act is void as in contravention of the constitution of the state of Washington and of the 5th and 14th amendments to the constitution of the United States, in that it deprives plaintiff of his liberty and property without due process of law; that it denies to him the equal protection of the laws, and abridges his privileges and immunities as a citizen of the United States; that it is discriminating and class legislation, and that it is an attempt to regulate interstate commerce.

Plaintiff further alleges that, if arrested and prosecuted for a violation of the act, his

business will be irreparably damaged; that he deals only with school teachers, who are peculiarly punctilious in the observance of all law, and his arrest, if published in the newspapers and educational journals throughout the states in which he does business, will work a loss of confidence in him and his business and that his present and possible future patrons will refrain from doing business with him, although his business may finally be held [675] by the courts to be a lawful business; that, unless his business is carried on without interruption, its efficiency and value cannot be maintained, and that to discontinue it would result in total destruction. These facts come to this court as admitted, the court having sustained a demurrer to the complaint and entered a judgment dismissing plaintiff's action with prejudice.

We are advised by counsel that the court below sustained the demurrer upon the theory that plaintiff's business falls within the prohibitions of initiative measure No. 8, and that the act is a valid exercise of the police power of the state. It is our judgment, after mature reflection, that we are not called upon to pass upon the constitutionality of the law. The case may be decided upon other grounds.

Appellant contends that the law does not include one who is conducting an agency patronized only by teachers and those who employ them; that the act, by its words and intendment, applies only to those who may be classed as "workers" or workmen, and not to those who are engaged in professional service. He submits several definitions of the word "worker" and "workman":

Worker: "One who, or that which, works; a laborer; performer; doer, as a worker in brass; worker of iniquity.

"One who, or that which, works; a laborer; a toiler; a performer.

"One who, or that which, performs work; a toiler."

Workman: "A man employed in labor, whether in tillage or manufactures; a worker; especially a skilled artificer or laborer.

"A laboring man; one who earns his living by manual labor.

"One who labors; one who is employed to do business for another."

Laborer is defined as "one who performs physical or manual labor."

This argument is met by the suggestion that, although the ballot title and section one of the act use the word "workers," [676] they are to be regarded as a preamble to section two, the rule being:

"The preamble to a statute can neither expand nor control the scope and application of the enacting clause, when the latter is clear and explicit." Black, Interpretation of Laws (2d ed.) § 84.

Many authorities are cited to sustain this proposition.

Section two, which, it is said, is the enacting part of the law, uses the words "any person," and, under the rule quoted, we are called upon to hold that the act covers any person who may receive a fee for procuring employment for another or for furnishing any information leading thereto.

Appellant meets this argument, saying that the purpose of the act was to protect laborers and workers only as distinguished from professional men and others, and that the terms and history of the law concur to sustain a judicial declaration that the words "any person" qualify and have reference only to those who take fees from the class designated as "workers" in the ballot title and section one of the act.

We are unable to follow the Attorney General in his interpretation of the law. To do so would be to thrust aside all other and equally important rules of statutory construction. While it may be true that the ballot title and section one are in a sense preambulatory, they nevertheless go further than to declare merely an evil and a purpose to correct it by legislation. A preamble is, strictly speaking, matter that is descriptive of the purpose of the law, making general reference to its objects. It is,

"A clause at the beginning of a constitution or statute explanatory of the reasons for its enactment and the objects sought to be accomplished." Black, Law Dictionary; 6 Words & Phrases, Title Preamble.

A preamble is not without its uses. It is not to be entirely rejected where the statute is ambiguous, although it will not be resorted to to create a doubt or misunderstanding [677] which otherwise does not exist. Where there is a doubt, it will be given its place as a component part of the act.

"A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statute." Bouvier, Law Dictionary, Title Preamble.

"When a statute is in itself ambiguous and difficult of interpretation, the preamble may be resorted to." Den v. Dubois, 16 N. J. L. 285.

Where the intent of the law is the object of inquiry, it is said that a preamble "discloses the intention of the legislature in enacting the statute." Hanly v. Sims, 175 Ind. 345, 93 N. E. 228, 94 N. E. 401.

"It is a good means," says Lord Coke, "to find out the meaning of the statute, and is a true key to open the understanding thereof." Lewis' Sutherland, Statutory Construction (2d ed.) § 341.

Without multiplying authorities or discussing those cited, we think it may be laid down

as a general rule that, if there is a broader proposition expressed in the act than is suggested in the preamble, the body or enacting part of the law will prevail over the preamble. But if the body of the act can be given a construction that is consistent with the purpose as declared in the preamble, it will be so construed.

Under these rules, section one is as much a part of the act as sections two and three. It not only defines an evil and a purpose to correct it, but also recognizes and defines a certain class, "workers," as being the object of the law's solicitude and as a class entitled to the protection of the police power. The preamble is not wholly descriptive. It is a declaration of a policy that is intended to advance the police power into a new field, and to bring within its protection a certain class of men, and to make a class amenable to it which has hitherto been unaffected by any law directed specially against it. The finding of necessity co-ordinates with section [678] two for the reason that classes are defined. If the law were a general statute applying to all alike, the rule would be as contended.

To limit the declarations of the act to sections two and three would require us to ignore section one, and extend a law which is limited in its scope beyond its clear intent. If thus construed, it might well be questioned whether the law would be constitutional—granting, for present purposes, that the act in whole or in part does no violence to the Fourteenth amendment to the constitution of the United States, a question upon which we make no ruling—for an act of the character of the one now before us, in so far as it affects individuals who may have conducted a legitimate business fairly and honestly, would be clearly unconstitutional, unless it can be said that the abuses growing out of the conduct of a certain kind of a business are so great as to warrant a holding that the general welfare demands that the innocent must limit or give up their calling for the common good. Such laws are sustained, not because a business is in itself unlawful, but because of the abuses attending its operation. Consequently, it is in the abuses and not the business that the law is rooted. The police power touches those things which offend against the welfare of society. It finds no resting place in that which is inoffensive.

If the act be construed as to include "any person" who may accept a fee for procuring employment for another, without qualification, and without reference to the mischiefs declared in the preamble and sought to be remedied by the statute, it would be an unreasonable restraint, and probably be overturned in its entirety.

"The test of the [police] power is found in the effect the pursuit of the calling has upon

the public weal, rather than in the inherent nature of the calling itself." *State v. Clausen*, 65 Wash. 156, 192, 117 Pac. 1101, 37 L.R.A.(N.S.) 466.

[679] We have said that, to adopt the theory of the Attorney General, we would have to reject other rules of statutory construction. Having met, and as we believe answered, the contention that section one is not to be rejected as a preamble, but to be considered as a guide to the intent and purpose of the law, we shall endeavor to fortify our conclusion by reference to other rules.

Where a new statute is so ambiguous as to incite contrary opinion as to its meanings, the first resort is to discover the antecedent mischief. The mischief inducing the present act is not hard to find. It was to correct what society had come to regard as a wrong practiced upon those who for many reasons were unable to protect themselves against impositions and extortions. It was to protect a class that was powerless under existing conditions to protect itself. As said by the supreme court of the United States in *Patterson v. The British Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 U. S. (L. ed.) 1002, when speaking of the Federal statute prohibiting any person from demanding or receiving remuneration for providing employment for sailors:

"The story of the wrongs done to sailors in the larger ports, not merely of the nation but of the world, is an oft-told tale."

Or, as the court of appeals of New York said when considering the constitutionality of a statute regulating employment agencies:

"The legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality." *People v. City Prison*, 183 N. Y. 223, 5 Ann. Cas. 325, 76 N. E. 11, 2 L.R.A.(N.S.) 859.

[680] The supreme court of Minnesota has noticed particular abuses incident to a class of business and impositions upon its patrons in the same way:

"The nature of the business, and the character of those with whom the business is likely to be conducted, in point of intelligence, experience, and capacity for self-protection from fraudulent practices, are such that it might well be deemed necessary by the legislature, as a matter of proper police regulation. . . . The propriety of police regulation seems apparent when it is considered that, by means

of such agencies, ignorant and credulous persons might easily be defrauded of their money under a mere pretense of employment to be afforded them in a distant part of the state, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution." *Moore v. Minneapolis*, 43 Minn. 418, 45 N. W. 719.

The history of a law passed in obedience to an expression of public opinion is of value when construing an act or in gathering its intent. *State v. Superior Court*, 70 Wash. 545, 127 Pac. 120. It is a matter of common knowledge that initiative measure No. 8 was aimed at those agencies to which laboring men, as distinguished from professional men, were compelled to resort, and it will not be denied, if agencies like the one conducted by appellant is prescribed, the law which was passed to accomplish one purpose is a drag net for all purposes.

The act has no reasonable relation to any subject other than the protection of those who may be classed as workers or laborers. It has never been contended that business and professional men, teachers, and those following scientific pursuits, are not amply equipped to protect themselves. A teacher renders the very highest class of professional service, whereas, those for whose benefit this law was passed are frequently unskilled in business affairs, and in many instances are men of foreign birth having no competent understanding of our business methods or our language.

[681] Furthermore, the act must be determined by a consideration of its natural effect when put in operation. In operation it may tend to protect the day laborer who, as said by the examiner in the office of the labor commission of the city of Seattle, "is generally poor and without means" (*Wiseman v. Tanner*, 221 Fed. 694), and who, in consideration of a fee, is directed to a job which may not exist, or which may not endure because of collusion between the employment agent and a corrupt foreman. But such considerations do not naturally or reasonably follow the case of a teacher when measured by the admitted facts. A teacher is not employed to do day labor. When hired he cannot be "fired at will." He is put in touch with those who may employ him. He is not called upon to make futile trips "into the woods." He arranges his own contract, either in person or by correspondence. His contract is for a term which the law will protect, and he is not subject to the hazards of unemployment by the act of a collusive foreman. The fee for the service rendered, barring a preliminary fee of two dollars to cover cost of enrolment and correspondence, is paid when a contract for a fixed term is secured.

There is another rule of statutory construction to which courts frequently resort, and that is, the rule of cotemporaneous construction. As we have said, the ballot title is a notice of the general purport of an act submitted under the seventh amendment to our constitution. There is nothing in the ballot title that would indicate to the elector that the proposed law would apply to any class other than those engaged in procuring employment or giving information leading to the employment of workers or laborers. It must have so occurred to the Attorney General at the time the ballot title was prepared, otherwise some apt words would have been used to suggest that the law applied generally to all who might procure employment or furnish information leading to employment, whatever the character of the patron might be or to whatever class he might belong.

[682] The opinions of the Attorney General are always valuable when passing upon questioned statutes, and, although not binding, are always considered and frequently resorted to: Spokane, etc. Trust Co. v. Young, 19 Wash. 122, 52 Pac. 1010; Hicks v. King, 21 Wash. 567, 58 Pac. 1070; State v. Schively, 63 Wash. 103, 114 Pac. 901; Wendt v. Industrial Ins. Commission, 80 Wash. 111, 141 Pac. 311.

The law is penal. It is well settled that if it is doubtful whether a given act falls within or without a penal statute, the doubt will be resolved in favor of the innocence of the one charged, or who may be charged, with its violation.

"Laws are interpreted in favor of liberty, and if a statute is capable of two constructions, one of which makes a given act criminal and the other innocent, the statute will be given the construction which favors innocence." State v. Anderson, 61 Wash. 674, 112 Pac. 931.

See, also, State v. Hazeltine, 82 Wash. 81, 143 Pac. 436; State v. Furth, 82 Wash. 665, 144 Pac. 907; State v. Wilson, 83 Wash. 419, 145 Pac. 455.

It will not be contended but that it is at least doubtful whether the act was intended to cover a business such as is carried on by appellant.

Although it may be doubtful whether the demurrer properly raised the question, it is submitted that plaintiff cannot maintain this action; that it is contrary to the general rule and the rule as declared by this court in Brown v. State, 59 Wash. 195, 109 Pac. 802—that is, that a court of equity has no jurisdiction to review or vacate the judgment of a criminal court or to restrain the execution of a criminal sentence, and these things being so, a court will not restrain the administrative officers of the state when about to subject a citizen to an arrest for the vio-

lation of a statute which is alleged to be unconstitutional, or which, it is contended, does not include the complaining party within its inhibitions.

[683] Counsel say:

"We think that the case of Brown v. State, 59 Wash. 195, 109 Pac. 802, is decisive of this. In that case this court held that it would not enjoin the enforcement of a statute relating to the practice of dentistry, alleged to be unconstitutional, because the right to practice dentistry is not a property right. If this be true, much less can the right to charge fees for securing employment for persons be considered a property right. It is merely a personal right, and therefore not the subject of equity jurisdiction."

With the Brown case and the authorities upon which it rests before us, this court held, in City Cab, etc. Co. v. Hayden, 73 Wash. 24, 131 Pac. 472, Ann. Cas. 1914D 731, L.R.A.1915F 726, that one who was threatened with an arrest under a city ordinance might bring a proceeding in equity to test by way of injunction the validity of a police regulation.

Counsel for the state seek to distinguish and harmonize these two opinions thus: first, in the Hayden case it was sought to enjoin the enforcement of a municipal ordinance; second, the exception noted in the Brown case, that is, irreparable injury to property rights, should be considered as necessary to the application of the rule there stated. Such conclusions do not follow. We find no real distinction in the authorities between the rules applying in cases brought to enjoin prosecutions under a city ordinance and cases brought to test the validity of a statute. 22 Cyc. 903. Nor can we think of any real distinction. In either case, it is generally held that such a suit will not be entertained unless a civil or property right is involved. The cases are collected in 21 L.R.A. 84; 2 L.R.A.(N.S.) 631; 25 L.R.A.(N.S.) 193, and 34 L.R.A.(N.S.) 454.

Nor do we agree with counsel that plaintiff is concerned only in the preservation of a personal right and that no right of property is involved. Whatever the law may have been, it must be construed with reference to its present developments [684] and existing social conditions. We can readily understand why a court of equity would refuse to restrain a prosecution under a penal statute where the rights of the party had accrued after the enactment of the statute, or the questioned law is not merely *malum prohibitum* but *malum in se*. But in these modern times, when the activities of the state have been so greatly and rapidly extended that almost all forms of business which have been and are now regarded as legitimate have been made the subject of state control and regulation, it would seem.

that no man should be denied the privilege of testing a law that touches him in his rights to pursue the business to which he has devoted his time and energies and in which his capital is invested, by anticipating an arrest which must surely follow if the officers of the state perform the duties imposed upon them.

The right to pursue any lawful business calling, subject to proper regulation and control, or, in other words, the police power, is a right guaranteed by the 14th amendment to the constitution of the United States. *Murphy v. California*, 225 U. S. 623, 32 S. Ct. 697, 56 U. S. (L. ed.) 1229, 41 L.R.A. (N.S.) 153.

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 S. Ct. 427, 41 U. S. (L. ed.) 832.

The holdings of this court are strictly in accord with the idea that the right to peacefully pursue an avocation is more than a personal right. In *Hillman v. Seattle*, 33 Wash. 14, 73 Pac. 791, it was said:

"It seems to us, however, that a person who has valuable property rights at stake ought not to be required or expected [685] to submit to the odium of being dragged into a criminal court before being permitted to take steps to protect these rights."

Coming to the case at bar, we have a business that is legitimate; that performs a necessary function, for surely we may take notice that the propaganda in furtherance of the present law carried with it the suggestion and hope that the necessity for employment agencies would be met and cared for by bureaus conducted by municipalities and the state government. By the terms of the law, the act of conducting an employment agency is not interdicted as criminal. It may still be carried on, subject only to the restraint that no fees shall be taken from the employee for securing employment or giving information leading to employment. Having then a proprietorship in a legitimate business to which his time and energies have been devoted and which, if interrupted by a lapse incident to criminal prosecutions, would be partially if not effectually destroyed, it would seem that the right of appellant, under any con-

struction of the law, is more than a right of liberty, and that a court should not regard it in a technical way, but from the broad viewpoint of the consequences of the threatened invasion.

In so far as the writer of this opinion is concerned, he is not disposed to draw any refined distinctions between personal and property rights. If the right of a professional man or one engaged in a business depending upon personal attention, educational qualifications, or peculiar fitness for the work at hand, to pursue a legitimate avocation, or to practice his profession, is involved, I would be perfectly willing to hold that the mere right to pursue such business or profession is a right that will be protected by the courts, albeit there are some who may say that such right is personal.

To say that a man who runs a grocery store, or a public service corporation operating under a franchise, can invoke the aid of equity to protect civil or property rights, and that a professional man, or one conducting a business requiring [686] no capital in money, is not entitled to the protection of the law, is inconsistent and unsound. Under the authorities, the one may come into a court of equity and secure relief. Under the weight of authority, the other cannot. If the law be a progressive science—and we have frequently asserted that it is—it would seem that the professional man, or the man with no capital, who has hitherto committed no offense against the laws of the state and whose business or profession is not inherently vicious, or one who is performing a necessary service to society, should not be put to the harassment or the annoyance or disgrace of an arrest under a statute which has been passed while he was thus engaged and which, if enforced, would destroy his business and deprive him of his means of livelihood. In such a case, I confess my utter inability to draw a distinction between a personal and a property right. I find no sound reasons in the books for declaring that a man must become a potential criminal before he can test a law that by its letter denies his right to do that which, but for the new dispensation, has been recognized by all men as lawful.

Nor does this reasoning lead us into the mire or baffle us to answer the question put by the Attorney General, "If a man conceives that he is about to be arrested for murder would a court of equity issue an injunction to test the law." Clearly it would not, for murder is a crime by all law, human and divine. It is *malum in se*. It is vastly different when a peaceful, respected and industrious citizen goes to bed an innocent man, and wakes to find himself and his business under the shadow of a statute that out-

laws his business and makes him a possible criminal if he pursues it. If the time has not yet come, it is time the courts should cease from saying that no man shall be denied the right to protect his liberty when threatened under a statute *malum prohibita*, unless it can be said at the same time that he has suffered a deprivation of property rights or of property loss. Such a holding would be in complete accord with modern tendencies. This tendency found peculiar emphasis in the industrial insurance act, and [687] in other humane laws which have been passed by our own legislature. There is an old maxim,

"*Cessante ratione legis, cessat et ipsa lex.*" The reason of the law ceasing, the law itself ceases also. Co. Litt. 70b; 2 Bl. Comm. 390, 391; Broom, Max. 159." Black, Law Dictionary, 185.

The reason for the rule that would deny a man the right to question the constitutionality of a law by a proceeding in injunction to prevent an arrest or to restrain criminal proceedings came from the lack of relation between equity and law courts as they formerly existed in England. The reason that courts of equity have refused to interfere is that they had no jurisdiction to enforce their decrees without invading the jurisdiction of another court. High, Injunctions (4th ed.) § 68. No such distinction now remains. While we preserve, in a certain sense, proceedings in equity and actions at law, these distinctions do not touch anything other than the form of trial and the procedure. The remedy, whatever it is, is to be found in the same court. We have elaborated this thought in many cases: In re Sall, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885; Sloan v. West, 63 Wash. 623, 116 Pac. 272; In re Martin's Estate, 82 Wash. 226, 144 Pac. 42.

The old jealousies which maintained a bar of distrust between law courts and equity courts no longer exist, for the province of the judge and the discretion of the chancellor are combined in the one person. No question of substantive law is involved. The only question is the one of procedure, or how can the right be determined. It would be to render obeisance to the image of a dead legal form and practice to say to a man, if you are damaged in property we will hear you in equity, and, if it be so, declare the law which confounds you unconstitutional; but if your liberty only is at stake, although it may be dearer to you than your property, you must go out of the equity door of the court, receive submissively the odium and disgrace of an arrest, and re-enter by way of the law door of the same court. If you do this we will hear you, and if the [688] law under which you have been arrested is

unconstitutional, we will so declare. We will then, and then only, permit you to go hence, free to do as you will, with the handicap of a tarnish upon your good name. Such an argument finds no response in the chambers of abstract reason, nor does the reason that formerly sustained it exist in our present court system, nor can it, from the very nature of things, exist. *Cessante ratione legis, cessat et ipsa lex.*

Neither are we impressed with the suggestion that, although the rule be admitted, courts will not entertain a case of this kind until there be a damage or an actual restraint of liberty. To bring a case to this court to test the constitutionality of laws has become a constant practice. They are brought here by the officers of the state, by individual litigants, and by the connivance—and we use the word in no derogatory sense—of the state and the individual. We have accomplished by an accepted practice what has been done by the legislature or by constitutional amendment in some of the other states, notably in the state of Massachusetts, where laws are submitted for the opinion of the judges prior to the time of their final passage by the legislature. In most of the cases of the kind to which we have referred, we know, as everyone knows, no real controversy has arisen, and that the object of the suit is to take the opinion of this court. In recent years we have passed upon the constitutionality of laws in what may be truthfully declared to be agreed cases, scores of times, the most prominent instance being in the case of State v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L.R.A.(N.S.) 466, where, with nothing before us but the question of whether the law, not yet in operation was constitutional, we anticipated it and went into every phase of the law of the case.

If the state can do these things, or accept the practice when adopted by others, is there any sound reason why the citizen cannot proceed in the same way when his liberty is at stake? The question cannot be answered in the negative without a [689] charge of inconsistency. It is no answer to say that a party has no interest until arrested. He has the same interest. If the execution of the questioned law would operate to deprive him of his liberty, or if his arrest would interrupt or destroy a business theretofore lawful, it is neither logical nor praiseworthy on the part of the state to put the burden of arrest and possible imprisonment, pending a trial, upon one who has the admitted right to question the constitutionality of the law if it were a question of property right only. To longer hold to this rule is but to enrich the already fertile field of misunderstanding as to the

ways of courts and their procedure, and to put courts to the labor of drawing the fine distinctions between property rights and the right of personal liberty, and the one as an incident to the other, as in many of the cases collected in 22 Cyc. 903, note 37.

We conclude, therefore, that the acts of appellant and the business conducted by him are not within the terms or intendments of initiative measure No. 8, and that the court has jurisdiction to restrain the threatened prosecution. Whether the law is a proper exercise of the police power as to those falling within its terms, we pass no opinion.

Reversed, and remanded with instructions to enter a perpetual injunction.

Morris, C. J., Holcomb, Parker, and Mount, JJ., concur.

MAIN, J. (dissenting).—I am unable to concur in the views expressed in the majority opinion. Section 2 of the act provides that it shall be unlawful for "any employment agent" to receive or demand from "any person" a fee for furnishing such person with employment. This language is so plain as not to call for construction. It is obvious that the appellant comes within the terms of the act. It is true that § 1 of the act, which is in the nature of a preamble and declares the general policy of the state, uses the word "workers," but to limit the meaning of the word "work" to those who perform [690] physical labor is not sustained by the lexicographers defining the term nor is it the common understanding of its meaning. The word "workers" as used in § 1, even though given the limited meaning, should not modify the plain language used in the operative section of the statute.

Fullerton and Ellis, JJ., concur with Main, J.

NOTE.

The reported case construes a statute which recites as the evil to be remedied the oppression of "workers" by the exaction from them of fees for procuring employment, and forbids "any employment agent" to receive a fee from "any person" seeking employment. It is held that the act is restricted by the prefatory recitals to employment agents securing employment for laborers and has no application to an agency procuring employment for school teachers. The statutory regulation of employment agencies is discussed in the notes to *People v. City Prison*, 5 Ann. Cas. 325; *Watts v. Com.* Ann. Cas. 1914B 738; and *Hager v. Walker*, 129 Am. St. Rep. 238.

IDEAL TEA COMPANY ET AL.

v.

CITY OF SALEM ET AL.

Oregon Supreme Court—July 27, 1915.

77 Oregon 182; 150 Pac. 852.

Injunctions — Subjects of Relief — Preventing Criminal Prosecution.

Where prosecution under a void regulation relating to a misdemeanor is threatened, and the attempted enforcement of the regulation will deprive plaintiff of a valuable property right, he may sue to enjoin the prosecution.

[See 1 Ann. Cas. 121; 19 Ann. Cas. 459; 35 Am. St. Rep. 677.]

Hawkers and Peddlers — Soliciting Orders by Sample.

One who, by displaying samples, solicits orders for the sale of goods for future delivery, is not, as a general rule, a "peddler."

[See note at end of this case.]

Statutes — Definition of Terms.

The legislature may adopt reasonable modifications of former definitions of words, so as to make their interpretation conform to modern usage.

Licenses — Power of Municipality — Discrimination against Nonresidents.

Const. art. 1, § 20, forbidding laws granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens, restricts the legislature and is a limitation on the common council of a city, and prevents any discrimination against nonresidents of a city in occupation or license taxes.

[See 129 Am. St. Rep. 257.]

Same.

An ordinance imposing a license on peddlers having no regular place of business in the city, but who solicit therein orders for the sale and future delivery of tea, coffee, spices, etc., cannot be sustained as an exercise of the police power.

Same.

An ordinance of a city, which imposes on peddlers a license, which defines a "peddler" as a person who, for himself or as the agent of another, goes from house to house selling or offering to sell for future delivery by sample, and which declares that the provisions shall not apply to any merchant or dealer having a regular place of business in the city in taking or soliciting orders for the sale and delivery of his merchandise, conflicts with Const. art. 1, § 20 prohibiting laws granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens; for it imposes a license on nonresident solicitors, but permits merchants of the city to have their employees visit the houses of their customers and take orders for goods without a license.

Appeal from Circuit Court, Marion county:
GALLOWAY, Judge.

Action by Ideal Tea Company et al., plaintiffs, against City of Salem et al., defendants. Judgment for plaintiffs. Defendants appeal. **AFFIRMED.**

[183] This is a suit by the Ideal Tea Company, a corporation, and C. F. Henshaw against the City of Salem and others, to enjoin the enforcement of a municipal ordinance. The material averments of the complaint are to the effect: That pursuant to subdivision 7 of Section 6 of the charter of the City of Salem, empowering its mayor and aldermen "to license, tax and regulate . . . peddlers, sample peddlers . . ." (Laws [184] Or. 1899, p. 921), the common council on November 6, 1911, attempted to enact Ordinance No. 1009, Section 13 of which, as far as important herein, reads:

"Peddlers passing from place to place in the City of Salem, Oregon, on foot and not crying their wares, shall pay a license fee of \$75 for one (1) year; . . . \$15 for one (1) month; \$5 for one (1) week and \$1 for one (1) day. . . . The term 'peddler' as used in this section is defined to mean . . . every person who for himself or as agent of another goes from place to place or from house to house selling or offering to sell for future delivery, by sample or catalogue, at retail to individual purchasers who are not dealers in the articles sold. Provided that the provisions of this section shall not apply to any merchant, or dealer having a regular place of business in the City of Salem, Oregon, in taking or soliciting orders for the sale and delivery of his goods, wares or merchandise."

That the Ideal Tea Company is a corporation engaged in selling tea, coffee, spices, etc., having its principal office in Portland, Oregon, and conducting business outside that city by agents, and C. F. Henshaw is its representative in Salem, Oregon, where he had resided for a long time prior to May 24, 1915, but had no place of business therein. That he was engaged at Salem in taking orders for merchandise, which requests were forwarded to his principal, whereupon the goods desired were sent and delivered to the customers, but he did not carry any wares that he offered for sale. That on May 24, 1915, a verified complaint was filed in the recorder's court of Salem, charging Henshaw with peddling in that city without a license, and being apprehended he was compelled to put up cash bail. That such criminal action has not been tried, but the defendants Charles F. Elgin, city recorder, and J. T. Welch, marshal, are attempting to [185] prosecute the charge, and the plaintiffs have been prevented from pur-

suing their business in Salem, to their damage in the sum of \$500. That the ordinance is void, in that it is not uniform in its application to all persons similarly situated, and violates Section 20 of Article I of the organic law of the state, notwithstanding which the defendants are threatening to enforce the provisions of the attempted enactment, to prevent which the plaintiffs have no adequate remedy at law. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, was overruled; and, the defendants declining further to plead or answer, the relief prayed for in the complaint was granted, and they appeal.

William H. Trindle for appellants.
George G. Bingham for respondents.

MOORE, C. J. (*after stating the facts*).—1. When, under color of void legislation relating to misdemeanors, the prosecution of an alleged offender is threatened, which attempted enactment if enforced would deprive a party of a valuable property right, a court of equity, upon proper application, will intervene, and by injunction prevent the menaced injury: *Sandys v. Williams*, 46 Ore. 327, 80 Pac. 642; *Marsden v. Harlocker*, 48 Ore. 90, 85 Pac. 328, 120 Am. St. Rep. 786; *Renshaw v. Lane County Ct.* 49 Ore. 526, 89 Pac. 147; *Hall v. Dunn*, 52 Ore. 475, 97 Pac. 811, 25 L.R.A. (N.S.) 193; *Guernsey v. McHaley*, 52 Ore. 555, 98 Pac. 158; *Portland Fish Co. v. Benson*, 56 Ore. [186] 147, 108 Pac. 122; *Wiley v. Reasoner*, 69 Ore. 103, 138 Pac. 250; *Sherod v. Aitchison*, 71 Ore. 446, Ann. Cas. 1916C 1151, 142 Pac. 351.

2, 3. It is almost universally held that a person who, by displaying samples, solicits orders for the sale of goods for future delivery, is not a "peddler": *Scribner v. Mohr*, 90 Neb. 21, 132 N. W. 734, Ann. Cas. 1912D 1287, 1293. The legislative assembly of a state may adopt reasonable modifications of former definitions of words, so as to make their interpretation conform to modern usage: *Ex p. Case*, 70 Ore. 291, Ann. Cas. 1916B 490, 135 Pac. 881, 141 Pac. 746. Whether the common council of the City of Salem, without an express grant of authority for that purpose, which is not to be found in the organic law of the municipality, can prescribe the meaning of words different from their usual acceptance, would seem to be very doubtful, for in subdivision 5 of Section 6 of the charter authority is given "to prevent and remove nuisances, and to declare by general rules what shall constitute the same," and in subdivision 28 thereof power is conferred "to define what shall constitute vagrancy:" *Laws Or. 1899*, pp. 924, 928. But, however this may be, it will be assumed,

without deciding the question, that the interpretation of the word "peddler" as given in the ordinance was justified by the charter.

4. The clause of the fundamental law, invoked to defeat Section 13 of the ordinance assailed, reads:

"No law shall be passed granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Article I, Section 20 of the Constitution of Oregon.

This interdiction, though evidently enacted to restrict the legislative assembly, also operates as a limitation [187] upon the common council of a municipality, thereby preventing any discrimination against nonresidents in occupation or license taxes: *McQuillin*, Mun. Ord. § 219.

5. The ordinance imposing a license upon peddlers who have no regular place of business in Salem, but who solicit therein orders for the sale and the future delivery of tea, coffee, spices, etc., should not be classed as an exercise of the police power, since it would seem that such business could not injuriously disturb the peace, molest the order, impair the health, violate the morality or annoy the society of the city: *McQuillin*, Mun. Ord. § 260; *People v. Jenkins*, 202 N. Y. 53, 94 N. E. 1065, 35 L.R.A.(N.S.) 1079; *Sayre v. Phillips*, 148 Pa. St. 482, 488, 24 Atl. 76, 33 Am. St. Rep. 842, 16 L.R.A. 49. In the latter case, Mr. Justice Williams, speaking for the court, says:

"If a statute, or municipal ordinance, is in reality directed only against certain persons who are engaged in a given business, or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police, but a trade regulation; and it has no right to shelter itself behind the police power of the state or the municipality."

See, however, the notes to the case of *State v. Bayer*, 19 L.R.A.(N.S.) 297, 301.

Judge Dillon, in his valuable work on *Municipal Corporation* (5th ed. Section 593) remarks:

"As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained."

Thus in *Grafty v. Rushville*, 107 Ind. 502, 508, 8 N. E. 609, 612, 57 Am. Rep. 128, it was held [188] that an ordinance requiring a peddler, who was not a resident of the city, and who proposed to sell wares and merchandise which were not grown or manufactured in the county in which the municipality was situated, to procure a license and pay a fee therefor before he could lawfully follow his calling in such city, discriminated

against the citizens and products of other communities, and for that reason was void because it violated a clause of the Constitution of Indiana which provided:

"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Article I, Section 23.

To the same effect, see also *Ex p. Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Marshalltown v. Blum*, 58 Ia. 184, 12 N. W. 266, 43 Am. Rep. 116; *Pacific Junction v. Dyer*, 64 Ia. 38, 19 N. W. 862; *Saginaw v. Saginaw Circuit Judge*, 106 Mich. 32, 63 N. W. 985; *State v. Nolan*, 108 Minn. 170, 122 N. W. 255; *State v. Williams*, 158 N. C. 610, 73 S. E. 1000, 40 L.R.A.(N.S.) 279; *Sayre v. Phillips*, 148 Pa. St. 482, 24 Atl. 76, 33 Am. St. Rep. 842, 16 L.R.A. 49; *Com. v. Snyder*, 182 Pa. St. 630, 38 Atl. 356.

"It is true a state," says Mr. Justice Bean in *State v. Wright*, 53 Ore. 344, 349, 100 Pac. 296, 298, 21 L.R.A.(N.S.) 349, "may impose a tax on, or require a license from, persons engaged in certain callings or trades, without being bound to include all persons or all property that may be legitimately taxed for governmental purposes. . . . But the classification must be on some reasonable basis, and the law, when enacted, must apply alike to all engaged in the business or occupation."

[189] See the notes to this case in 21 L.R.A.(N.S.) 349. To the same effect, see *Moffitt v. Pueblo*, 55 Colo. 112, 133 Pac. 754; *Ex p. Case*, 70 Ore. 291, Ann. Cas. 1916B 490, 135 Pac. 881, 141 Pac. 746.

6. In the case at bar, the business in which the plaintiffs are engaged is identical with that of some of the merchants of Salem whose employees daily visit the houses of their customers, taking orders for groceries which are later delivered, except that the plaintiffs do not have a regular place of business in that city. Section 13 of the ordinance in question is a clear violation of Section 20 of Article I, of the Constitution of the state, and for that reason is void.

No error was committed in overruling the demurrer. The judgment should therefore be affirmed, and it is so ordered.

Affirmed.

Eakin, Bean and Harris, JJ., concur.

NOTE.

Sale by Sample for Future Delivery as Peddling.

Generally.

The rule laid down in *Potts v. State*, 45 Tex. Crim. 45, 2 Ann. Cas. 827, that one who, by the display of samples, obtains orders for

the sale of goods to be delivered in the future is not a peddler, is supported by the following recent authorities: *State v. Dressner*, 4 Boyce (Del.) 80, 85 Atl. 881; *State v. Bristow*, 131 Ia. 664, 109 N. W. 199; *Com. v. Standard Oil Co.* 129 Ky. 744, 112 S. W. 902; *Newport v. French Bros. Bauer Co.* 169 Ky. 174, 183 S. W. 532; *Saal v. Fortner*, 124 La. 112, 49 So. 997; *Milan v. Allen* (Mo.) 175 S. W. 933; *Scribner v. Mohr*, 90 Neb. 21, Ann. Cas. 1912D 1287, 132 N. W. 734; *Great Atlantic, etc. Tea Co. v. Tippecanoe*, 85 Ohio St. 120, 96 N. E. 1092; *State v. Ivey*, 73 S. C. 282, 53 S. E. 428; *Rex v. Pember*, 3 Dominion L. Rep. 347, 21 Ont. W. Rep. 915, 3 Ont. W. N. 1216, 20 Can. Crim. Cas. 60. See also *Smith v. Wilkins*, 164 N. C. 135, 80 S. E. 168; *State v. Littlefield*, 112 Me. 214, 91 Atl. 945.

In *State v. Dressner*, supra, the court said: "After a careful examination of the statutes of the different states respecting peddlers, which are very similar in their essential features, and an examination of the decisions based thereon, we are constrained to believe that the courts have been practically unanimous in holding that the doing of such things as the defendant in this case is alleged and admitted to have done, would not make one a peddler within the statutory meaning and intent. According to the authorities the distinctive feature of peddling 'consists in the fact that the peddler goes from house to house or place to place carrying his merchandise with him; and concurrently sells and delivers it.'"

In *Com. v. Standard Oil Co.* supra, it was said: "The words 'selling by sample' evidently mean by taking orders for future delivery, as the commercial traveler does. It is not necessary for the traveling salesman to carry with him a sample of everything he takes orders for. Indeed, he does not do this, as is well known. There are various well known brands and kinds of staples in all lines of goods and merchandise that are so well known to the merchant that he does not care to see a sample. So in this case it was not necessary for the agent, when the first arrangement was made for regular trips and regular delivery of oil, to exhibit a sample of oils. In the previous case of *Brenner v. Com.* 9 Ky. L. Rep. 289, it was held that a person whose business it is to make weekly or semi-weekly visits to his customers to solicit orders and deliver goods previously ordered is not a peddler within the meaning of the statute."

In *Milan v. Allen* (Mo.) 175 S. W. 933, it was said: "The plaintiff very properly says that it does not contend that a single sale constitutes one a peddler, but understands that term to describe one who goes from place to place carrying with him goods for the pur-

pose of selling them. We have read all the evidence carefully, and fail to find anything in it that measures the defendant up to that standard. It is not denied that his principal business was as agent for the Price Installment Mercantile Company to sell goods by sample for that company to be delivered by them to the purchaser. In the prosecution of this business from house to house he was engaged in interstate commerce; but were this not so, and had he been taking orders in like manner for goods in this state, the same ordinance under which he was convicted contained another provision imposing a license upon 'agents selling goods by sample, or taking orders for any goods, wares, or merchandise other than from merchants who hold a merchant's license.' It is plain that he could not have been convicted as a peddler for making a single sale, but that it was necessary to prove that he went from house to house for the purpose of making such sales. The proof is that it was his business to sell by sample, and, to convict him as a peddler, the burden was upon the city to prove that he acted as a peddler. They introduced two witnesses in that attempt. One of them, Mrs. Losey, failed to remember anything bearing upon that question, and the other, Mrs. Dennis, testified that she met appellant at her mother's home two or three days before the transaction, where the following occurred: 'Q. What did he say, if anything, when he met you there? A. No more than any other agent would have said. He was out to make sales, of course, and that was his business. Q. He wanted to sell you or take an order for blankets? A. No, sir; he never spoke to me about the blankets. He asked my mother to buy, and mamma told him she didn't care for the blankets. Mr. Allen didn't insist on any of us to buy the blankets.' There is nothing in this inconsistent with the innocent theory that this was all done and said in the legitimate prosecution of his business of selling by sample. It does not tend to prove that the appellant had, on either of those occasions, solicited the parties to purchase goods which he was carrying for delivery. There was a total failure of proof of the charge in the complaint. The judgment will be reversed."

In *Great Atlantic, etc. Tea Co. v. Tippecanoe*, 85 Ohio St. 120, the court said: "The averments of the petition, which the demurrer admits to be true, exhibit the course and conduct of the plaintiff's business and make it appear to be essentially different from the conduct of business by one of the three classes of persons named in the ordinance. It has a fixed place from which it does business: it does not carry about the merchandise which it offers for sale; it does not sell at the time it offers for sale, but enters into contracts

for future sales; it does not carry on negotiations or any part of its business upon the streets, highways or public places, but at the residences of its customers."

An occasional sale of a sample by a person engaged in taking orders from sample does not constitute peddling. *Newport v. French Bros. Bauer Co.* 169 Ky. 174, 183 S. W. 532, wherein it was said: "A sale of an article, once in a great while in the nature of the sale of a sample, would not constitute one a peddler, where it was not the purpose to sell the goods in that way as a material part of his business."

Under Statute or Ordinance.

It is within the power of a state or a municipality to declare, by statute or ordinance, that the soliciting of orders by sample for the sale of goods to be delivered in the future shall constitute peddling. *Crenshaw v. State*, 95 Ark. 464, 130 S. W. 569; *Rogers v. State*, 101 Ark. 45, 144 S. W. 491, 49 L.R.A. (N.S.) 1198. In the case last cited, the court said: "The statute does not declare it an offense to make sales, nor does it seek to impose a license fee or tax on sales, but only makes it an offense for one to go about from place to place, from residence to residence, in and through the county in the prosecution of a wayfaring business, without procuring license, whether in making sales or in taking orders. As was said relative to a statute quite similar to this by the Supreme Court of the United States: 'Its object in requiring peddlers to take out and pay for licenses and to exhibit their licenses on demand to any peace officer or to any citizen householder of the county appears to have been to protect the citizens of the state against the cheats and frauds and even thefts which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door.'"

"We are of the opinion that the facts in the cases at bar are, in every essential particular, analogous to those in the *Crenshaw* case. In the *Crenshaw* case the constitutionality of this peddling statute, under similar facts and conditions, was upheld, and we see no reason for changing that decision. . . . The peddling statute of this state, we think, is legislation of that character, and is for that reason valid."

In several recent cases regulations of the kind just mentioned have been enforced without a discussion of their validity. *Collins v. Dalton*, 12 Ga. App. 119, 76 S. E. 1053; *Fallis v. Gas City*, 169 Ind. 508, 82 N. E. 1056; *Alma v. Clow*, 146 Mich. 443, 109 N. W. 853; *Muskegon v. Hanes*, 149 Mich. 460, 112 N. W. 1077; *Ex p. Case*, 70 Ore. 291, 135 Pac. 881, 141 Pac. 746; *Pomeroy v.*

Rutherford, 80 Wash. 43, 141 Pac. 178, L.R.A. 1916B 1291.

In *Fallis v. Gas City*, supra, the court said: "By an act of the general assembly, in force March 12, 1901 (Acts 1901, p. 560, sec. 7; sec. 7231p Burns 1901), it is declared that 'for the purpose of this act the word "peddle" is defined as meaning to sell or offer for sale manufactured goods, wares or merchandise directly to a consumer, either by going from house to house for the purpose of selling and delivering such goods, or for the purpose of taking orders for the future delivery of such goods.'"

In *Ex p. Case*, 70 Ore. 291, 135 Pac. 881, 141 Pac. 746, it was said: "The statute (sec. 4961, L. O. L.) defines the term 'peddler,' as used therein: 'The term "peddler," as used in this act, means and includes the following persons: . . . (2) Every person who, for himself or as agent of another, goes from place to place or from house to house, selling or offering to sell for future delivery, by sample or catalogue, at retail, to individual purchasers who are not dealers in the articles sold, any goods, wares, or merchandise'—petitioner contending that this definition is not within the true meaning of the word 'peddler,' and that the acts complained of were not in violation of the statute. The legislature has said by the language quoted that such acts shall constitute peddling. Wherever the word 'peddler' is used in the act, it shall include the act specified. The legislature could forbid these acts under any name they might choose to give them."

In *Pomeroy v. Rutherford*, 80 Wash. 43, 141 Pac. 178, L.R.A. 1916B 1291, the court said: "On principle it would seem hard to make a rational distinction between the vocation of a person who makes sales of wares by canvass from house to house and delivers the wares immediately, and one who sells in the same manner but delivers later on in the same day, or on the next or some succeeding day."

In the reported case it is held that an ordinance making it peddling to solicit orders must not discriminate between residents and nonresidents. See to the same effect *State v. Parr*, 109 Minn. 147, 123 N. W. 408, 134 Am. St. Rep. 759.

As to the validity of a statute or ordinance imposing a tax on the taking of orders for goods to be delivered from another state, see the notes to *In re Kenyon*, 2 Ann. Cas. 699; *International Trust Co. v. A. Leschen*, etc. *Rope Co.* 14 Ann. Cas. 861; and *Ex p. Case*. Ann. Cas. 1916B 490. The fact that such an ordinance is invalid as to interstate transactions does not work a total invalidity. *Ex p. Case*, supra.

PATTANGALL

v.

MOOERS.

Maine Supreme Judicial Court—July 6,
1915.

113 Me. 412; 94 Atl. 561.

**Libel and Slander — Interpretation of
Language — Understanding of Hear-
ers.**

Defamatory language is to be interpreted as it would be actually understood by the hearers, taking into consideration the surrounding circumstances.

**Language Slanderous per Se — Preju-
dice to Attorney in Profession.**

Slanderous words directly tending to the prejudice of one in his profession are actionable per se, though not applied directly by the speaker to the party's profession; hence a slanderous charge that an attorney who was seeking political preferment, and who had represented and opposed measures pending before the legislature, received a sum of money from the supporters of a measure to procure its passage, and thereafter received a sum of money from the opponents to defeat its passage, and did so, is slanderous per se, tending directly to destroy all confidence in him as an attorney.

[See Ann. Cas. 1912A 376.]

Privilege — Criticism of Candidate.

When a person becomes a candidate for a public office, his qualifications and fitness may be freely and fully discussed, and such discussion and criticism, so long as it is made in good faith without express malice, is privileged, but the publication of false charges of specific acts of culpable dishonesty against an attorney who is a candidate for office which tend directly to injure him in his profession and defame his reputation for integrity is not privileged.

[See note at end of this case.]

**Mitigation of Damages — Bad Repu-
tation of Plaintiff.**

In an action for slander, defendant may in mitigation of damages show that plaintiff's reputation as a man of integrity was bad.

[See 19 Ann. Cas. 986.]

Same.

In an action for slander, where defendant desired to show the bad reputation of plaintiff in mitigation of damages, it must be proven by testimony as to his general reputation, and not by evidence of specific accusations of misconduct.

**Rumors as to Truth of Charge — Ad-
missibility.**

The presumption of malice arising from the publication of a false defamatory charge is not rebutted by proof that the publisher had reason to believe the charge was true; hence evidence of rumors of the truth of the charge is properly rejected.

Ann. Cas. 1917D—44.

**Instructions — Privilege of Political
Criticism.**

In an action for slander, where defendant claims that the statements were privileged comment on plaintiff's qualifications as a candidate for office, an instruction that every man has a right honestly and truthfully to comment about any person, that public interest demands that the qualifications of candidates may be openly discussed, but that the privilege does not protect false statements maliciously made, or untrue accusations uttered for the purpose of character injury, or false charges of dishonesty in the man's profession made with reckless indifference as to its truth and a desire to injure, is sufficiently favorable to defendant.

**Requested Instructions Covered by
Charge.**

In an action for slander, the court refused defendant's request charging that it was for the jury to determine whether the words were spoken concerning plaintiff's profession as an attorney at law, remarking that he had covered that point, and informing the jury that they should construe the slanderous charge according to its ordinary meaning. Defendant further requested charges that the fact that plaintiff was a candidate for office rendered the communication made with reference to such candidacy qualifiedly privileged, and plaintiff could recover only by showing actual malice, and that plaintiff could not recover if defendant spoke the words in good faith. In passing on these requests the court remarked that the jury had heard the testimony and arguments of counsel upon the request, and that it was for them to show under the instructions given how those words were spoken and for what purpose. It is held that, in view of the other instructions and the remarks of the court, the refusal of defendant's request was not error.

**Malice — False Statement to Defeat
Candidate.**

A slanderous charge which injured the professional reputation of a candidate for office may be made with actual malice which implies a desire and intention to injure, although defendant's only desire was to defeat the candidacy.

Exceptions from Superior Court, Kennebec county.

Action by William R. Pattangall, plaintiff, against John A. Mooers, defendant. Judgment for plaintiff. Defendant alleges exceptions. The facts are stated in the opinion.
EXCEPTIONS OVERRULED.

George W. Heselton and Pattangall & Plumstead for plaintiff.

Fred E. Lawrence for defendant.

[413] KING, J.—This is an action for slander for certain oral statements by the defendant, alleged to be false and defamatory, and to have been made maliciously concern-

ing the plaintiff, with intent to injure him in his good name and reputation as an attorney at law, and likely to so injure him. The alleged slanderous statements were made on the 12th day of August, 1913, at Skowhegan, Maine, first to one Fisher, and afterwards on the same day repeated to one Adams. At that time the plaintiff was one of three candidates, nominees of three political parties, for the office of Representative to Congress from the Third Maine Congressional District, the election to which office was to be held about a month later. The defendant and both Fisher and Adams were electors in that District. Mr. Fisher's version of what the defendant said to him concerning the plaintiff is this: "Why, he went on to tell me about the bill that the labor unions was trying to get passed through the Legislature so if they got injured in any corporation or firm, was the way I understood it, that they should have compensation, if they got hurt in any way, and they went to Mr. Pattangall and asked him what he would put the bill [414] through for and he said \$500. And then the corporations goes to Mr. Pattangall and asked him what he would defeat it for and he said \$500. So he gets \$1000 and defeats the bill."

Mr. Adams' version of the defendant's statement to him is substantially the same as that of Fisher, except that he adds that the defendant said, "and that is your Mr. Pattangall." And the defendant testified: "I told Mr. Fisher that, as I understood it, there was a bill, one of the worthiest bills, as I said to him, that was before the last Legislature. And I explained to him somewhat the nature of the bill, and I said to him that as I heard it Mr. Pattangall was engaged upon one side or the other, and that later he took a retainer from the opposite side, whatever it was I didn't know, and received money from both sides, and I told him that was just how I heard it."

His version of what he later said to Mr. Adams is: "I repeated to him, as near as I could tell you now, the exact words, substantially the words that I told Mr. Fisher. Mr. Adams said to me, 'John, you wouldn't say that about Mr. Pattangall if it was not so?' or something to that effect. I said, 'I hope you don't think I am that kind of a man.' I think that is all there was said that I remember."

It appears from the foregoing testimony that there was no material controversy as to that part of the defendant's statement which is claimed to be defamatory of the plaintiff. He admits saying that the plaintiff, having accepted money for his services and influence in securing the passage through the Legislature of the Workmen's Compensation Act, also accepted a retainer from the opponents of the Act. There appears to be some differ-

ence between the testimony of the plaintiff's witnesses and that of the defendant as to whether he made the defamatory statement concerning the plaintiff as a fact of his own knowledge, or as a rumor that he had heard. He claimed the latter. But on cross-examination, Mr. Fisher was asked, "You understood that he told it to you as something he knew personally?" And he answered, "yes sir, he didn't explain anything about anybody to me." Mr. Adams' testimony on that point was to the same effect. And the defendant does not claim that at the time he made the statement complained of he gave the name of his informant of the rumor, if such it was. The plaintiff recovered a verdict of \$279.25, and the case comes up on defendant's exceptions to the exclusion of certain testimony, to the refusal of certain instructions, and to the giving of certain other instructions.

[415] No attempt was made to justify the defendant's statement concerning the plaintiff by proving its truth, and accordingly it must be regarded as false. If it was but the repetition of something he had heard about the plaintiff, he did not give the name of his informant; but the evidence was sufficient to justify the jury in finding that the defendant made the statement as a fact within his own knowledge, and not as a rumor. What was the statement? How was it to be interpreted as applied to the plaintiff? The evidence shows that the plaintiff had been a qualified attorney at law for about twenty years, commanding an extensive practice throughout the State. He had frequently been employed professionally to appear before committees of the Legislature to present and advocate, or to oppose, proposed legislation. He had served as Attorney General for the State, had been a member of the Legislature during four of its sessions, and had been mayor of the City of Waterville for three terms, ending in March, 1914. Defamatory language is to be interpreted as it would naturally be understood by the hearers of it, taking into consideration accompanying explanations and the surrounding circumstances known to the hearers. It cannot be reasonably questioned that Fisher and Adams, to whom the defendant made the slanderous statement complained of, understood from it that the plaintiff had been employed and paid as an attorney for the labor unions to advocate the enactment of the Workmen's Compensation Act, and that he was guilty of most culpable dishonesty towards his employers, and had basely betrayed their trust and confidence in him by accepting a retainer from the opponents of the Act and using his influence to defeat it. If slanderous words, whether written or oral, directly tend to the prejudice or injury of one in his profession, trade or business they are actionable. And when the defama-

tory words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of the business great confidence must necessarily be reposed, they are actionable, although not applied directly by the speaker to the profession or occupation of the plaintiff. 25 Cyc. 328. The slanderous statement complained of directly tended to injure the plaintiff in respect to his profession and occupation. If believed it could have no other effect than to destroy all trust and confidence in him as an attorney. We [416] entertain no doubt, therefore, that the defendant's false statement concerning the plaintiff was actionable per se, independent of the question of privilege.

But the defendant claimed and undertook to maintain at the trial that his statement to Fisher and Adams concerning the plaintiff was within the qualified privilege accorded to voters in discussing the qualifications and fitness of a candidate for an elective public office. Therein is involved the important and fundamental question raised by the exceptions.

It is the law everywhere that when a person becomes a candidate for a public office his qualifications and fitness for that office may be freely and fully discussed, commented on and criticised by any member of the community having an interest in the matter. Such comment and criticism may be harsh, severe and unnecessarily acrimonious, but so long as it is made in good faith, without express malice, it is privileged in law, and therefore not actionable. The law tolerates such comment and criticism of public men and candidates for public office upon the theory that it is for the public good to do so, to the end that the people may learn the truth as to the qualifications and fitness of candidates for office, and become informed of the manner those in office are discharging the duties of the office, thereby being better qualified to intelligently exercise the elective franchise.

But the authorities are not in accord on the question, whether this privilege to make fair comment and criticism of public men and candidates for public office includes the right to make false defamatory statements concerning them.

One view or rule is to the effect that while fair comment and criticism respecting the qualifications and fitness of candidates for office may be privileged, false defamatory statements of fact concerning them are not within the privilege. This limited rule may be more fully expressed as follows: One who becomes a candidate for election to an office in the gift of the people thereby puts in issue

before them his abilities, qualifications and fitness for that office. And any voter or other person having an interest in that election may fully and freely comment on and criticize his talents and qualifications, mentally and physically, for the office he seeks. The conduct and actions of such candidate may be canvassed, discussed and boldly criticised. Even his faults and vices, in so far as they necessarily affect his fitness for the office, may be investigated and commented on. His private [417] character, however, is only put in issue so far as his qualifications and fitness for the office may be affected by it. He does not by becoming a candidate for office surrender his private character to false accusation. The public have an interest to know the truth respecting the qualifications and fitness of a candidate for office. But it would not serve the public good to have falsehoods concerning him disseminated among the people. And, therefore, the law does not justify, under the guise of qualified privilege, a false defamatory statement of specific acts of misconduct concerning a candidate for office. While the publication of the truth respecting him may be justified, the publication of defamatory falsehoods will not be. More than a century ago Parson, C. J., in *Com. v. Clap*, 4 Mass. 163, 169, 3 Am. Dec. 212, said that, "the publication of falsehood and calumny against public officers, or candidates for public office, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be the loss of their liberties." In *Newell on Slander and Libel*, page 568, the author says: "It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. To state matters that are libelous is not comment or criticism." Speaking on this subject, Mr. Cooley says: "A candidate for public office does not surrender his private character to the public, and he has the same remedy for defamation as before; and the publication of false and defamatory statements concerning him, whether relating to his private character or public acts, is not privileged."

This limited rule, which excludes from the doctrine of qualified privilege false defamatory statements concerning candidates for public office, is supported by the great weight of authority. See 25 Cyc. 403. We also call particular attention to a note to *Black v. State Co.* reported in *Ann. Cas. 1914C* page 997, where numerous cases are cited in many jurisdictions supporting the limited rule. The following are but a few of those citations, but they show how exten-

sively this rule is recognized. Post Pub. Co. v. Hallam, 59 Fed. 530, 16 U. S. App. 613, 8 C. C. A. 201; Dauphiny v. Buhne, 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136; Star Pub. Co. v. Donahoe (Del.) 58 Atl. 513; Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676; Rearick v. Wilcox, 81 Ill. 77; Burt v. Advertiser Newspaper Co. 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97; Hubbard v. [418] Allyn, 200 Mass. 167, 86 N. E. 356; Com. v. Pratt, 208 Mass. 553, 95 N. E. 105; Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L.R.A. 72; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L.R.A. 59; Hamilton v. Eno, 81 N. Y. 116; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; Upton v. Hume, 24 Ore. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L.R.A. 493; Tiepke v. Times Pub. Co. 20 R. I. 200, 37 Atl. 1031; Brewer v. Weakley, 2 Overt. (Tenn.) 99, 5 Am. Dec. 656; Nichols v. Daily Reporter Co. 30 Utah 74, 8 Ann. Cas. 841, 83 Pac. 573, 116 Am. St. Rep. 796, 3 L.R.A.(N.S.) 339; Williams Printing Co. v. Saunders, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E 693; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; Ingalls v. Morrissey, 154 Wis. 632, Ann. Cas. 1915D 899, 143 N. W. 681.

The other and more liberal view, which has the sanction of considerable authority, holds that a charge made against a candidate for public office is privileged regardless of the fact that the charge is a false statement of fact, provided the person making it acts in good faith, without malice, believing the charge to be true with reasonable and probable ground for such belief. Authorities supporting this rule will also be found cited in 25 Cyc. 403, and in the note to Black v. State Co. supra.

It is claimed in behalf of the defendant that the more liberal rule should have been applied to his statement concerning the plaintiff complained of in this case. That although the statement was false and defamatory yet if he made it in good faith, without express malice toward the plaintiff, in an honest belief in its truth, to persons interested in the subject matter of the statement, it was privileged. He contends that there are decisions of this court sustaining his position. We do not think so. In Bearce v. Bass, 88 Me. 521, 34 Atl. 311, 51 Am. St. Rep. 446, the comment and criticism complained of referred solely to the character of the plaintiffs' work and materials used in constructing a public building. The court there held the language complained of to be well within the general rule of privilege, being only a fair and reasonable criticism upon the work which entered into the construction of a public building, and constituting no attack upon the character of the

plaintiffs either as individuals or in their business as contractors. It is true that the court there in commenting on the doctrine of privilege said: "In regard to matters of public interest, all that is necessary to render the words privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds. In such cases, the occasion rebuts the inference [419] of malice, which the law would otherwise draw from unauthorized communications, and affords a qualified defense depending upon the absence of malice. If fairly warranted by any such occasion or exigency as we have named, and honestly made, upon reasonable grounds, such communications are protected for the common protection and welfare of society." We do not think that statement of the rule of qualified privilege was intended by the learned Justice who wrote that opinion to be interpreted so as to include, as privileged communications false charges against a candidate for office of crimes, or of specific acts of dishonesty in his business or profession, or false accusations affecting his private character, even where the other elements of privilege are shown. If such is the necessary interpretation of the language there used, then we think it should be modified somewhat. But in that case the only question before the court was whether certain criticism of the work and materials that entered into the construction of a public building was privileged as fair comment. That case is in no sense comparable to the case at bar. There the language complained of was but the opinion of the writer as to the quality of the plaintiffs' work and materials. Here the words spoken constitute an unqualified charge against the plaintiff of specific dishonesty in his profession, and it had a direct tendency also to injure him in his private character.

Of the other decisions of this court to which our attention has been called by defendant we need not here make special comment. It is true that in some of them there are general expressions of much the same import as that above quoted from Bearce v. Bass. We do not here decide that in no instance may the publication of a false statement concerning a candidate for office be justified under the doctrine of qualified privilege, which would otherwise be actionable. We are not now called upon to determine whether the doctrine of qualified privilege may not be a good defense in an action for oral slander, of a candidate for an elective office, if the spoken words, though false and actionable per se, were but the repeti-

tion in good faith of what had been uttered by some other person whose name was given at the time, the other essential elements of privilege being shown. That is not this case. But we are constrained to the conclusion that the law does not justify any one in publishing a false charge of specific acts of culpable dishonesty against a candidate for office which directly tends to injure him in his profession and occupation, [420] or to defame his reputation for honesty and integrity. That conclusion accords with reason and the great weight of judicial precedent. Its application will promote the public welfare by restricting the spread of falsehood and calumny, always too readily believed, and protecting the reputation and character of individuals from being unjustifiably and wantonly assailed. The law not only protects the person and property of the citizen, but vigorously guards as equally sacred his personal reputation and character. And we hold that the defendant's statement concerning the plaintiff, complained of in this action, being a false and specific charge of dishonesty towards those who had employed him, and which charge necessarily tended to injure his reputation for integrity in his profession, was not within the doctrine of qualified privilege. It was an unauthorized defamatory statement, and the law implies that it was maliciously made and therefore actionable.

The conclusion we have reached renders it unnecessary perhaps to discuss in detail the specific exceptions, for they all chiefly rest upon the defendant's proposition that the alleged slanderous statement was privileged.

1. On cross examination the plaintiff was asked, if during the primary campaign of 1913 he had occasion to remonstrate against a certain editorial in the Independent Reporter at Skowhegan, and he replied that he did for the reason that he conceived it to be an unjust attack upon him. He was then asked the nature of that editorial and was not permitted to answer.

The object of the inquiry, as stated by counsel for defendant, was to show that the editorial was a reflection upon the personal reputation of the plaintiff and to rebut malice upon the part of defendant. It was competent for the defendant to introduce evidence, in mitigation of damages, that the plaintiff's general reputation as a man of moral worth was bad, and also that his general reputation was bad with respect to that feature of character covered by the defamation in question. *Sickra v. Small*, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344. But the rule is too well established to admit of doubt that the general reputation of a person is to be proved by the oaths of wit-

nesses who know what that general reputation is, and not by evidence of specific accusations of misconduct against the person, or of general rumors of ill-repute concerning him. *Powers v. Cary*, 64 Me. 9, 16; *Peterson v. Morgan*, 116 [421] Mass. 350; *Wigmore on Ev. V. 1*, Sec. 74. Whatever may have been the nature of the editorial it was clearly incompetent as evidence on the question of the plaintiff's general reputation. Nor was it admissible to rebut malice.

2. There was no error in the rulings, which are made the subject of exceptions III, IV, and V, excluding inquiries as to specific rumors or reports respecting the plaintiff similar to the slanderous statements complained of. The object of the inquiries was to rebut malice, but the presumption of malice arising from the publication of a false defamatory charge is not rebutted by proof that the publisher had reason to believe the charge was true. Accordingly evidence of similar rumors or reports respecting the plaintiff were inadmissible. It was so expressly held in *Powers v. Cary*, 64 Me. 9, 16.

3. That portion of the charge, which is made the subject of exception VI, was in substance and effect an instruction to the jury that if they found that the defendant's statement concerning the plaintiff was properly understood by those to whom it was made as applying to the plaintiff in his profession and business, then, if it was false, it was actionable per se, because the law implies that there was malice on the part of the defendant in making it. And that is the equivalent of an instruction that it was not a privileged communication, the same conclusion that we have hereinbefore expressed.

4. Exception was taken to the following instruction: "Every man has a right to honestly and truthfully comment, rehearse and recite, privately and publicly, the truth about any man or person. Public interest demands that public affairs should be freely commented upon, and that the qualifications of candidates for office should be fairly, openly and honestly discussed, immunity should be and is granted to comments and discussions of this nature. But this immunity does not extend, either in reason or by law, to protect false statements maliciously made, untruthful accusations wilfully uttered, for the purpose of character injury, or false charges of dishonesty in a man's profession or business, or made with a total and reckless indifference as to its truth or falsity, with a desire and a design to injure him."

The defendant has no reasonable ground for his exception to that instruction. It was

as favorable to the defense, we think, as the law would allow.

[422] 5. The defendant complains that three of his requested instructions were not given as requested. We will here consider all his requests and the ruling thereon in the order as presented and disposed of at the trial.

No. 1. "It is for the jury to say whether the words spoken by the defendant were spoken of and concerning his profession as an attorney at law." As to this the court said: "I think I have covered that point. You are to construe the words spoken at that time as those two witnesses had a right to construe them, taking their every-day, common meaning, and what was the meaning conveyed to their minds and what meaning do the words convey to your mind." This of course, was not excepted to, but we refer to it here because it is important to be considered in connection with the rulings on the other requests. There can be no doubt that the jury understood from this request of the defendant, and the instruction given thereunder, that it was an important question in the case for them to decide, whether the words spoken by the defendant were spoken of and concerning the plaintiff in his profession as an attorney at law.

No. 2. "It is not sufficient to establish the foregoing contention that the effect of the words spoken would be to injure a professional reputation; it must also appear that the words were spoken with direct reference to the profession." This request was properly refused. Defamatory words may be such and so spoken that they naturally convey to the hearers a meaning applicable to the profession of the person of whom they are spoken, although no such reference there-to is directly made by the speaker. And we have already pointed out that when defamatory words directly tend to injure the profession or occupation of him of whom they are spoken they are actionable although not directly applied by the speaker to the profession or occupation of the plaintiff.

No. 3. "The fact that the plaintiff was a candidate for Congress renders the communication, if made with reference to such candidacy, qualifiedly privileged; and the plaintiff can only recover by showing actual malice." No. 4. "The plaintiff can not recover if the defendant spoke the words in question in good faith, with reference to the plaintiff's said candidacy, in an honest belief of their truth based upon reasonable and probable cause." We have quoted these two requests together because they convey substantially the same idea. As to the last one quoted the court said: "And you have heard the testimony, [423] and the arguments of counsel upon that request. It is for you to say,

gentlemen, under the instructions I have given you, how those words and for what purpose they were spoken." This statement of the court again emphasized to the jury that the vital question in the case was, whether the words as spoken naturally conveyed to the hearers thereof the meaning that they were spoken concerning the plaintiff in respect to his profession, and that the determination of that question was solely for the jury to decide. And we think the jury must have clearly understood that if they did not find that the words were spoken of the plaintiff in respect to his professional conduct, then he could not recover. Accordingly we are of opinion that there was no reversible error in the refusal of those requests in view of the other instructions already given and the added qualification and explanation made in connection with the refusal.

No. 5. "Actual malice implies a desire and intention to injure." This was given. "And a mere desire to defeat a man's candidacy for public office is not a desire and intention to injure him within the rule stated." As to this the court said: "I cannot give you the last part of that instruction as requested. As I said before, if you find that there was actual malice, and that those words were spoken of him and were an injury to him in his business, then the plaintiff may recover." Earlier in the charge the court instructed the jury as to actual malice, and pointed out to them that it was evidenced by the acts or words of the party chargeable with malice, and he particularly called their attention to the respective contentions of the parties as to the evidence in the case bearing on the issue of actual malice of the defendant in speaking the slanderous words. We think there was no error in the ruling as to this requested instruction.

6. That instruction which is made the subject of exception XII was entirely in harmony with the law applicable to this case as we have hereinabove stated it.

Finding no reversible error in any of the rulings complained of, the entry will be, Exceptions overruled.

NOTE.

The reported case holds that while the character and qualifications of a candidate for office may be fully discussed and he may be subjected to criticism which is unduly harsh and acrimonious without imposing any legal liability on the critic, no qualified privilege attaches to a false assertion of a specific fact with respect to a candidate. The subject of political criticism as libel or slander is discussed in the note to *Black v. State Co.* Ann. Cas. 1914C 989.

TWENTIETH STREET BANK

v.

JACOBS.

West Virginia Supreme Court of Appeals—
June 16, 1914.

74 W. Va. 525; 82 S. E. 320.

Bills and Notes — Validity — Gaming Consideration — Negotiable Instruments Law.

Chapter 81, Acts of 1907 (chapter 98a [secs. 4172-4368], of the Code), known as the Negotiable Instruments Law, does not by implication or otherwise repeal, limit, or qualify, in any degree or respect, section 1 of chapter 97 (sec. 4168) of the Code, declaring void what are commonly known as gambling contracts.

Rights of Bona Fide Holder — Note for Illegal Consideration.

Negotiable paper, the consideration whereof is money lost or bet in gaming, is void in the hands of the holder, even though he took it for value and without notice of the character of the consideration.

[See note at end of this case.]

Statutes — Construction — Presumption against Innovation.

In determining the meaning of a statute, it will be presumed, in the absence of words therein specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, alter, violate, repeal, or limit another general statute or statutory system, the entire subject-matter of which is not directly nor necessarily involved in the act.

Presumption of Legislative Knowledge.

The legislature is presumed to know the rules and principles of construction adopted by the courts.

Bills and Notes — Rights of Bona Fide Holder — Note Declared Void by Statute.

While a merely illegal consideration in a negotiable instrument does not invalidate it in the hands of a holder in due course, a paper negotiable in form, but declared void by a statute, is not enforceable at the instance of anybody.

[See note at end of this case.]

Error to Circuit Court, Cabell county.

Action by Twentieth Street Bank, plaintiff, against J. B. Jacoba, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. **REVERSED.**

C. S. Welch and D. R. Daugherty for plaintiff in error.

Marcum & Shepherd for defendant in error.

[526] POFFENBARGER, J.—Assuming sec. 1 of ch. 97 of the Code, declaring void every contract the consideration of which is money, property or other thing won or bet at any game, sport, pastime, or wager, or money lent or advanced at the time of any gaming, betting or wagering, to be used therein, to have been partially repealed by implication, by the passage of the negotiable instruments law, ch. 81, Acts, 1907, ch. 98A of the Code, the Circuit Court of Cabell County, in an action for the recovery of the amount of two checks, on an agreed statement of facts, admitting the consideration thereof to have been money lost in gambling, rendered a judgment for the amount of the checks against the drawer and in favor of the assignee thereof, who had taken them without notice of the character of the consideration.

The provision of the negotiable instruments law to which such effect is accorded by the judgment is sec. 57, saying: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all the parties liable thereon." In connection therewith, sec. 55 relating to defectiveness of the title of a person negotiating paper, sec. 196, making the law merchant govern in [527] all cases not provided for by the act, and sec. 197, repealing sec 9 of chap. 99 of the Code and all acts and parts of acts inconsistent with the new law to that extent, are relied upon. By another section a holder in due course is defined.

Sec. 55 makes illegality of consideration a mere defect and sec. 57 says a holder in due course takes the instrument free from any defect of title of prior parties. A holder in due course is one who has taken an instrument complete and regular on its face before it was overdue, in good faith and for value without notice of its previous dishonor, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it.

The effect claimed for these general provisions cannot be accorded them consistently with the rules and principles of construction of statutes. The legislature was dealing, at the time of the passage of the act and in the passage thereof, with the matter of negotiability of paper which the law allowed men to put on the market and the courts to enforce. It was not then considering the subject of gaming to which it had previously given its careful attention, nor acting upon it. The act does not mention it, nor did any provision thereof suggest it to the legislative mind. Any presumption that any member of the legislature, while considering

or acting upon the bill, had the slightest suggestion or intimation from any of its terms, that it would, in any sense or to any degree, legalize gambling debts, would be a most violent one. Nobody in reading the act, without having had the subject of naming debts, fixed in his mind, at the time, by some means other than its terms, would likely discover the alleged opening for the use of paper expressly declared by law to be absolutely void in the hands of any and all persons, and appreciate at the same time the far-reaching effect of it. The partial legalization contended for would virtually destroy the previous statute, for every paper negotiable in form, taken for money lost or bet in gambling, would be made valid by the mere endorsement and delivery thereof to some person ignorant of the character of the consideration. Of course, the legislature never saw nor intended any such result.

But, if the suggestion of such a possibility did enter the legislative mind any time, there is a presumption in law that [528] the law making body relied upon a well settled rule of construction, adopted by the courts, for protection against it. That rule limits the operation of a statute to its subject matter and general purpose, in the absence of a specific expression of intent and purpose to extend its operation to other subjects. *Reeves v. Ross*, 62 W. Va. 7, 57 S. E. 284; *Coal, etc. R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *Brown v. Gates*, 15 W. Va. 131; *Orange, etc. R. Co. v. Alexandria*, 17 Grat. (Va.) 176; *Grubbs v. Sult*, 32 Grat. (Va.) 203, 34 Am. Rep. 765; *Cope v. Doherty*, 2 DeG. & J. (Eng.) 614; *Hawkins v. Gathercole*, 6 DeG. M. & G. (Eng.) 1. Upon an exhaustive review of the subject, this court has declared the following rule: "In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, disregard, after or violate, (1) the common law; (2) a general statute or system of statutory provisions, the entire subject matter of which is not directly or necessarily involved in the act; (3) a right or exception based upon settled public policy; (4) the constitution of the state; nor (5) the constitution of the United States." *Coal, etc. R. Co. v. Conley*, cited.

This rule old as English jurisprudence and hoary with age is deemed to have been within the knowledge of the legislature, while acting upon the bill converted into law by the passage of ch. 81 of the Acts of 1907. *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; *Browne v. Turner*, 174 Mass. 150, 54 N. E. 510, 36 Cyc. 1135. "The legislature is presumed to know the principles of statutory construction." *Lewis' Suth. Stat. Con. sec. 499*.

The decisions of courts of other states, in which this rule has been overlooked or ignored in the construction of the statute, *Schlesinger v. Gilhooly*, 189 N. Y. 1, 12 Ann. Cas. 1138, 81 N. E. 619; *Schlesinger v. Lehmaier*, 191 N. Y. 69, 83 N. E. 657, 123 Am. St. Rep. 591, 16 L.R.A. (N.S.) 626; *National Bank of Commerce v. Pick*, 13 N. D. 74, 99 N. W. 63; *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629; *Arnd v. Sjoblom*, 131 Wis. 642, 11 Ann. Cas. 1179, 111 N. W. 666, 10 L.R.A. (N.S.) 842, and *Wirt v. Stubblefield*, 17 App. Cas. (D. C.) 283, do not commend themselves to us and we decline to follow them. The two Kentucky cases relied upon by the plaintiff in error. *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353, and *Lawson v. Fulton First Nat. Bank (Ky.)* 102 S. W. 324, embody the correct interpretation of the statute, in our opinion.

Uniformity of construction of the new law is desirable, but [529] it can be attained only by adherence to fundamental and cardinal rules of interpretation. Courts cannot be expected to lay them out of view for the sake of mere conformity with decisions that clearly violate them.

The judgment complained of will be reversed and judgment entered here for the defendant.

Reversed and rendered.

NOTE.

Validity in Hands of Bona Fide Holder of Negotiable Contract Void by Statute between Original Parties.

Introductory, 696.

General Rule, 696.

Application of Rule, 698.

Introductory.

The purpose of this note is to review the recent cases which have discussed the validity in the hands of a holder in due course of a negotiable contract, which by virtue of a statute is unenforceable between the original parties thereto. The earlier cases on this point are collated in the notes to *Union Trust Co. v. Preston Nat. Bank*, 4 Ann. Cas. 347; *Arnd v. Sjoblom*, 11 Ann. Cas. 1179; and *Gray v. Boyle*, 133 Am. St. Rep. 1042.

General Rule.

As a general rule a negotiable contract will be enforced at the suit of a bona fide holder, notwithstanding the instrument is unenforceable between the original parties because it is in violation of a statute, unless the statute expressly declares that a con-

tract in violation thereof shall be void and of no effect.

England.—*Edwards v. Dick*, 4 B. & Ald. 212, 6 E. C. L. 455, 106 Eng. Rep. (Reprint) 915.

Canada.—*Canadian Bank of Commerce v. Gurley*, 30 U. C. C. P. 583; *Houliston v. Parsons*, 9 U. C. Q. B. 681; *Crombie v. Overholtzer*, 11 U. C. Q. B. 55; *Evans v. Morley*, 21 U. C. Q. B. 547; *Canadian Bank of Commerce v. Rogers*, 23 Ont. L. Rep. 109, 18 Ont. W. Rep. 401, 2 Ont. W. N. 627, 769.

Alabama.—*Bluthenthal v. Columbia*, 175 Ala. 398, 57 So. 814; *Moseley v. Selma Nat. Bank*, 3 Ala. App. 614, 57 So. 91.

Florida.—*Commercial Nat. Bank v. Jordan*, 71 Fla. 566, 71 So. 760.

Indiana.—*State Bank v. Lawrence*, 177 Ind. 515, 96 N. E. 947, 42 L.R.A.(N.S.) 326; *Wilson v. National Fowler Bank*, 47 Ind. App. 689, 95 N. E. 269.

Michigan.—*Pontiac Sav. Bank v. Reinforced Concrete Pipe Co.* 178 Mich. 201, 144 N. W. 486.

Mississippi.—*Compare Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231 (note for rent of house leased for purpose of prostitution).

Missouri.—*Farmers' Sav. Bank v. Reed*, 192 Mo. App. 344, 180 S. W. 1002.

Nebraska.—*Storz Brewing Co. v. Skirving*, 94 Neb. 215, 142 N. W. 669.

New Jersey.—*Clark v. Barthold*, 87 N. J. L. 255, 93 Atl. 699.

Washington.—*Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042. And in *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611.

Wisconsin.—*Samson v. Ward*, 147 Wis. 48, 132 N. W. 629. And see the cases cited throughout this note.

Thus in *Crombie v. Overholtzer*, 11 U. C. Q. B. 55, the court said: "We take it to be clearly settled that when a statute does not provide that all securities shall be void which shall be made in furtherance of such dealing as the statute prohibits, but merely prohibits the act, or even goes further and imposes a penalty, such a statute has not the effect of making void, in the hands of an innocent holder for value a negotiable instrument, which was made in furtherance of such a transaction."

The uniform negotiable instruments act provides that a bona fide holder of negotiable paper holds it "free from defenses available to prior parties among themselves." That provision is apparently deemed to be declaratory of the common law and not to affect the rule that the violation of a statute may be asserted against a bona fide holder when and only when the statute expressly declares the instrument to be void. Thus in several recent cases wherein the statute under consideration did not so declare, the

Negotiable Instruments Law has been referred to as protecting a bona fide holder. *Farmers Sav. Bank v. Reed*, 192 Mo. App. 344, 180 S. W. 1002 (note given on assignment of liquor license); *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042 (note for rebated insurance premium); *Samson v. Ward*, 147 Wis. 48, 132 N. W. 629 (note failing to show that it was given for purchase price of stallion). On the other hand it is held in the reported case that where a statute expressly declares a note given in violation thereof to be void the Negotiable Instruments Law does not protect an innocent holder. So in *Perry Sav. Bank v. Fitzgerald*, 167 Ia. 446, 149 N. W. 497, it was said: "It was the rule in this state prior to the passage of the negotiable instruments act, as shown by the cases already cited, that usury is in the nature of a forfeiture and may be urged against a contract, into whosever hands it may pass. In other words, usury was in the nature of a defense which was not 'available to prior parties among themselves' alone, but was available as between the maker of the instrument and of the world. A fair construction of this provision is that a holder in due course was protected against such defenses as were available between prior parties, but took the instrument subject to any defenses that the parties thereto might, under the law as then in force, urge against the instrument in the hands of third parties."

In *Georgia* a statute (Civil Code, § 4286) provides that a bona fide holder of a negotiable instrument "shall be protected from any defenses set up by the maker, acceptor, or indorser, except the following: 1. Non est factum. 2. Gambling, or immoral and illegal consideration. 3. Fraud in its procurement." Under that act it has been held that a bona fide purchaser may enforce a note though it does not express on its face the fact that it was given for a patent right, *Hunt v. Davenport*, 138 Ga. 622, 75 S. E. 644; or for corporate stock, *Heard v. Wilkes National Bank*, 143 Ga. 48, 84 S. E. 129. On the other hand it may be shown as against a bona fide holder that the note was given for the purchase of political influence to procure the removal of a county seat, *Exchange Nat. Bank v. Henderson*, 139 Ga. 260, 77 S. E. 36; or for the purchase price of fertilizer which was not tagged as required by law, *International Agricultural Corp. v. Spencer*, 17 Ga. App. 649, 87 S. E. 1101.

In *Texas* it seems that a negotiable instrument which evidences a transaction violative of a statute is unenforceable by a bona fide purchaser, not only when the statute expressly declares the instrument to be void; *Jones v. Abernathy*, 174 S. W. 682; but when the statute violated is designed for the

protection of the public from fraud, such as the act forbidding the issuance of corporate stock on credit, *Prudential L. Ins. Co. v. Smyer*, 183 S. W. 825; *Republic Trust Co. v. Taylor*, 184 S. W. 772. But with respect to an instrument belonging to neither of the foregoing classes a bona fide holder is protected. *Carrollton Press Brick Co. v. Davis*, 155 S. W. 1046 (note by foreign corporation not authorized to do business in state).

Application of Rule.

In *Moseley v. Selma Nat. Bank*, 3 Ala. App. 614, 57 So. 91, it was held that while a note executed and delivered on Sunday is void between the parties, yet, if such a note is falsely dated as of another day, and comes to the hands of one who takes it for value, before maturity, without notice, the maker is estopped, in an action on the instrument by the innocent holder, from setting up that it is not truly dated, and is a Sunday contract. The court said: "To hold otherwise would be to invite fraudulent collusion between makers and payee of negotiable instruments, who at their will could give a false date to a negotiable note and invite its use in the commercial world, and then defeat its enforcement in the hands of an innocent purchaser for value, before maturity, by pleading their own perfidy." So in *Clark v. Barthold*, 87 N. J. L. 255, 93 Atl. 699, the court said: "It was insisted that the notes were made upon Sunday, and hence were invalid in the hands of an innocent holder for value. The law is to the contrary, and the general rule, as evidenced by the trend of authority, is that the fact that negotiable paper was executed on Sunday is not a defense against a bona fide holder for value without notice, where there is nothing on the face of the paper to indicate that fact."

In *Storz Brewing Co. v. Skirving*, 94 Neb. 215, 142 N. W. 669, it was held that a promissory note given to settle a gambling loss was not void in the hands of an innocent purchaser. The court said: "That such note would be voidable in the hands of the original payee may be conceded, but, the note being negotiable in character and having been assigned for value before maturity to an innocent purchaser, the rule cannot be extended to such a case." And in *Wilson v. National Fowler Bank*, 47 Ind. App. 689, 95 N. E. 269, it was held that since the statute did not make a note given in settlement of a wager or to cover losses arising out of a bucket shop speculation void in the hands of an innocent purchaser, such a holder might enforce its payment against the maker.

In *Bluthenthal v. Columbia*, 175 Ala. 398, 57 So. 814, the appellants sued the appellee, a municipal corporation, on a note executed

to them by the municipality. The complaint alleged that the appellants attempted to sell to the municipality, which was carrying on a dispensary under a general law, a lot of spirituous, vinous and malt liquors on credit in express violation of the dispensary law and that the consideration of the note sued on was the liquor thus sold. The court affirming a judgment for the municipality said: "It is true, as contended by appellant, that a purchaser of a negotiable paper in due course of business, before maturity and without notice of defenses that existed between the original parties, or that had subsequently arisen, is a bona fide holder for value, and as such takes the instrument free from defenses which were available between such original parties. . . . There are, however, a few exceptions to this rule, one of which is where a statute creates the prohibition which makes the note illegal, and thus makes it absolutely void in the hands of every holder, whether he has had such notice or not. . . . And as often repeated by this court, courts will not lend their aid to carry into effect contracts entered into by parties with a view of accomplishing anything which is prohibited by law; but it is equally well settled that if the consideration of a negotiable paper is against law, yet it cannot be avoided on that account in the hands of a bona fide holder who is not a party nor privy to the illegality of the consideration."

In *Commercial Nat. Bank v. Jordan*, 71 Fla. 568, 71 So. 760, the statute under consideration provided that a contract made by a foreign corporation which had not complied with the statutory requirements for doing business in the state should be "void in its behalf and on behalf of its assigns." Holding that a note given by such a corporation was valid in the hands of a bona fide purchaser the court said: "If he may escape upon the defense set up, it must be because the statute expressly or by necessary implication declares that a negotiable promissory note given under such circumstances shall be void in the hands of a bona fide holder without notice of the transaction of which it formed a part. Does the use of the word 'assigns' in the following connection: 'shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them,' show by necessary implication such to be the legislative purpose? We think not. The word 'assigns' when used to designate those who have acquired ownership of a negotiable instrument from the payee or prior indorser, is not synonymous with the word 'indorsees.' . . . The word 'assigns' therefore does not mean 'indorsees' in the connection used in the statute, nor is there any indication in the statute that the word was intended to include indorsees. To give

the word assigns that meaning would be to read into the statute a purpose which from the ordinary meaning of the words used the legislature did not have." See also *Carrollton Press Brick Co. v. Davis* (Tex.) 155 S. W. 1046. And see *Pontiac Sav Bank v. Reinforced Concrete Pipe Co.* 178 Mich. 261, 144 N. W. 486, as to a note given by a partnership which had failed to file a proper certificate of its membership.

In *State Bank v. Lawrence*, 177 Ind. 515, 96 N. E. 947, a note given for services performed by an unlicensed practitioner of medicine was held to be valid in the hands of a bona fide holder.

In a number of recent cases statutes declaring in express terms that contracts in violation thereof shall be void have been held to invalidate a negotiable contract in the hands of a bona fide purchaser.

England.—*Clubb v. Hutson*, 18 C. B. N. S. 414, 114 E. C. L. 414, 144 Eng. Rep. (Reprint, 506 (forbearance to prosecute); *Lowe v. Waller*, 2 Doug. 736, 99 Eng. Rep. (Reprint) 470 (usurious consideration).

Canada.—In *re Summerfeldt*, 12 Ont. 48 (gambling debt).

Alabama.—*Birmingham Trust, etc. Co. v. Curry*, 160 Ala. 370, 49 So. 319, 135 Am. St. Rep. 102 (gambling in futures). See also *Citizens' Nat. Bank v. Bucheit*, 14 Ala. App. 511, 71 So. 82, 72 So. 1019 (contract by unauthorized foreign corporation).

Arkansas.—*Ensign v. Coffelt*, 102 Ark. 568, 145 S. W. 231 (sale of patented machine).

Illinois.—*Sherfy v. W. A. Lachenmyer*, 190 Ill. App. 443 (gambling debt).

Iowa.—*Perry Sav. Bank v. Fitzgerald*, 167 Ia. 446, 149 N. W. 497 (usurious contract).

Kentucky.—*Holzbog v. Bakrow*, 156 Ky. 161, 160 S. W. 792, 50 L.R.A.(N.S.) 1023 (gambling debt).

Mississippi.—*Gray v. Robinson*, 95 Miss. 1, 48 So. 226 (gambling in futures).

Tennessee.—See *Cohn v. Lunn*, 133 Tenn. 547, 182 S. W. 584 (sale of patent right).

West Virginia.—See the reported case.

WALLACE

v.

COX ET AL.

Nebraska Supreme Court—December 19, 1916.

100 Neb. 601; 160 N. W. 992.

Replevin — Judgment — Value of Property.

Section 7833, Rev. St. 1913, provides that, when the finding is for the defendant in an action of replevin, the judgment shall be "for a return of the property or the value thereof in case a return cannot be had." The "value thereof" is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of the trial.

Recovery on Bond — Value of Property — Effect of Original Judgment.

If, upon appeal to this court, such judgment is affirmed, and the property is returned to the defendant pursuant to such judgment, in an action upon the appeal bond the plaintiff cannot recover damages occurring prior to the original judgment.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Webster county: DUNGAN, Judge.

Action by William E. Wallace, plaintiff, against A. W. Cox et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

L. H. Blackledge for appellant.

Bernard McNeny for appellees.

[601] SEDGWICK, J.—This action is upon a replevin bond. It was once before in this court, and in the first opinion the judgment of the district court was affirmed. 92 Neb. 354. Afterwards, upon rehearing, it was reversed and the cause remanded, 94 Neb. 194. There has since been a trial in the district court and the case is again appealed.

In this last trial the court instructed the jury to find for the plaintiff the amount that the jury in the first trial found as damages, together with the costs of the first trial, and then instructed the jury that the only question for them to determine was whether the property in question was damaged after the trial in the original replevin suit, and the amount of such damage. The plaintiff asked the court to instruct the jury that they should find all damages which "occurred while the property was in the possession of the Clark Implement [602] Company or its

agents from the time it was taken in the replevin suit . . . to the time of the offered return" of the property. The court in several different instructions made it plain to the jury that they should not allow any damages to the property in this suit upon the bond, which damages occurred before the trial of the replevin suit. This was upon the theory that the defendants in replevin must upon the trial recover any damages that have occurred to the property up to that time, and this is the principal, if not the only substantial, question that is presented in this record. The statute provides that, when the finding is for the defendant, the judgment shall be "for a return of the property or the value thereof in case a return cannot be had." Rev. St. 1913, sec. 7833. The "value thereof" is instead of a return of the property when a return cannot be had, and should be the equivalent of the property itself as it was at the time of the trial, that is, should be its value at the time of the trial, and, if it has been decreased in value by the action of the plaintiff in replevying it, such loss of value would be damages which should be included in the judgment in favor of the defendant in replevin. The New York court has so decided under a similar statute; that is, the New York court construes the statute to mean that the value thereof which is to be recovered in case the property cannot be returned is the value at the time the property should be returned, that is, at the time the judgment is entered. The contention of the plaintiff in this case now is that he ought to be allowed to prove that as a matter of fact the jury did not take into consideration any damages to the property in their verdict in the original replevin suit.

The trial court on this last trial has followed the decision of this court upon the former appeal, and the judgment is therefore

Affirmed.

Letton, J., dissents.

[603] **HAMER, J., (dissenting).**—I am unable to agree with the majority opinion. William F. Wallace, the defendant in the replevin suit and the plaintiff in this case, testified that there was taken from him a threshing machine. It was a 10-horse Russell engine, separator, blower, feeder, driving belt, water tank—a threshing machine outfit. It was returned to his shed, and he testified that he refused to receive it; also that the property was in bad condition; that the cylinder was pitted where it had been run without oil and burned; that the driving wheels were broken; that the canopy top was torn; that the cylinder guides were all cut; that the axle on the water tank was

broken; that the grain pan was warped, and where there was a strip of tin to separate the grain it had come loose, and nails had been driven in the separator along the side; that the driving belt was worn out and the other belts were badly worn; that the engine was not getting enough oil; that the man who was running it said that he tried to pump oil into it, but the cylinders were so worn that it would not take any effect; that they started about 9 or 10 o'clock in the morning to go 2½ miles, and it took until after 2 o'clock in the afternoon to go that distance; that it took a big tank of water and eight tanks besides to run the machine to town; that the property was not worth over \$700; also that he offered to prove that he had had no access to the machine and engine, and that there was no opportunity to examine it from the time it was taken from him until it was offered back; that he did not know its actual condition till that time; that he offered to prove by a witness on the stand that the difference in the value of the outfit in controversy in the replevin suit from the time it was taken from him until it was offered back to him was \$1,200; that between the time when it was taken from him under the replevin proceedings and the time when it was offered back it was kept in the possession of the Clark Implement Company [604] and its agent, Eli H. Cox, and away from him, and without his having any access or means of access to it, or any knowledge or means of knowledge of its condition, and that the actual condition at the time it was tendered back was not known to him, and that the condition at the time of the trial of the replevin suit could not be ascertained by him; that the said Clark Implement Company and its agent, Cox, concealed the fact of the damage and injuries from him, so that he did not know the same. This is the third time this case has been before this court.

The action is one brought upon a replevin bond by the successful defendant in a replevin suit. The machine, when returned, was in so badly a damaged condition as to give the defendant in the case the option of rejecting it and suing for its value on the bond. Upon the trial of the replevin suit the jury found that the defendant (plaintiff herein) was the owner and entitled to the possession of the property, and that, at the time the property was taken under the writ, its value was \$2,000, and that defendant had sustained damages by the wrongful taking and using of said property in the sum of \$404.50, and costs \$121.60. Upon the trial of the action on the replevin bond, there was a verdict and judgment for the plaintiff in that case for \$2,886.33. The judgment was first affirmed

(92 Neb. 354) upon condition that plaintiff demit from the judgment the sum of \$404.50. The badly damaged condition of the property controlled the views of the majority. It was said: "Our statute does not provide that the property shall be returned in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held. Some of the authorities containing these views we here cite, but without quoting from any." The citations are: "Eickhoff v. Eikenbary, 52 Neb. 332, 72 N. W. 308; Berry v. Hoeffner, 56 Me. 170; Parker v. Simonds, 8 Metc. (Mass.) 205; Capital Lumbering Co. v. Learned, 36 Ore. 544, 59 Pac. 454, 78 Am. St. Rep. 792; Childs [605] v. Wilkinson, 15 Tex. Civ. App. 687, 40 S. W. 749; Fair v. Citizens' State Bank, 69 Kan. 353, 2 Ann. Cas. 960, 76 Pac. 347, 105 Am. St. Rep. 168; Douglass v. Douglass, 21 Wall. 98, 22 U. S. (L. ed.) 479; Pittsburgh Nat. Bank of Commerce v. Hall, 107 Pa. St. 583; 34 Cyc. 1551, 1552; Cobbey, Replevin (2d ed.) sec. 1182; Wells, Replevin (2d ed.) sec. 422; Shinn, Replevin, sec. 679"—which we have examined.

It was then said that the judgment of the district court would be reversed and the cause remanded, unless the plaintiff within 60 days from the rendition of the order remitted from the judgment \$404.50 as of the date of the judgment: "If such remittitur is filed, the judgment of the district court for the sum of \$2,121.60, with interest at 7 per cent on \$2,000 from the 19th day of July, 1909, will be affirmed, but at the costs of the appellee."

Judge Sedgwick dissented from the above opinion, and he claimed in his dissent that the plaintiff was not justified in refusing to accept the property when it was returned. He claimed that the petition and the evidence failed to make a case for the plaintiff, because they did not allege or prove that there was any other or different damage than that which the jury allowed in their verdict. He stated that no reason was given for refusing a return of the property: "The evidence and the rulings of the trial court show plainly that the court tried the case upon the incorrect theory that this plaintiff would be justified in refusing to receive a return of the property if he could show that the property was not in the same condition when it was returned as it was when it was replevied, without regard to the fact that he had been allowed \$404.50 because of the change in the condition of the property." Judge Sedgwick's contention was: "If the property replevied is delivered to the plaintiff and the plaintiff has damaged the property in any way while so in his possession, there seems to be no doubt that the defend-

ant may upon the trial of the replevin action recover such damages." Judge Sedgwick's view is clearly apparent [606] when he says: "If he (plaintiff) fails to return the property at once, and retains it, and the property is damaged in his possession while he retains it after the judgment in replevin, a different question is presented, which is not involved in this case." He was then of the opinion that the judgment of the district court should be reversed. The majority opinion affirmed it.

The case was heard on rehearing before this court, and Judge Rose delivered the majority opinion. 94 Neb. 194. It was said in the third paragraph of the syllabus: "Deterioration in the value of replevied property, while it is unlawfully detained, does not alone justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin, damages to the property after the rendition of such a judgment being recoverable in an action on the replevin bond."

If I understand this aright, it is contended that because the property may be returned it must be received. The condition apparently is that in any event the property must be received, and then if it is not in the same condition that it was when taken there must be another law suit, and this last case must be brought upon the replevin bond. In this case the property in controversy was the threshing machine and a traction engine. In the first opinion Judge Reese calls attention to the damaged condition of the machine. It will be readily understood that an old, worn-out threshing machine would be of very little, if any, value, and a badly damaged traction engine would only be junk. The contention apparently is that the strict letter of the statute must be followed, and that, in any event, when the machine is returned, however badly injured it may be, the party from whom it was taken is bound to accept it. That does not seem to me to be good law or good business.

While the judgment of the district court was affirmed in the opinion delivered by Judge Reese, and it seems to have been held in that case that the damaged condition [607] of the threshing machine and engine was a good reason why they should not be received when tendered by the plaintiff in that case to the defendant therein, yet by the time the same case was reached on rehearing it was held, Judge Rose delivering the opinion, that the damaged condition of the threshing machine and engine furnished no sort of good reason for not receiving them, and that the defendant in that case was bound to receive the same old threshing machine and engine when tendered, no differ-

ence how much they had been injured since they were taken away from the defendant, and regardless of the circumstances under which they might have been kept out of sight of the defendant, and regardless of the circumstances surrounding the transaction and the trial, and without reference to the defendant knowing their condition, and that the statute contemplated nothing else except that the battered old threshing machine, though only fit for kindling wood, and the burned-out old engine, though only fit for the junk heap as old iron, must be received when offered to the defendant, and at any loss to him. In other words, this theory permits the plaintiff to take away from the defendant his property, to keep and use it up to the end of a long lawsuit, and then, when the plaintiff has lost the case, he may return the property which he has taken away and injured and rendered worthless, and he then is bound to receive it, whether or no, and is without remedy, except by bringing another lawsuit on the replevin bond, which may be attended by all the uncertainties and loss of time and money incident to any other lawsuit.

Section 7833, Rev. St. 1913, refers to sections 7831 and 7832, and says that the judgment in replevin "shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit." Of course, where the property is very much deteriorated in condition, or [608] shrunken in value, this section, if it is to be strictly construed, cannot give relief. It should be considered in conjunction with the two sections to which it refers. In section 7831 it is provided that, if the property has been delivered to the plaintiff and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action, the court on the application of the defendant shall impanel a jury "to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant."

Section 7832 provides: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and

if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

It will be noticed that each judgment referred to in the sections quoted is a judgment in a replevin suit. Neither of these sections seems to have the replevin bond in mind; yet the law provides for the replevin bond, and these sections are not complete, unless the provision of the Code with reference to the replevin bonds is also to be kept in mind. Section 7827, relating to the bond, provides that the sheriff or other officer shall not deliver to the plaintiff the property taken until there has been executed by one or more sureties of the plaintiff [609] a written undertaking to the defendant in at least *double the value* of the property taken, "to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him, and return the property to the defendant, in case judgment for a return of such property is rendered against him." Neither of the sections referred to specifically provides what shall be done in case the property is so damaged when it is returned that it is of little or no value. If a strict interpretation of these sections is to be given, then the defendant, although entitled to the property, is without remedy. In other words, if these sections quoted contain the sum of human knowledge on the subject, the injured defendant is utterly without prospect of relief. This can never have been intended, and no doubt the purpose of the section relating to the replevin bond is that damages may be recovered against the plaintiff in a proper case in which he has injured the defendant.

In *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308, it was stated in paragraph 3 of the syllabus: "A plaintiff in replevin against whom judgment has been rendered, must, in order to satisfy the judgment for a return of the property, return or offer to return the identical property replevied and not other property of like kind and value." In *Reavis v. Horner*, 11 Neb. 479, 9 N. W. 643, it was held that a party might return a portion of the property, where its value had been separately ascertained, and tender the value of the remaining property. It is said in the body of the opinion in *Eickhoff v. Eikenbary*, supra: "There can be no doubt that in order to satisfy a judgment for the return of property the identical property must be tendered, *in substantially the condition in which it was received.*" In that case the property in controversy was lumber. After the property was replevied, the plaintiff went on with his business and proceeded

to get other lumber. When he got beaten, it was decided that any sort of lumber would not do. [610] It must be the same old lumber and in the same condition that it was when it was taken.

In *Berry v. Hoeffner*, 56 Me. 170, it was held, as stated in the second paragraph of the syllabus: "If goods have been damaged since they were replevied, and while in the possession of the plaintiff in replevin, their mere restoration in a damaged condition will not be a compliance with the bond which requires them to be restored in like good order and condition as when taken."

In Massachusetts, by the statute of 1789 (Laws 1789, ch. 26, sec. 4), the proviso of the writ was: "And also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment." Afterwards the statute was amended, and as amended the language was, "to return the said property, in case such shall be the final judgment" (Rev. St. 1836, ch. 113, sec. 19); but no mention was made that the goods and chattels were to be restored in like order and condition. In *Parker v. Simonds*, 8 Metc. (Mass.) 205, 210, it was contended that because of his change the plaintiff in replevin was not bound to restore the goods replevied in the same condition as when taken. The court held otherwise.

To hold that in every case the damages found by a jury embrace all damages which defendant may be entitled to will often result in injustice. To illustrate: Certain staple articles having a well-known market value are replevied. They pass from the possession of the defendant to that of the plaintiff, and while in plaintiff's possession are so far removed from the defendant that he has no knowledge of their condition, presumably the plaintiff may be exercising proper care to preserve them. Upon trial of the case, however, it is shown that the articles were the property of the defendant and properly in his possession. Therefore a verdict must be returned in his favor. Suppose [611] the market value of the articles has depreciated. Defendant knows this fact, and offers proof of it in evidence. He is entitled to the verdict for damages, which shall include the depreciated value. He gets this. Plaintiff then returns the property. It had a value when taken from defendant of \$10,000, so found by the jury. The same articles, because of the depreciation in the market value, are, though in good condition, worth at the time of the trial but \$7,500. Suppose ordinary wear and tear incident to plaintiff's use is \$500. The jury makes the loss good by finding defendant's damage to be \$3,000. However, because of plaintiff's neglect or failure to properly care for the articles returned, they have suffered a loss

in value and are worth but \$5,000. Defendant in the replevin suit must accept the goods worth \$5,000. 94 Neb. 194. He has judgment for \$3,000 and the loss of \$2,000 in place of what the plaintiff wrongfully took from him worth \$10,000. If defendant must suffer this, then here is a wrong without a remedy. Defendant is deprived of \$2,000 through a fiction that he has recovered all damages in the replevin suit. Such a theory is a fiction in any case where the defendant has no knowledge that the goods had been injured by more than the ordinary wear and tear. That is this case.

In the case of *Washington Ice Co. v. Webster*, 125 U. S. 426, 8 S. Ct. 947, 31 U. S. (L. ed.) 799, which was a suit on a replevin bond, Mr. Justice Blatchford used this language: "The principal argument on the part of the defendants in the present suit is that in the statute of Maine (Rev. St. 1857, 1871, ch. 96, sec. 11), which provides that, in a replevin suit, 'if it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs,' the words 'damages for the taking' mean all damages resulting from the taking and detention of the goods; that, if the defendant in replevin recovers judgment for a return of the goods replevied, he may, at his election, [612] have the damages which he has sustained by reason of the taking and detention of them, to the time of such judgment, assessed in the replevin suit, or he may recover those damages in a suit on the bond, but cannot have both." Judge Blatchford then said that the contention was "that, as the plaintiff in this suit failed to have such damages assessed in the replevin suit, he cannot recover them in the present suit. This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle." If I understand this, Justice Blatchford condemned the principle for which the majority opinion contends. I think the law is, and ought to be, that, if the facts are known to the plaintiff which relate to the alleged damages, the extraordinary damages must be considered at the time of the trial of the replevin case, and, if such damages are allowed, they should be put into the verdict; but, if there are damages to the property in controversy which occur after the trial, then such damages form a sufficient basis for an action on the replevin bond. The damages awarded in the replevin action should be conclusive of all damages sustained prior to the trial of the replevin suit, unless there has been some sort of concealment or other sufficient cause that has prevented their discovery by the plaintiff. The principle of allowing litigants to get done at some time is recognized in *Reams v. Sinclair*, 97 Neb. 542, 150 N. W. 826, wherein,

notwithstanding the prior judgment in the ejectment case by reason of plaintiff's failure to show a legal title, he was permitted in the second suit to establish and quiet his title based upon the same defective instrument which had resulted in his defeat in the former action.

In *Ewald v. Boyd*, 24 S. D. 16, 123 N. W. 66, 24 L.R.A. (N.S.) 739, the horse in controversy died. The judgment was rendered July 10, 1907. On July 13, 1907, the defendant wrote to the plaintiffs, requesting them to come and get the horse. This request reached the plaintiffs on July 29, 1907. [613] One of the plaintiffs went to the defendant's premises, and was told that the horse died about a week before out in the slough in the pasture. The plaintiff was not shown the body of the horse, but he was shown a mound where it was claimed the horse was buried. It was the contention of the defendant that, inasmuch as he had offered to deliver the horse after judgment and before plaintiffs came after it, and the horse had died through no fault of his, it worked a satisfaction of that part of the judgment awarding the plaintiff possession of the horse or its value. The court said: "After the judgment was entered, the defendant retained possession of this horse at his own peril. If he desired to protect himself against the alternative judgment for value of the horse, he was bound to return the horse to plaintiffs. Plaintiffs, if they saw fit, could allow their judgment to stand without issue of execution, desiring that a time would come when defendant would be unable to turn over the horse, and they then be able to collect the alternative judgment which might be more than the horse was worth."

In *Hinkson v. Morrison*, 47 Ia. 167, there was an action brought on defendant's redelivery bond, and defendant attempted to plead as a partial defense the death of one horse. The court said: "We think the defendant's bond cannot be discharged *pro tanto* by showing the mere fact that one of the horses died. By the verdict his detention of the horse was found to be wrongful. His undertaking is absolute to return the property in as good condition as it was when the action was commenced. His obligation is entirely different from that of a bailee rightfully in possession."

In *Lillie v. McMillan*, 52 Ia. 463, 3 N. W. 601, the plaintiff took possession of property pending the suit. The jury found for the defendant. One horse and one cow had died. The defendant elected to take the money judgment, and the court held that this was his right, not merely for the property that had died, but for all of it.

[614] In *Capital Lumbering Co. v. Learned*, 36 Ore. 544, 59 Pac. 454, 78 Am. St. Rep. 792, it was held, as stated in the second

paragraph of the syllabus: "Where, in replevin, plaintiff takes possession of the property, and judgment is rendered for its return, and it is of such a character that it can be moved, plaintiff must seek defendant and there tender it to him in the same condition as when received, to avoid liability on his bond."

In *Vallancy v. Hunt*, 26 N. D. 611, 145 N. W. 132, it was held, as stated in the syllabus: "A party who desires to avoid the penalties of a redelivery bond in replevin must show a delivery or offer of delivery of the property within a reasonable time, in substantially as good condition as when taken, and without material depreciation in value."

In *Moran v. Plankinton*, 64 Mo. 337, it was held that the judgment in the first action is only a bar to the second action as far as the plaintiff knew, or ought to have known, of the facts in time to have included the omitted articles in such first action.

In *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085, it is said in the syllabus: "The rule announced in *Romberg v. Hughes*, 18 Neb. 579, 26 N. W. 351, that damages for detention may only be had where there is a return of the property, should be restricted to damages for deterioration or depreciation after the taking." In the body of the opinion it was said: "If the property is injured or deteriorates in value after it is taken, a return does not make the defendant whole, because he does not get it in the condition in which it was, and, in order to be fully restored to his former position he ought to have the difference in value as damages. This is universally recognized, and such deterioration is considered a proper element of damage." Commissioner Pound, who prepared this opinion, cited *Hooker v. Hammill*, 7 Neb. 231; *Shinn, Replevin*, sec. 648.

It would seem that the damages in a replevin suit should be compensation for the interruption of the defendant's possession, the loss of the use of the goods [615] from the time of the taking under the writ of replevin until they are restored, and their deterioration in value within the intervening time. I think that the judgment of the district court is not sustained by the evidence, and that *Teel v. Miles*, 51 Neb. 541, 71 N. W. 296, should be overruled or modified. I think that the majority opinion is against a liberal interpretation of the statute, that it is against public policy, and that it is too technical.

NOTE.

The reported case is a second appeal of the case reported in Ann. Cas. 1913E 1158 with a note on the right of a successful de-

defendant in replevin to refuse to receive back the replevied property and sue on the replevin bond. On a rehearing, reported in Ann. Cas. 1914D 109, the original decision was reversed on the question of fact whether the property was tendered back within a reasonable time after the judgment for its return. In the reported case, an appeal from the judgment rendered on the retrial ordered by the decision last referred to, the right to refuse to accept the return of the property in case it is so far damaged as to be without substantial value is apparently taken as established by the prior decisions. It is however held that the damage occurring prior to the trial of the replevin suit must be recovered therein, and that in an action on the bond only damage subsequent to the judgment in the replevin suit may be recovered.

JUST ET AL.

v.

LITTLEFIELD.

Washington Supreme Court—September 24, 1915.

87 Wash. 299; 151 Pac. 780.

Physicians and Surgeons — Action for Malpractice — Pleading — Certainty.

A complaint in an action against a physician for malpractice, which merely averred that he did not use the usual test to ascertain plaintiff's pregnancy, is subject to motion to make more definite and certain, as medical men might differ on what was the usual test.

Harmless Error — Refusal to Make Pleading More Certain.

Under Rem. & Bal. Code, §§ 307, 1572, requiring the disregarding of immaterial errors and the consideration of the case on the merits, the erroneous denial of a motion to make a complaint in a malpractice suit more definite and certain as to the usual test for discovering pregnancy, which it was alleged defendant did not use, is harmless, where defendant was not surprised, or precluded from introducing any appropriate testimony.

Physicians and Surgeons — Malpractice — Erroneous Diagnosis.

While a physician is liable for the results of improper treatment administered through negligence, he is not ordinarily liable for damages consequent upon an honest mistake or error of judgment in making a diagnosis, where there is reasonable doubt.

[See note at end of this case.]

Ann. Cas. 1917D—45.

Same.

In an action for malpractice, the question whether defendant physician is negligent in making an incorrect diagnosis of plaintiff's condition and in operating is held to be for the jury.

[See note at end of this case.]

Damages — Excessiveness of Verdict for Malpractice.

Where a physician wrongfully diagnosed plaintiff's trouble as cystic tumors, instead of pregnancy, and when she was operated upon none were found, and she suffered much shock and underwent pain during her confinement, an award of \$500 is not excessive.

[See Ann. Cas. 1916C 1078.]

Discovery — Physical Examination of Party — Impartial Physicians.

In an action for malpractice, while the court may require plaintiff to submit to the examination by impartial physicians, she cannot be required to submit to examination by physicians selected by defendant.

[See 1 Ann. Cas. 266; 11 Ann. Cas. 844; Ann. Cas. 1917D 351; 3 Am. St. Rep. 554; 68 Am. St. Rep. 242.]

Witnesses — Examination on Hypothetical Questions — Experts Appointed by Court.

In an action for malpractice, where the court required plaintiff to submit to an examination by impartial physicians, either party may examine such witnesses hypothetically as to matters within the issues; the witness not belonging to one party more than another.

Appeal and Error — Necessity of Objection and Exception — Instructions.

Objections to instructions cannot be raised on appeal, where they were not excepted to, and were not questioned, either in the motion for new trial or for judgment non obstante veredicto.

Appeal from Superior Court, King county: ALBERTSON, Judge.

Action by Mamie Just et al., plaintiffs, against Charles W. Littlefield, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Robert A. Devers for appellant.

Jackson Silbaugh for respondents.

[300] HOLCOMB, J.—During the latter part of 1912, respondent, Mrs. Just, was suffering some physical ailment, and for a time was treated by a Dr. Dawson. She did not improve as she desired, and a lady osteopathist, rooming at the apartment house of which respondent had charge, recommended the appellant as a physician, and took Mrs. Just to consult him on about January 25 or 26, 1913. Appellant examined her and diagnosed her ailment as cystic tumors. Mrs. Just [301] testified that she informed appellant

that Dr. Dawson had diagnosed her case as pregnancy. Appellant was positive, she says, that the trouble was cystic tumors, and advised her that an immediate operation was necessary. Before deciding to accept and act upon appellant's advice, Mrs. Just consulted with her husband and again consulted with Dr. Dawson, informing him of appellant's diagnosis and advice. Dr. Dawson then, to confirm his diagnosis, called in another physician, a Dr. Bourns, who had previously treated Mrs. Just, who, in company with Dr. Dawson, made an examination of her and determined that her condition was that of pregnancy of the stage of three or four months. Dr. Dawson then took her to a hospital for treatment for membranous colitis. She did not seem to improve, and, after talking the matter over with her husband, they concluded that perhaps Dr. Littlefield was right and they again called him in and discharged Dr. Dawson. Appellant again assured her that his diagnosis was right, but that to make sure, he would call in another doctor for consultation, and called in a Dr. Palmer, who also made an examination and declared that the ailment was cystic tumors and not pregnancy. Dr. Palmer had also been informed that both Dr. Dawson and Dr. Bourns had declared the case one of pregnancy.

This examination was made on January 31, and on the next morning, February 1, 1913, appellant procured Dr. Palmer to perform an operation. The surgeon merely made an incision about four inches long into the abdomen of Mrs. Just, examined the interior of the abdomen, found what appeared, and then closed the incision, sewed it up, and left her in the hospital for care. They did not find any cystic tumors. She remained in the hospital five days and was then removed to her home. On the 13th day after the operation, appellant came to her house and removed the stitches. Five weeks afterwards he came to her home, accompanied by both the Dr. Palmer who performed the operation and another Dr. Palmer, and made further examination to ascertain [302] whether or not she was actually pregnant, and the doctors all then heard, by means of the stethoscope, the fetal heart beats and were convinced that she was pregnant. Mrs. Just claimed that she suffered the pains of childbirth from the time of the operation until the birth of the child, on July 2, 1913, five months later, and that the birth of the child was delayed one month by reason of the operation, and that, by reason of that delay and her weakness and illness, the child was necessarily removed with forceps and later died. She contends that her health has been permanently injured by reason of the operation and that she is no longer able to perform her duties.

Respondents brought this action for damages in the sum of \$6,200. The negligence alleged in their complaint is as follows:

"That the defendant unskillfully and negligently failed to apply the usual test, which, if so applied would have disclosed the condition as that of pregnancy, and failed and neglected to use proper care and skill, not only in the diagnosis of the case but failed and neglected to give the plaintiff, Mamie Just, proper care after the operation, in that he failed to visit and treat her but one time, and then only for the purpose of removing the stitches from the wound."

The jury rendered a verdict for respondents for \$500.

Before issues were joined upon the facts, appellant moved to strike certain paragraphs and portions of paragraphs from the complaint, and to make the fifth paragraph more definite and certain by alleging specifically what test is referred to as "the usual test." There was no prejudice to appellant in the denial of all the motions to strike. The motion to make more definite and certain the allegation that appellant failed and neglected to apply "the usual test," should have been granted. What the pleader meant by "the usual test" might have been entirely different from what appellant or any reputable physician or obstetrician would mean by "the usual test," and, at most, pleaded nothing but a conclusion, [303] which upon motion directed to that purpose, the pleader should have been required to make definite and certain by stating the character of the "usual test" which respondents meant in charging appellant with negligent failure to use it. But on the trial, as the case developed, it did not appear that the appellant was in any way surprised or prejudiced, or prevented from procuring and introducing testimony upon the nature and informative value of "the usual test" in the early stages of pregnancy, which is simply the "bimanual test," or examination or palpation with the hands.

Our statute, Rem. & Bal. Code, § 1752 (P. C. 81 § 1255), requires this court "to hear and determine all causes . . . upon the merits thereof, disregarding all technicalities, etc." It not being made to appear that appellant was misled or surprised in any way to his disadvantage in the trial of the cause, this technical error of the court is now unavailing to him. Rem. & Bal. Code, §§ 307, 1752 (P. C. 81 §§ 303, 1255; Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168; Peterson v. Barry, 50 Wash. 361, 97 Pac. 239).

The principal question here is, whether a physician is, as a matter of law, liable for a wrong diagnosis and ensuing treatment based thereon, even where there may be an honest difference of opinion among members

of the medical profession as to the diagnosis if the diagnostician proceeded with due care, skill and diligence in treating the patient. The law is, of course, well settled that a physician is liable for a wrong diagnosis of a case, resulting from a want of skill or care on the part of the physician, and followed by improper treatment, to the injury of the patient. But unless improper treatment follows, a wrong diagnosis gives no right of action. 30 Cyc. 1575; 22 Am. & Eng. Enc. of Law (2d ed.) 802; 5 Thompson, Negligence, § 6717; *Richardson v. Carbon Hill Coal Co.* 10 Wash. 648, 39 Pac. 95.

It is now well settled that a physician is entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, [304] and is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice. 30 Cyc. 1578; *Merriam v. Hamilton*, 64 Ore. 476, 130 Pac. 406; *Wells v. Ferry-Baker Lumber Co.* 57 Wash. 658, 107 Pac. 869, 29 L.R.A.(N.S.) 426; *Coombs v. James*, 82 Wash. 403, 144 Pac. 536; *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31.

Whether errors of judgment will or will not make a physician liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such, but whether he has treated the case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession. There is a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion. If he omits to inform himself as to the facts and circumstances and injury results therefrom, then he is liable. 30 Cyc. 1579; *Staloch v. Holm*, 100 Minn. 276, 111 N. W. 264, 9 L.R.A.(N.S.) 712; *Johnson v. Winston*, 68 Neb. 425, 94 N. W. 607.

In the present case, appellant and another physician positively determined that the patient was afflicted with tumors. Another physician had previously positively determined that she was pregnant, of which diagnosis appellant was informed, according to respondent's case. After appellant's diagnosis, the first physician, and another physician consulting with him, again examined the patient and determined that she was pregnant and that she had no tumors, of which diagnosis, according to respondents' case, appellant was also informed. His response to this was that "the other doctors were crazy."

It may well be conceded that the statements made by the patient to appellant were deceptive and calculated to deceive. [305] She did not believe, at the time of her examinations by any of the doctors, that she was pregnant. Her first "suspicion," according to her own statement, that she was pregnant occurred three weeks after the operation, when she first felt motion of a quick fetus. Prior to the operation she had menstruation, of which she no doubt informed the doctors who examined her. The expert testimony of both parties at the trial showed that the bimanual test may give indicative results during the fourth, fifth and sixth months; it is more uncertain in the earlier months; the same sensation may possibly result to the palpation of the physician's hands from tumors; the same symmetrical development of the uterus may appear from the existence of a tumor; the mother feels quickening before an examiner can feel *bi-lottement* or rebound; there is often *bi-lottement* upon one examination during the fourth fifth or sixth month, and none at other examinations about the same time. So that it is manifest that there might be utterly different, though thoroughly honest, opinions reached by physicians as to the patient's condition at or about the time of the examinations by these various doctors. Appellant's diagnosis proved to be wrong, and those of other physicians correct.

But did appellant exercise the proper care and diligence in advising, immediately upon his diagnosis, an operation for tumors? There is no complaint made of the operation itself as to the manner of its being performed. The matter of the ethics and propriety of appellant's conduct in proceeding with the operation without notifying the patient's former attending physician is immaterial. But the matter of appellant's notice that other competent and reputable physicians had positively declared that the woman was pregnant, is serious. Surely it put upon appellant a greater degree of diligence and care to be as certain as circumstances and conditions surrounding the case would admit of. Notwithstanding what she may have stated to the examining physicians, pregnancy is not an impossible or improbable condition to [306] the ordinary married woman of the age of thirty-seven years. Appellant urges, however, that the incision made was in the nature of an exploratory operation to determine the true condition of his patient. As to this, though no point was made of it, he had not the consent of the patient and her husband to make an exploratory operation. Their consent to operate was upon a positive assurance that tumors existed, and that an immediate operation was necessary to remove tumors. The

appellant, having notice of a directly different diagnosis from his, the patient being a married woman of thirty-seven years living with her husband, not being past her climacteric period, it would seem he should not have hastily flouted the opinion of other reputable physicians that she was pregnant, but might have waited for a time, watching developments, making other examinations, and proceeding with considerable deliberation, unless the presence of tumors becoming more symptomatic, or injurious, rendered the operation therefor more imperative. At all events, it would seem that, whether appellant did; under the circumstances and conditions shown to exist, proceed with due and ordinary care in treating the patient, was a question of fact for the jury. The further questions of the damages for any unnecessary pain and suffering produced, as well as financial loss to both respondents, were also questions for the jury. We cannot say that the award of \$500 was excessive.

Appellant urges that the court erred in not granting his request to require an examination of respondent Mrs. Just by physicians selected by appellant. That would have been gross error. It was, after some hesitation in this state, adopted by the courts as a rule that, in personal injury cases, when it was alleged that the injury was continuing or permanent, an examination of the injured person by a disinterested expert solicited by the court could be required in the interest of exact justice. *Lane v. Spokane Falls, etc. R. Co.* 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L.R.A. 153. That was done in the case at bar. A disinterested [307] physician was selected by the court, and plaintiff ordered to submit to examination by him, which she did. The evidence the expert selected by the court obtained from such examination was for either or both the parties, at their option. Both chose to avail themselves of his testimony by examining him upon subjects within the issues. This was within the respective rights of the parties, and there was no error, therefore, in the permission accorded by the court to respondents to fully question this physician upon hypothetical questions as to matters within the issues. He was no more appellant's witness than he was respondents' witness.

Appellant complains in his brief of the refusal of the court to give a certain instruction, and the giving of certain instructions by the court. The record does not show any exceptions taken by appellant at or before the time the motions for new trial were submitted to the court. Nor does the record show that appellant, on the last day to which the hearing of the motions for judgment *non obstante veredicto* or for new trial were adjourned, made a request for an extension of

time to file exceptions, as stated in appellant's brief. The practice regarding the question is so well settled as to hardly require mention in this connection. We cannot consider errors based upon the giving or refusing to give instructions which were not excepted to within the time required by statute. *Rem. & Bal. Code*, § 339 (P. C. 81 § 587); *State v. Peeples*, 71 Wash. 451, 129 Pac. 108; *State v. Neis*, 74 Wash. 280, 133 Pac. 444.

Judgment affirmed.

Morris, C. J. Main, and Ellis, JJ. concur

NOTE.

Liability of Physician for Malpractice in Making Wrong Diagnosis.

Generally.

A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment, and is not liable in damages for an error of judgment in making a wrong diagnosis of a disease in the absence of a failure to exercise reasonable care and proper professional skill.

Alabama.—*Hamrick v. Shipp*, 169 Ala. 171, 52 So. 932; *Barfield v. South Highlands Infirmary*, 191 Ala. 553, Ann. Cas. 1916C 1097, 68 So. 30.

Colorado.—*McGaw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870.

Connecticut.—*Compare Stanford v. Hyde*, 87 Conn. 707, 87 Atl. 738.

Idaho.—*Osborn v. Carey*, 24 Idaho 158, 132 Pac. 967; *Osborn v. Cary*, 28 Idaho 89, 152 Pac. 473.

Kentucky.—*Bolar v. Browning*, 168 Ky. 273, 181 S. W. 1109.

Maine.—*Nickerson v. Gerrish*, 114 Me. 354, 96 Atl. 235. See also *Coombs v. King*, 107 Me. 376, Ann. Cas. 1912C 1121, 78 Atl. 468.

Massachusetts.—*Compare Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992.

Michigan.—See *Luka v. Lowrie*, 171 Mich. 122, 136 N. W. 1106, 41 L.R.A.(N.S.) 290.

Minnesota.—See also *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813. See also *Staloch v. Holm*, 100 Minn. 276, 111 N. W. 264, 9 L.R.A.(N.S.) 712.

Missouri.—See *Logan v. Field*, 75 Mo. App. 594.

Nebraska.—*Van Boskirk v. Pinto*, 99 Neb. 164, 155 N. W. 889.

New York.—*Brown v. Purdy*, 54 Super. Ct. 109, 8 N. Y. St. Rep. 143; *Warner v. Packer*, 139 App. Div. 207, 123 N. Y. S. 725. See also *Rosenthal v. Hasbrouck*, 161 N. Y. S. 354.

Oregon.—*Langford v. Jones*, 18 Ore. 307, 22 Pac. 1064; *Merriam v. Hamilton*, 64 Ore. 476, 130 Pac. 406

Pennsylvania.—*Wohlert v. Seibert*, 23 Pa. Super. Ct. 213; *English v. Free*, 205 Pa. St. 624, 55 Atl. 777.

Vermont.—*Willard v. Norcross*, 86 Vt. 426, 85 Atl. 904.

Washington.—*Wells v. Ferry-Baker Lumber Co.* 57 Wash. 658, 107 Pac. 869, 29 L.R.A. (N.S.) 426; *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 131; *Dishman v. Northern Pac. Beneficial Assoc.* (Wash.) 104 Pac. 943. And see the reported case.

Canada.—*James v. Crockett*, 34 N. Bruns 540.

In *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870, it appeared that the plaintiff, a child five years of age, fractured his right arm. A physician examined him within an hour of the accident and asserted that the boy's arm was dislocated. The defendant, another physician was called the next day. He was told the history of the case and that the previous doctor had pronounced the injury to be a dislocation of the shoulder. The defendant advised rest for the boy, saying that he would make an examination at the proper time, and if necessary would have an X-ray picture taken. Thereafter the doctor examined the arm daily by feeling and manipulation and about a week after the accident discovered the fracture. He advised the father of the plaintiff to take the latter to a hospital for an operation. The father disregarded this advice and immediately discharged the defendant. The plaintiff brought suit for damages against the defendant, alleging, among other things, that the latter had failed to diagnose the case as a fracture. On appeal the court said: "The question for determination was whether the defendant was guilty of negligence or want of skill in diagnosing and treating the injury during the time he had charge of the case, from which the injury complained of, if established, was caused. . . . Plaintiff alleged that defendant, being called to set a fractured arm, diagnosed the case as a dislocation of the shoulder, and treated it accordingly. Defendant alleged that he was called to treat a recognized case of dislocation, and to alleviate the suffering and condition arising therefrom. The testimony of both plaintiff and defendant tends to support the latter view, and defendant may have so understood his employment, as it is undisputed that he was notified upon entering the case that the injury had been diagnosed by a physician as a dislocation, and the dislocation reduced; and it is admitted that for a time defendant tentatively accepted such former diagnosis and treated the arm accordingly. The evidence fails to show that in the diagnosis defendant did not use the means and method ordinarily and usually used by other physicians. It is true, he did not at

first make use of the X-ray or of the anesthetics. Both of these means were discussed by the defendant with the father of plaintiff, and with his consent, or at least without objection, deferred for a time, and for apparently good reason. No evidence was offered to show that under the conditions it was usual or customary at that time and place, among physicians of defendant's school, or immediately necessary, to either use the X-ray or resort to anesthetics in diagnosis, or that failure to do either constituted want of care or skill. By proceeding upon a diagnosis not made by him, but accepted, the treatment by daily rotation or manipulation of the arm probably caused some degree of pain and suffering, in excess of what the plaintiff would have endured if the fracture had been discovered sooner. But that treatment, in all probability, prevented a union of the parts and resulted in the nonunion as found by the defendant at the time he discovered the fracture. In view of the conditions, as stated, under which defendant took charge of the case, there is reason for believing and holding that the failure of the defendant to use the X-ray or anesthetic, as a means of diagnosis, if error, was a mere mistake or error of judgment. We are unable to see that such error, if error it was, was so gross as to be inconsistent with that degree of skill which it is the duty of a physician to possess."

In *Osborn v. Carey*, 24 Idaho 158, 132 Pac. 967, it appeared that the defendant examined the plaintiff, pronounced his ailment to be blood poisoning and treated him accordingly for about three months. About one month thereafter, another physician examined the plaintiff and found that he was suffering from osteomyelitis. It is held that the defendant was not liable, even though the plaintiff contracted the latter disease while he was being treated by the defendant. To the same effect see *Bolar v. Browning*, 168 Ky. 273, 181 S. W. 1109.

In *Nickerson v. Gerrish*, 114 Me. 354, 96 Atl. 235, it appeared that the plaintiff fractured both bones in the lower part of his right leg. The defendant examined him by manipulation and pronounced the injury to be a sprain. According to expert medical testimony the defendant should have examined the injury either by an X-ray picture or by etherized manipulation. It was held that a failure so to do was not in itself sufficient to make him liable. The court said: "That the defendant was perfectly familiar with all the methods and tests recognized by the profession to be used in such examinations, and understood their relative usefulness, is conceded. He concluded that it was unnecessary in the plaintiff's case to have an X-ray picture taken of the leg, or

to etherize the patient, and he relied upon his manipulation of the injured parts and his examination for deformity or other possible indication of fracture, as affording him sufficient information upon which to base his diagnosis. He made a mistake, however, and his diagnosis was wrong. But that fact alone is not sufficient to render him liable. Something else must be shown. And the issue before the jury in this case necessarily was, whether that mistake was the result of a failure of the defendant to use painstaking care and diligence, and to exercise the best of his admitted learning, skill and judgment in his examination and treatment of the plaintiff's injuries."

In *Van Boskirk v. Pinto*, 99 Neb. 164, 155 N. W. 889, it appeared that the plaintiff fell from a ladder a distance of about eighteen feet. The defendant examined him carefully and asserted that his injury was a severe sprain of the ankle. It later developed that the plaintiff had received a slight impact fracture. It was held that the defendant was not liable in damages for the wrong diagnosis unless he was negligent in making the same and in not giving proper treatment.

In *Brown v. Purdy*, 54 Super. Ct. (N. Y.) 109, it was held that the defendant was liable for reporting in good faith to the board of health, according to statutory requirements, that the plaintiff was suffering with smallpox, when in fact she was not afflicted with that disease.

In *Warner v. Packer*, 139 App. Div. 207, 123 N. Y. S. 725, it appeared that the plaintiff had been laboring under delusions regarding her domestic affairs. The defendant examined her and pronounced her to be insane. It later appeared that he had made a wrong diagnosis. In reversing a verdict in favor of the plaintiff for negligent malpractice, the court said: "We know insanity is a mysterious disease; that it may exist without physical indications, is often cunningly concealed so as almost or altogether to baffle detection even by a specialist, or may be so occult as to cause most eminent alienists to clash as to its existence in an instance. The diagnosis of it is recognized as a difficult task."

In *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213, it appeared that the plaintiff was suffering with severe pains in the head and his eyes were inflamed. The defendant examined the plaintiff and advised cold applications. The plaintiff was in fact afflicted with glaucoma, an exceedingly rare disease and hard to detect, from which he became totally blind. It was held that the defendant was not liable for his failure to discover the existence of that malady.

In *Langford v. Jones*, 18 Ore. 307, 22 Pac. 1064, it appeared that the plaintiff suffered

extreme pain from a laceration of the neck of her womb. The defendant diagnosed her sickness as cancer and advised an operation, which he performed by removing a large tumor. It later appeared that in fact the plaintiff was quick with child. It was held that the defendant was not liable. The court said: "In view of the character of the respondent's sickness when she applied to the appellant for treatment, what earthly reason could he have had, after learning the history of her case, for surmising that she might be pregnant? The tumor with which she was afflicted had doubtless been developing for a long time. . . . After the removal of the tumor the appellant had still better grounds for supposing that there was no pregnancy. He had then good reason to believe that if the respondent were in that condition the operation would produce a miscarriage, and as it did not have that result, it was a convincing circumstance in his mind that she could not be so. . . . Time, however, which is the only certain proof of the correctness of any theory, showed that the appellant's conclusion was wrong in that particular; but that did not prove him guilty of unskillfulness or negligence. He did not undertake, in the treatment of the respondent's case, that his judgment was infallible; he only agreed to exercise his best judgment."

In *Merriam v. Hamilton*, 64 Ore. 476, 130 Pac. 406, it appeared that the plaintiff suffered pain in her back. The defendant diagnosed her ailment as pregnancy and treated and advised her accordingly. It was later proved that she was not pregnant but that she had superfluous fat on her abdomen. It was held that the defendant was not liable for the wrong diagnosis.

In *English v. Free*, 205 Pa. St. 624, 55 Atl. 777, it appeared that the plaintiff suffered a severe injury to his hip joint. The defendant examined him but failed to discover a dislocation of the joint. He treated the plaintiff for about four months, but without success. Thereafter another physician made a proper diagnosis, after having had the plaintiff under the influence of an anesthetic. He completely recovered after two weeks treatment by the second doctor. It was held that the defendant was not liable.

In *Willard v. Norcross*, 86 Vt. 426, 85 Atl. 904, it appeared that the plaintiff a woman about 55 years of age, slipped and fell on her hands. She sustained severe injuries to her wrists. The defendant diagnosed her injury as a sprain, when in fact she had a Cole's fracture. According to the expert medical testimony a Cole's fracture of the wrist is difficult to discover. It also appeared that the defendant properly treated the plaintiff's wounds and that, considering

her age, obtained good results. It was held that the defendant was not liable. The court said: "We hold, therefore, that there was no medical expert testimony in the case fairly and reasonably tending to show malpractice by the defendant, and consequently that his motion for a verdict should have been granted. . . . It must be admitted that there was evidence tending to show that the plaintiff's injuries were, in fact, fractures; that defendant treated them as sprains. Was he negligent in making his diagnosis? And this is no more than asking if, in his effort to ascertain the character and extent of the injuries, he had and exercised the care and skill then had and exercised by physicians and surgeons in the examination of like cases in that locality. If this question is answered in the defendant's favor, liability can be established only by proof of negligent treatment; and in proving this it must be remembered that his mistake in the diagnosis was free from legal fault. In other words, treatment is to accord with the diagnosis, and in judging it it must be referred to the diagnosis,—assuming, of course, that there is no negligence during the treatment in not discovering the true nature of the injury. . . . The question of negligent treatment, as we have seen, is to be referred to the diagnosis. If this is free from negligence and the treatment is in accord therewith, no cause of action for malpractice exists."

In *Wells v. Ferry-Baker Lumber Co.* 57 Wash. 658, 107 Pac. 869, it appeared that the plaintiff sustained severe injuries to his wrists. The defendant examined him with a fluoroscopic X-ray but took no picture. He erroneously diagnosed the injuries as a sprain of the left wrist and a fracture of the right wrist. In an action for malpractice it was held that the defendant was not liable. The court said: "The conclusion is irresistible that the surgeon used reasonable diligence and skill, and that to permit a recovery would establish the rule that a surgeon is liable for a failure to use extraordinary care and diligence in both diagnosis and treatment. . . . Viewing the testimony in the light most favorable to the appellant, it clearly shows that the attending surgeon used reasonable care, skill, and diligence in diagnosis and treatment. A verdict for the appellant could not be permitted to stand, and a judgment resting upon it would be set aside."

In *Dishman v. Northern Pac. Beneficial Assoc.* (Wash.) 164 Pac. 943, it appeared that the plaintiff sustained an injury to his left hand and wrist. He was examined by one of the defendant's, Dr. Thompson, who diagnosed the injury as a sprain when in fact it was a fracture of some of the wrist

bones. However, the defendant applied proper treatment in accordance with his diagnosis. It was held that he was not liable. The court said: "We feel constrained to decide as a matter of law that Dishman cannot recover against Dr. Thompson because of failure of proof of negligence on his part."

In *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 131, it appeared that the plaintiff, a girl seven years of age, suffered from infantile paralysis. The defendant diagnosed her sickness as typhoid fever and treated her accordingly. It further appeared that skilled physicians and surgeons might have diagnosed the child's disease either as typhoid fever, infantile paralysis, or multiple neuritis. It was held that the defendant was not liable. The court said: "It needs no argument to show there could be no recovery against respondent unless, as a medical man of ordinary skill, he should have correctly diagnosed the case as an injury to the sciatic nerve and was negligent in his treatment. If, then, there is no evidence that there was such an injury, when all the facts upon which the diagnosis must be predicated are included, but rather the evidence without exception excludes such an injury, there was nothing to submit to the jury. If respondent could be held liable because he did not make a proper diagnosis of the case on his now theory that the child was suffering from infantile paralysis, then the court was in error. But in an action for malpractice, a physician cannot be held for an error in judgment as to the disease his patient is suffering from, since all that any physician can give to any case is his best judgment; and if he exercise that judgment as a man of ordinary skill would exercise it, there can be no recovery. The testimony of the physicians called by appellant is to the effect that the symptoms present in this case from Thursday night to Sunday morning might be diagnosed by men of ordinary skill in the medical profession as typhoid fever, multiple neuritis, or infantile paralysis, and that the treatment given by respondent in no way contributed to the present condition of the child. There is, therefore, no evidence in the case that the treatment by respondent was negligent or unskillful. The most that can be said is that he did not discover the infantile paralysis."

In *James v. Crockett*, 34 N. Bruns. 540, it appeared that the plaintiff sustained a dislocation of one of his shoulders. The defendant diagnosed his injury as a bad sprain of the muscles and treated him accordingly. It was held that the defendant was not liable. The court said: "By the evidence of the plaintiff himself, Dr. Crockett made more than one careful examination of the injured arm, and not content with his own diagnosis, he took with him Dr. Coburn for consulta-

tion. I fail to see that the evidence shows any neglect or want of ordinary care and skill on the part of the defendant. Even if the plaintiff's shoulder was dislocated when he was thrown from the pump it does not follow that the defendant was negligent because he was unable to discover the dislocation. He gave careful attention to the patient, and the learned judge could not have put his finger on any evidence which would have justified him in directing the jury that, if they believed it, they must find the defendant guilty as charged."

In *Luka v. Lowrie*, 171 Mich. 122, 136 N. W. 1106, 41 L.R.A.(N.S.) 290, it appeared that a physician committed an error of judgment in deciding on an amputation of the plaintiff's foot. There was some evidence that plaintiff could have recovered without an amputation. However, the court held that the defendant was not liable for malpractice. To the same effect see *Staloch v. Holm*, 100 Minn. 276, 111 N. W. 264, 9 L.R.A.(N.S.) 712.

A physician is not liable for erroneous diagnosis where the treatment he administers is proper for the actual disease. Thus in *Tomer v. Aiken*, 126 Ia. 114, 101 N. W. 769, the court said: "If it be conceded, however, that the physicians declared it a case of fracture of the clavicle, rather than dislocation, they are not liable, unless improper treatment followed. No one claimed on the trial that the clavicle had been fractured, nor was there any evidence that the dressing applied was adapted peculiarly to remedying that defect. If suitable at all, it was as appropriate to the reduction of a dislocation. In these circumstances there was no occasion to submit the issue raised in the first count of the petition that, because of a mistake in the diagnosis, the plaintiff had been treated for a fracture, rather than a dislocation, to the jury. If the treatment was such as reasonable skill and care exacted for the cure of a dislocated clavicle, defendants were not liable, regardless of what their diagnosis may have been; otherwise they were."

Negligent Diagnosis.

Where a physician fails to exercise due care in making a diagnosis, and by reason thereof he fails to discover the true ailment, he is liable in damages. *Bonnet v. Foote*, 47 Colo. 282, 107 Pac. 252, 28 L.R.A.(N.S.) 136; *Polionos v. Renner*, 190 Ill. App. 416; *Stout v. Powers*, 97 Kan. 33, 154 Pac. 259; *Lewis v. Dwinell*, 84 Me. 497, 24 Atl. 945; *Rogers v. Kee*, 171 Mich. 551, 137 N. W. 260; *Grainger v. Still*, 187 Mo. 197, 85 S. W. 1114, 70 L.R.A. 49; *Rann v. Twitchell*, 82 Vt. 79, 71 Atl. 1045, 20 L.R.A.(N.S.) 1030; *Hoffman v. Watkins*, 89 Wash. 661, 155 Pac. 159. See also *Fowler v. Sergeant*, 1 Grant Cas. (Pa.) 355.

In *Bonnet v. Foote*, supra, it appeared that the plaintiff sustained a fracture to her hip. The defendant examined her without applying the proper tests, and told her that she was only bruised. It was held that he was liable. The court said: "Applying these well-settled principles of law governing the liability of surgeons, it is at once apparent from the facts that the failure of the defendant to properly diagnose and treat the injury to plaintiff's hip was inexcusable. That the bone was fractured cannot be doubted. The evidence of such fracture was plain from the fact that plaintiff's foot lay over on one side, to which the attention of defendant was directed, so that one of two conclusions is inevitable: Either defendant did not possess that degree of learning and skill which the law requires of surgeons; or, if he did, he failed to exercise ordinary care in applying it."

In *Lewis v. Dwinell*, 84 Me. 497, 24 Atl. 945, it appeared that the defendant failed to discover the lesion of a rupture of the perineum in the plaintiff after repeated examinations, but told her that she was "all right." It was held that this was actionable negligence.

In *Polionos v. Renner*, 190 Ill. App. 416, it appeared that the plaintiff, a boy fourteen years of age, was injured by an iron radiator falling on his leg. According to the evidence a reliable diagnosis could be made only by an X-ray picture. The defendant examined the boy by manipulation. In an action for damages for the injuries sustained by reason of the wrong diagnosis the defendant was held to be liable.

In *Rogers v. Kee*, 171 Mich. 551, 137 N. W. 260, it appeared that the plaintiff fractured his left thigh-bone. The defendant examined him superficially and diagnosed the case as sciatica, and later as locomotor ataxia. Furthermore, he gave the plaintiff improper advice and treatment. The plaintiff sustained severe injuries by reason of the defendant's carelessness. It was held that the defendant was liable in damages. The court said: "The law is well settled that a patient who employs a physician is entitled to a thorough and careful examination, such as the condition of the patient and circumstances will permit, with such diligence and methods of diagnosis for discovering the nature of the ailment as are usually approved and practiced by medical men of ordinary learning, judgment, and skill, in similar localities. If, by the exercise of such care and skill, the fracture would have been discovered, a failure to properly diagnose is negligence, and it is the duty of a physician, in taking charge of a case where there is a broken limb, to inform and instruct the patient as to his conduct and what caution should be observed in mov-

ing or using the limb while it is being treated.

. . . We think there is testimony in the case, controverted in many essentials it is true, but tending to show that, when defendant was professionally called, plaintiff was suffering from a fracture of the neck of the left femur; that a proper diagnosis would have disclosed it; that defendant made no proper diagnosis, and did not discover it; that the experts agree some approved treatment should be administered to such an injury promptly, delay rendering subsequent efforts futile; that defendant gave no proper treatment; that the treatment he did prescribe was, so far as it had any effect, painful and deterrent; that with the patient quiet and the limb at rest with the broken ends of the bone as nearly as possible in apposition a bony union was possible and a better fibrous union probable; that the patient should be advised and instructed as to the nature of his injury and his movements to avoid interference with the treatment; that defendant did not advise plaintiff of the nature of his injury; did not direct rest and quiet, and confinement to the bed, though plaintiff was a strong man, able to stand it, but allowed and advised him to walk and exercise the limb, tending to work the head of the fractured bone up and down in the muscles of the hip; that plaintiff's recovery is limited to a poor fibrous union with a loose and mobile joint; that by his erroneous treatment and advice defendant precluded plaintiff from obtaining other medical attendance till it was too late."

In *Rann v. Twitchell*, 82 Vt. 79, 71 Atl. 1045, 20 L.R.A. (N.S.) 1030, it appeared that the plaintiff received a severe injury to his right eye and that a piece of tin was imbedded therein. The plaintiff was treated by a physician for about one week, at the end of which time he advised that an operation should be performed for the extraction of the foreign substance. The defendant, an eye specialist, carelessly examined the plaintiff and told him that there was nothing in the eye. Thereafter the plaintiff continued to suffer for about three weeks, at the end of which time the first physician successfully extracted the piece of tin. In holding the defendant to be liable the court said: "One who holds himself out as a specialist in the treatment of a certain organ, injury or disease, is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease,—its diagnosis and its treatment,—in the same general locality, having regard to the state of scientific knowledge at the time. . . . Tested by this rule, the evidence tended to show that the defendant's conduct did not

measure up to its requirements. He had a fair chance to examine the eye, and with the indications of the presence of the piece of tin so strong as the testimony of Dr. Gaines tends to show, it cannot be said as a matter of law that the defendant in his preliminary examination to ascertain the essential data upon which to predicate a professional opinion met the requirements of the rule above stated. The testimony tended to show that he did not, and the question should have been submitted to the jury, for the evidence shows that the tin ought to have been removed at the earliest possible moment."

In *Hoffman v. Watkins*, 89 Wash. 661, 155 Pac. 159, it appeared that the plaintiff sustained a dislocation of his right shoulder. The defendant made a perfunctory examination and diagnosed the injury as a sprain. It was held that he was liable for malpractice.

In *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992, wherein it appeared that the defendant gave his opinion that the plaintiff was afflicted with a loathsome disease when in fact he was not so afflicted, the defendant was held to be liable.

MASON ET AL.

v.

BOWEN.

Arkansas Supreme Court—February 14, 1916.

122 Ark. 407; 183 S. W. 973.

Wills — Contest — Holographic Will — Sufficiency of Evidence to Establish.

In a will contest where the jury were instructed that a holographic will must be established by the unimpeachable evidence of at least three disinterested witnesses that the entire body of the will and the signature were in the handwriting of the testator, the evidence is held to be sufficient to warrant a finding for the contestee.

[See 104 Am. St. Rep. 34.]

Same.

In a will contest, the evidence is held to be sufficient to warrant a jury finding that the will was attested by two witnesses in the manner required by the statute.

Testamentary Capacity — Evidence — Declarations of Testator.

Statements and declarations of a testator, whether made a reasonable time before or after the execution of a will, are admissible to show his mental capacity when that issue is raised, being external manifestations of his mental condition.

Undue Influence — Evidence — Declarations of Testator.

In a will contest, evidence of a statement by the testator that the contestee owed him money, and that he was going to live with him for the purpose of collecting this debt, is inadmissible upon the question of undue influence, since statements and declarations of a testator, whether made before or after the execution of a will, are not competent as direct or substantive evidence of undue influence, and are merely hearsay.

[See note at end of this case.]

Appeal and Error — Harmless Error — Exclusion of Cumulative Evidence.

It is not prejudicial error to refuse to allow cumulative evidence of an undisputed fact.

Wills — Testamentary Capacity — Evidence — Declarations of Testator.

In a will contest, statements of the testator, made more than two years prior to making his will, and before going to live with the contestee, that he intended his property to go to his relatives on his death are inadmissible as too remote to have any value in proving the mental capacity of the testator, since declarations of a testator, made prior to the execution of a will, are entitled to probative force, according to the nearness or remoteness of the time at which they were made; the time to be covered being left to the discretion of the trial court.

Undue Influence — What Constitutes.

The "undue influence" which will avoid a will is that, directly connected with its execution, resulting from fear, coercion, or other cause, that deprives the testator of his free agency in the disposition of his property, and is especially directed toward procuring a will in favor of particular parties, and does not include the legitimate influence from natural affection.

[See 31 Am. St. Rep. 670.]

Test of Testamentary Capacity.

The test of "testamentary capacity" is that the testator shall remember without prompting the extent and condition of his property, comprehend to whom he is giving it, and be capable of appreciating the claims of others whom he is excluding from participation in the estate.

Appeal and Error — Scope of Review — Sufficiency of Evidence.

A verdict of the jury will be upheld on appeal if there is any substantial evidence to support it.

Wills — Undue Influence — Sufficiency of Evidence.

In a will contest, the evidence is held to be sufficient to warrant a jury finding that the will was not procured by undue influence.

Testamentary Capacity — Sufficiency of Evidence.

In a will contest, the evidence is held to be sufficient to warrant a jury finding that the testator had the mental capacity to make a will.

Appeal from Circuit Court, Pulaski county: FULK, Judge.

Probate proceedings. J. B. R. Bowen, proponent, and B. E. Mason et al., contestants. Judgment for proponent. Contestants appeal. The facts are stated in the opinion. **AFFIRMED.**

Bradshaw, Rhoton & Helm and Gardner K. Oliphant for appellants.

Botts & O'Daniel and *H. C. Lochlar* for appellee.

[410] HART, J.—This was a contest over the will of L. W. Mason. The will was contested by the heirs of the testator on the ground of mental incapacity on the part of the testator and that the execution of the will was procured by undue influence on the part of the contestee. The probate court refused to admit the will to probate and the contestee appealed to the circuit court. There the issues were submitted to a jury and a verdict returned in favor of contestee. Thereupon the court rendered judgment establishing the will and ordering it admitted to probate. The contestants have duly prosecuted an appeal to this court.

L. W. Mason resided in Pulaski County, Arkansas, all his life and was nearly sixty years of age at the time of his death. He died of consumption and had been ill for many years suffering with that disease and with kidney trouble. He came to Little Rock in November, 1911, to reside with J. B. R. Bowen, the contestee, and lived with him until the time of his death on June 8, 1913.

(1) The will in question was executed on October 30, 1912. At the time of the execution of the will Mason owned property to the amount of \$6,000 or \$7,000, most of which he had inherited from his father. By the terms [411] of the will most of this property went to the contestee. After the will was executed the testator gave to his relatives certain specified amounts of money. For about three years prior to the time he came to Little Rock the testator resided with the widow of a deceased brother and she says she did not charge him any board. It was claimed by the contestee that the body of the will and the signature thereto were in the handwriting of the testator. The will was also attested by two witnesses as required by the statute. At the request of counsel for the contestants the court instructed the jury that to be valid as a holographic will both the entire body of the will and the signature thereto must be in the handwriting of the testator and that this must be established by unimpeachable evidence of at least three disinterested witnesses. See *Arendt v. Arendt*. 80 Ark. 204, 96 S. W. 982.

One of the attesting witnesses to the will testified that he had known L. W. Mason nearly all his life and was familiar with his handwriting and that the body of the will and the signature thereto were in the handwriting of L. W. Mason.

Two other witnesses testified that they had known L. W. Mason for a long time and were familiar with his handwriting. They said that they thought the body of the will and the signature thereto were in the handwriting of L. W. Mason.

Another witness testified that he was familiar with the handwriting of L. W. Mason and that the only reason he could not say that it was L. W. Mason's handwriting was because he did not see him write it.

(2) All these witnesses were disinterested persons and there is nothing in their evidence or in the entire record reflecting on their character or in any way tending to impeach their testimony. Therefore the jury was warranted in finding in favor of contestee on the question of a holographic will.

The court at the request of counsel for the contestants also instructed the jury on the question of attesting a will in the manner required by the statute. As we have already stated, one of the witnesses who attested the will [412] testified that the entire body of the will and the signature thereto were in the handwriting of L. W. Mason. He further stated that he came to the house where Mason lived on the day the will was executed at the request of Mason for the purpose of attesting his will; that the other attesting witness and a justice of the peace went with him; that Mason first acknowledged the will before the justice of the peace and had the justice sign the acknowledgment and that he and the other attesting witness signed their names at the end of the will at the request of the testator; that before they signed it the testator had signed the will in their presence and told them that this was his fourth will and hoped it would be his last one.

The other attesting witness said that he went there for the purpose of attesting the will of the testator and did attest it. He stated that the word "will" was never mentioned while he was there but that he was called there by the testator for the purpose of witnessing his signature to a will. He answered questions propounded to him in an evasive manner and said that the justice of the peace was there too and wrote out the acknowledgment of the testator to the will and signed that and that the justice of the peace then asked the testator if this was his last one and that the testator replied that he did not know whether or not it was; that it might be and that it might not. The witness said that he supposed it was the will of the testator but that the testator never in fact called it by that name.

(3) We think the evidence clearly shows that the testator, the justice of the peace and the two attesting witnesses were all present at the time the will was signed by each of them; that the said testator sent for these persons to witness his will and that they attested it in the manner required by the statute; at least, we think the jury was warranted in finding these to be the facts. See *Payne v. Payne*, 54 Ark. 415, 16 S. W. 1.

(4) Counsel for contestants offered to prove by Ben Mason, a brother of L. W. Mason, that L. W. Mason, before he went to board with J. B. R. Bowen, stated that Bowen was indebted to him and that the only reason he [413] was going to board and live with Bowen was for the purpose of collecting his debt. The court refused the admission of this testimony before the jury and counsel for the contestants assigns this as error. They say the testimony should have been admitted upon the question of undue influence.

It seems to be well settled, both by text writers and the decisions of courts of the various states, that the statements and declarations of a testator, whether made before or after the execution of a will, are not competent as direct or substantive evidence of undue influence, but are admissible to show the mental condition of the testator at the time of making the will. When the condition of the testator's mind is the point of contention, statements or declarations of the testator are received as external manifestations of his mental condition and not as evidence of the truth of the things he states. If offered to prove an external fact, such as undue influence or fraud, such statements or declarations are merely hearsay and are liable to all the objections to which mere declarations of third parties are subject.

In a valuable and well considered case in which the authorities are thoroughly reviewed, the Supreme Court of Tennessee held that in a will contest declarations made by the testator prior to the execution of the will are admissible in evidence for the purpose of showing the mental capacity of the testator but are not admissible for the purpose of establishing the substantive fact of undue influence. *Hobson v. Moorman*, 115 Tenn. 73, 5 Ann. Cas. 601, 90 S. W. 152. Many cases are cited in the note to support the reported case.

The same case is also reported in 3 L.R.A. (N.S.) 749, and an extensive case note also appears there.

(5) In addition to this the justice of the peace, who was also present when the will in question was executed, testified that at one time in a conversation with the testator the latter told him that Bowen was indebted to him and that he had gone there for the purpose of collecting his debt. This statement of the justice of the peace was not attempted

to be contradicted by counsel for the contestee [414] and it is well settled in this State that it is not prejudicial error to refuse to allow cumulative evidence of an undisputed fact.

(6-7) Counsel for contestants also offered to prove by J. L. Hoffman that L. W. Mason had told him that he intended at his death that all his property should go to his relatives, that whatever he had, he had obtained by inheritance from his father and that at his death he desired and intended that what he had left should go to his relatives. The court refused to admit this testimony to go before the jury and its action is assigned as error.

In the case of *Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242, the court said that the authorities are uniform in holding that the declarations of a testator made before the execution of a will are admissible to show his mental capacity when that issue is raised. See also authorities *supra*.

In *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459, the court said on this subject, through Bricknell, C. J.:

"Inasmuch as the mental condition of a person can be determined only by his acts and declarations, these are admissible, whether made a reasonable time before or after the execution of the will, to establish everything pertaining to the testator himself—his memory, intentions, idiosyncracies, prejudices, affections, relations with, and feelings towards, the beneficiaries and all those who, if he had died intestate, would have been entitled to share in the distribution of his estate, and towards those charged with the exercise of undue influence."

Tested by this rule, we do not think the court erred in refusing the testimony. Hoffman stated that he had the conversation in question with Mason about two years before Mason went to live with contestee and that he thought the testator lived with the contestee about two years before his death.

Mrs. Mason, a sister-in-law of the testator testified that the testator lived with her for three years prior to going to the home of the contestee; that he left her house just after Thanksgiving, in November, 1911, and went to the home of contestee; that he lived there until his death which occurred June 8, 1913.

[415] (8) Declarations of a testator made prior to the execution of a will would necessarily be entitled to probative force according to the nearness or remoteness of the time at which they were made. As the time became more remote they would necessarily lose much of their probative force and there would be a period of time at which such statements would be entitled to no probative force whatever. Such, we think, was the case here. The declarations were made at a period of

time before the declarant went to live with Bowen and amounted to no more than a declaration that at that time he intended his property to go to his relatives at his death. The declaration was made three and one-half years before the testator's death. The period of time to be covered by the declarations of the testator must necessarily be left to a great extent to the sound discretion of the trial court under all the circumstances of each particular case. The reason for this is that the declarations lose value as the time at which they were made grows remote, and when too remote, such declarations lose their probative force, and are entitled to no value whatever as proof of the mental capacity of the testator. *Schouler on Wills, Executors and Administrators*, 15th Ed. vol. 1, section 193.

It is contended that this ruling is contrary to the ruling announced in *Tobin v. Jenkins*, 29 Ark. 151, but we do not think so. In that case a will which was made in 1868 was contested on the ground of the mental incapacity of the testator. The court admitted in evidence a former will executed in 1862 which was executed at a time when there was no question as to the capacity of the testator to make a will. The first will, with regard to the disposition of the testator's property to his son to the exclusion of the children of his daughter, was essentially the same as the contested will. Under the circumstances the court held that it was competent evidence to be considered in connection with the other evidence to show whether the testator's mind was rational at the time the will of 1868 was executed.

(9) As we have already seen, while the will under consideration in the present case made a disposition of the [416] testator's property entirely different from the disposition he had intended to make of it, his declarations on the subject were at a period of time before he went to live with the contestee and the period of time was so remote that we do not think his declarations are entitled to any probative force whatever as tending to show whether or not he was mentally competent at the time he executed the will in question.

In the case of *McCulloch v. Campbell*, 49 Ark. 371, 5 S. W. 590, upon the question of undue influence requisite to avoid a will, the court said:

"As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his

property. And the influence must be specially directed toward the object of procuring a will in favor of particular parties."

What was there said by the court has been uniformly and repeatedly followed since that decision. In the case of *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405, the court, in discussing the question of testamentary capacity said:

"The test of testamentary capacity as declared by this court is that the testator shall have capacity to retain in memory without prompting, the extent and condition of his property, and comprehend to whom he was giving it; and to be capable of appreciating the deserts and relation to him of others whom he excluded from participation in the estate."

Objections are made to certain instructions given by the court. We do not deem it necessary however to set these instructions out or discuss them in detail. It is sufficient to say that the court gave full and complete instructions on the questions of undue influence and testamentary capacity in accordance with the rules of law laid down in the opinions just cited.

[417] (10) Finally, it is contended by counsel for the contestants that the verdict of the jury was not warranted by the evidence. It is true the justice of the peace who was present at the time the will was executed and who took the testator's acknowledgment thereto, said that the testator at that time was not mentally capable of transacting business of any kind; and that his testimony is corroborated by other witnesses for the contestants. It appears from their testimony that the testator had been an invalid for most of his life, suffering with kidney trouble and later with consumption. In order to alleviate his pain his physician prescribed morphine for him and during the last years of his life he became addicted to the use of that drug. It appears from the testimony of the contestants that his mind had become so weakened by his ill health and his constant use of morphine that he was not capable of making his will at the time it was executed. But we cannot balance the evidence and determine where the preponderance lies, for it is a well settled rule of law in this State that the verdict of the jury must be upheld on appeal if there is any substantial evidence to support it.

In the case before us one of the attesting witnesses to the will said that he had known the testator nearly all of his life and that his mind was perfectly clear at the time he executed the will and that he knew what he was doing. A physician who attended him in the fall that he executed the will testified that his mind was clear at that time and that he was mentally capable of executing the will. Another physician who attended him in the

spring and at a period of time about a month before he died, stated that although addicted to the use of morphine the testator's mind was clear and that he was capable of attending to business of any kind. Other witnesses testified that although the testator's body was weakened by disease, his mind remained clear up until the time he died and some of them regarded him as a man of unusual business ability.

On the subject of undue influence, but little need be said. There is little, if anything, to show undue influence [418] except the fact that the testator made a will in favor of the man with whom he lived during the last year and a half of his life. There was abundant testimony to warrant the jury in finding that the will was not procured by undue influence exercised on the testator and there was sufficient evidence to uphold the verdict of the jury on the question of the testamentary capacity of the testator.

It follows that the judgment will be affirmed.

NOTE.

Admissibility of Declarations of Testator Not Made at Time of Execution of Will, on Question of Undue Influence.

Introductory, 717.

Declarations as to Fact of Undue Influence, 717.

Declarations as to Testator's State of Mind, 719.

Remoteness of Declarations, 721.

Introductory.

It is the purpose of this note to review the recent cases discussing the admissibility of the declarations of a testator not made at the time of the execution of the will on the question of undue influence. The earlier cases are collated in the notes to *Hobson v. Moorman*, 5 Ann. Cas. 601; *Linebarger v. Linebarger*, 10 Ann. Cas. 596; and *Swope v. Donnelly*, 70 Am. St. Rep. 637.

Declarations as to Fact of Undue Influence.

The declarations of a testator not made at the time of the execution of his will are not admissible as to the fact of undue influence, statements of that kind being hearsay.

United States.—*Lipphard v. Humphrey*, 209 U. S. 264, 14 Ann. Cas. 872, 28 S. Ct. 561, 52 U. S. (L. ed.) 783.

Alabama.—*Winston v. Elliott*, 169 Ala. 416, 53 So. 750.

Arkansas.—See the reported case.

California.—In re Snowball, 157 Cal. 301, 107 Pac. 598; In re Ricks, 160 Cal. 450, 117 Pac. 532; In re Lavinburg, 161 Cal. 536, 119 Pac. 915; In re Kilborn, 162 Cal. 4, 120 Pac. 762; In re Gleason, 164 Cal. 756, 130 Pac. 872; In re Jones, 166 Cal. 108, 135 Pac. 288.

District of Columbia.—Kultz v. Jaeger, 29 App. Cas. 300.

Georgia.—Edenfield v. Boyd, 143 Ga. 95, 84 S. E. 436.

Illinois.—Crumbaugh v. Owen, 238 Ill. 497, 87 N. E. 312; Norton v. Clark, 253 Ill. 557, 97 N. E. 1079; Doyle v. Doyle, 257 Ill. 229, 100 N. E. 950; Kellan v. Kellan, 258 Ill. 256, 101 N. E. 614; Lyman v. Kaul, 275 Ill. 11, 113 N. E. 944.

Indiana.—Ditton v. Hart, 175 Ind. 181, 93 N. E. 961.

Iowa.—Wendt v. Foss, 161 Ia. 122, 140 N. W. 881; Zinkula v. Zinkula, 171 Ia. 287, 154 N. W. 158; In re Crissick, 174 Ia. 397, 156 N. W. 415.

Kentucky.—McConnell v. McConnell, 138 Ky. 783, 129 S. W. 106; Ridgely v. Brand, 144 Ky. 433, 138 S. W. 269; Rhea v. Madison, 151 Ky. 262, 151 S. W. 667; Wilson v. Taylor, 167 Ky. 162, 180 S. W. 45.

Maryland.—Wagner v. Klein, 125 Md. 229, 93 Atl. 446.

Michigan.—Leffingwell v. Bettinghouse, 151 Mich. 513, 115 N. W. 731, 15 Detroit Leg. N. 40; In re Loree, 158 Mich. 372, 122 N. W. 623, 16 Detroit Leg. N. 630; Provin v. Provin, 161 Mich. 28, 125 N. W. 743, 17 Detroit Leg. N. 198; In re Hartlerode, 183 Mich. 51, 148 N. W. 774.

Missouri.—Teckenbrock v. McLaughlin, 209 Mo. 533, 108 S. W. 46; Padgett v. Pence, 178 S. W. 205; Thomas v. Thomas, 186 S. W. 993.

Nebraska.—In re Johnson, 100 Neb. 791, 161 N. W. 429.

New York.—Gick v. Stumpf, 204 N. Y. 413, 97 N. E. 865, reversing 134 App. Div. 910, 118 N. Y. S. 1108; Smith v. Keller, 205 N. Y. 39, 98 N. E. 214; Matter of Van Ness, 78 Misc. 592, 139 N. Y. S. 485; Matter of Hermann, 87 Misc. 416, 150 N. Y. S. 118; In re Crumb, 127 N. Y. S. 269; In re Benjamin, 136 N. Y. S. 1070; In re Campbell, 136 N. Y. S. 1086; Lester v. Lester, 165 N. Y. S. 592.

North Carolina.—In re Fowler, 159 N. C. 203, 74 S. E. 117; In re Craven, 169 N. C. 561, 86 S. E. 587.

South Dakota.—Ekern v. Erickson, 157 N. W. 1062.

Texas.—Simon v. Middleton, 51 Tex. Civ. App. 531, 112 S. W. 441; Stubbs v. Marshall, 54 Tex. Civ. App. 526, 117 S. W. 1030; McDonald v. McDonald, 150 S. W. 593; Holt v. Guerguin, 156 S. W. 581.

Utah.—In re Miller, 36 Utah 228, 102 Pac. 996

Vermont.—In re Mason, 82 Vt. 160, 72 Atl. 329; In re Smith, 88 Vt. 259, 92 Atl. 223.

Wisconsin.—In re Duncan, 154 Wis. 39, 141 N. W. 1002.

In the case of In re Ricks, 160 Cal. 450, 117 Pac. 532, it was held that where there was no other evidence of undue influence, declarations made by the testatrix years before the execution of her will were not admissible to prove undue influence. The court said: "Declarations of a testator made subsequent to the execution of a will are sometimes admissible when his mental capacity to make a will is involved. No question as to the mental capacity of Mrs. Ricks was involved here. They are admissible also to show the state of feelings of a testator towards and his relations with his children. When made contemporaneously with the execution of his will, if made under such circumstances as to constitute a part of the *res gestae*, the declarations of a testator are also admissible. But declarations made subsequent to the execution of a will are never admissible as proof themselves of undue influence or fraud. After the execution of his will a testator is no more permitted to impeach its validity by declarations respecting it than can the validity of any other instrument be impeached by subsequent declarations of the maker respecting it."

In the case of In re Kilborn, 162 Cal. 4, 120 Pac. 762, evidence of declarations made by a testatrix to the effect that she intended to leave her property to her daughter was held not to be admissible to prove undue influence.

In the case of In re Gleason, 164 Cal. 756, 130 Pac. 872, statements made by a testator a few moments after executing his will, that he "had to do it right away" and if he did not do it it would be extremely uncomfortable at home, being the mere expression of his opinion regarding a past occurrence, were held not to be admissible to prove undue influence.

In Kultz v. Jaeger, 29 App. Cas. (D. C.) 300, wherein the disputed issue was whether undue influence had been exerted on a testatrix in the making of her will, evidence as to declarations made both before and after the execution of the will, as to her testamentary intentions and concerning her relations with the beneficiary of her will and her next of kin, was held not to be admissible to prove undue influence.

In Crumbaugh v. Owen, 238 Ill. 497, 87 N. E. 312, evidence as to declarations made by a testator before and after the execution of his will to the effect that the supposed spirit of his son had influenced him in the disposition of his property was held not to be admissible to prove undue influence.

In *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079, evidence of declarations by a testatrix that the beneficiary under her will, who was the divorced husband of her daughter, had had illicit relations with her and that he had acquired such an influence over her as to influence unduly the making of her will, was held not to be admissible to prove undue influence, but was proper to show her mental condition at the time the will was executed. The court said: "The declarations of a testator are not admissible as proof of the facts stated, and he cannot invalidate his will by declarations made either before or after its execution. They are not admissible to show that a will was executed under duress or undue influence or to show fraud, but they may be proved where they tend to show the mental condition of the testator at the time of the execution of the will or so near the time that the same state of affairs must have existed."

In *Kellan v. Kellan*, 258 Ill. 256, 101 N. E. 614, it appeared that a testatrix had made her home with those who benefited by her will. After her death, the contestants of her will attempted to prove that before she executed it she made statements as to how she desired her property to be left and that she at that time expressed her desire to cut those people off from her will. It was held that the statements could not be admitted as proof of undue influence.

In *Wendt v. Foss*, 161 Ia. 122, 140 N. W. 881, it appeared that the illegitimate grandson of the testatrix had lived with her for many years and she had always expressed great fondness for him. In her will she gave him \$10. Later the testatrix made a statement to a witness to the effect that she desired this illegitimate grandson to have her farm, and that she was going to the courthouse to look at her will, the contents of which she did not know, but she added that she did not wish anything said about her intention, as it would not do her any good. After her death, in a contest of the will, evidence as to those declarations of the testatrix was held not to be admissible to prove undue influence.

In *Zinkula v. Zinkula*, 171 Ia. 287, 154 N. W. 158, an action by daughters to set aside their father's will, it was held that letters written by the testator to the contestants concerning their mother's attitude toward them, and saying that she always spoke to him in anger, were not competent evidence to prove that undue influence was in fact exerted over him by his wife, as declarations of the testator could not be considered to prove undue influence in the absence of independent testimony.

In the case of *In re Crissick*, 174 Ia. 397, 156 N. W. 415, it was held that though it

appeared that the testatrix was a weak and retiring woman and that her husband was a rough and domineering man, her declarations that she had been induced to execute a will through the undue influence of her husband and that she was very fond of certain persons not recognized in the will were not admissible to prove that undue influence had in fact been exerted.

In *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731, 15 Detroit Leg. N. 40, it was held that statements by one of the contestants in a will case to the effect that there had been a conversation held in his presence between the proponent and the testatrix which had had the effect of poisoning the mind of the latter against her other children were not admissible to prove undue influence.

In *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46, the court said: "The doctrine of these cases is that where there is a charge of mental incompetency to make a will statements made by testator are competent; further, that where there is a charge of mental incompetency to make a will statements made by testator are competent; further, that where such statements are made at the time of making the will they become part of the *res gestae* and admissible; and that where there is an issue upon the state of the affections of the testator they may be admitted on that point, but they are not to be received or taken as proof of the truth of facts narrated."

In *Gick v. Stumpf*, 204 N. Y. 413, 97 N. E. 865, *reversing* 134 App. Div. 910, 118 N. Y. S. 1108, it was held that where a testatrix gave to her son certain money before her death, oral declarations made by her inconsistent with that gift were not admissible to prove fraud or undue influence.

In *Stubbs v. Marshall*, 54 Tex. Civ. App. 526, 117 S. W. 1030, the court said: "Where a will is charged to have been procured by undue influence, the law seems to be settled that where there is independent evidence showing, or tending to show, the exercise of undue influence over and upon the mind of the testator at the time the will is executed, then it becomes competent, for the purpose of showing whether he was probably influenced, or what in fact was the status of his mind at the time, to show his declarations and statements relative to it in order to illustrate the question as to whether he was in fact influenced thereby."

Declarations as to Testator's State of Mind.

Declarations of a testator made before or subsequent to the execution of his will are admissible on an issue of undue influence to prove the state of the testator's mind or his

affections toward those who may have an interest in his will. In re Snowball, 157 Cal. 301, 107 Pac. 598; In re Kilborn, 162 Cal. 4, 120 Pac. 762; Hurley v. Caldwell, 244 Ill. 448, 91 N. E. 654; Healea v. Keenan, 244 Ill. 484, 91 N. E. 646; Wilkinson v. Service, 249 Ill. 146, Ann. Cas. 1912A 41, 94 N. E. 50; Norton v. Clark, 253 Ill. 557, 97 N. E. 1079; Holliday v. Shepherd, 269 Ill. 429, 109 N. E. 976; McReynolds v. Smith, 172 Ind. 336, 86 N. E. 1009; Zinkula v. Zinkula, 171 Ia. 287, 154 N. W. 158; In re Crissick, 174 Ia. 397, 156 N. W. 415; Graham v. Courtright (Ia.) 161 N. W. 774; Wilson v. Taylor, 167 Ky. 162, 180 S. W. 45; Grill v. O'Dell, 113 Md. 625, 77 Atl. 984; Dudderar v. Dudderar, 116 Md. 605, 82 Atl. 453; O'Dell v. Goff, 153 Mich. 643, 117 N. W. 59; In re Cooper, 75 N. J. Eq. 177, 71 Atl. 676, *affirmed* Harrison v. Axtell, 76 N. J. Eq. 614, 75 Atl. 1100; In re Crumb, 127 N. Y. S. 269; Lester v. Lester, 165 N. Y. S. 592; Scott v. Townsend (Tex.) 159 S. W. 342; In re Esterbrook, 83 Vt. 229, 75 Atl. 1.

Thus in the case of In re Snowball, 157 Cal. 301, 107 Pac. 598, it appeared that after the death of her husband the testatrix lived with her daughter who had great influence over her and during that period of her life she executed her will. After her death her son whom she had practically disinherited brought a suit to have the will set aside as having been made through the undue influence of the daughter, and the contestant attempted to introduce in evidence certain statements of his mother made some ten months before the execution of the will to the effect that she wanted to make a will in which she would leave the contestant \$3,000 or \$4,000, and leave her ranch to her sons and that her daughter had already had enough. Those declarations were held to be admissible as bearing on the state of mind of the testatrix toward her children. The court said: "It is urged that evidence was received in violation of the rule contended for by appellants that, 'where the issue before the court is that of undue influence, the declarations of the decedent are inadmissible to show her testamentary intention, or undue influence, and this is true, whether the declarations be made before or after the making of the will.' The rule in this state in regard to the admissibility of such declarations, when not so made as to constitute a part of the *res gestae*, is clearly established by the decisions. They are not admissible in proof or disproof of any statement of fact contained in them, or for the purpose of showing the exercise of undue influence. But whenever the condition or state of mind of the declarant is a material matter, declarations of the testator legitimately tending to shed light on that question are admissible solely

for that purpose, that is for the purpose of showing his then condition or state of mind, the effect being, as was said in the case of In re Arnold, 147 Cal. 594 [92 Pac. 256], 'carefully limited to the question of his condition of mind.' The most common case in which such declarations are admissible is, of course, the case where the question is as to the mental capacity of the testator to make a will. But the authorities recognize that, as is obvious, the condition or state of mind of the testator at times preceding the execution of the will is a material matter where the issue is undue influence, not for the purpose of showing the exercise of undue influence by another, which cannot be so shown, but for the purpose of showing the effect of undue influence proved by other evidence. As is said in the case last cited, there is a distinction between the effect of such declarations to prove the undue influence and fraud, and their effect to prove the state of mind of the testator."

In the case of In re Kilborn, 162 Cal. 4, 120 Pac. 762, evidence of declarations made by a testatrix that she intended to leave her property to her daughter was held to be admissible to show the relations between them.

In Wilkinson v. Service, 249 Ill. 146, Ann. Cas. 1912A 41, 94 N. E. 50, it appeared that the testator was a physician who had resided and practiced for many years in Chicago. His only daughter, who later contested his will, had been married for a long period of time and resided in St. Paul. By his will the testator gave his household furniture and surgical instruments to another physician and left the rest of his property to his sister. After his death, the daughter brought suit to have the will set aside as induced by undue influence, and the defendants attempted to introduce evidence of a statement made by the testator to the effect that he had received a letter from his son-in-law forbidding him to communicate with his daughter. That statement taken in connection with the fact that he had made two other wills practically disinheriting his daughter was held to be admissible to show his attitude to his daughter and his reason for making the will. The court said: "The rule is well established in this state that the declarations of the testator are competent, in a contest involving the validity of his will, to show the state of his mind but not to prove the facts stated. (Reynolds v. Adams, 90 Ill. 134; Hill v. Bahrns, 158 Ill. 314; Taylor v. Pegram, 151 Ill. 106; Kaenders v. Montague, 180 Ill. 300; Baker v. Baker [202 Ill. 595].) Whatever is material to prove the state of a person's mind or what is passing in it, and what were his intentions, may be shown by his declarations and statements. The truth or falsity of such statements is of

no consequence. They are to be used only as showing the condition of his mind. Declarations, prior to the execution of the will, that certain of the testator's children were wanting in natural affection are properly considered as showing his state of mind."

In *McReynolds v. Smith*, 172 Ind. 336, 86 N. E. 1009, wherein a will was contested on the ground of testamentary incapacity and undue influence, it was held that evidence as to declarations of the testator that he had had a spiritual revelation to make a will which was unjust to his son, that it was a sacred document and that he would not change it, was admissible to prove the condition of his mind.

In *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984, it appeared that a testatrix had been making for many years deposits in a bank. In her will she partly disinherited her daughter. In a contest of the will a sister of the testatrix testified as to statements made by her that she wished the deposit account to be kept secret and that she was making the savings for her daughter. Those declarations were held to be admissible to show the attitude of the testatrix as to her estate and the object for which it was being accumulated.

In *Wilson v. Taylor*, 167 Ky. 162, 180 S. W. 45, evidence as to declarations made by a testator before and after the execution of his will that he had been induced to make it by threats of his wife that she would take his life was held to be competent to show the mental condition of the testator and his susceptibility to the influences by which he was surrounded at the time he executed his will.

In *Scott v. Townsend* (Tex.) 159 S. W. 342, the court said: "The distinction between declarations that are mere narratives of facts and those that are expressive of some mental state, it is believed, will likewise furnish a satisfactory explanation of apparent conflicts in some of the many decisions throughout the country upon the question now under discussion. That physical suffering, intentions, ill feelings, affections, and other emotions, when they are material circumstances to establish an issue, may, on the principle of *res gestae*, be established by proof of declarations contemporaneous with such intentions or feelings indicating them is a familiar doctrine; and this exception to the general rule, which excludes hearsay testimony, is as well established as is the rule itself."

In *re Esterbrook*, 83 Vt. 229, 75 Atl. 1, wherein a will was contested on the ground of testamentary incapacity and undue influence, it was held to be competent to prove declarations of the testatrix as to the cir-

cumstances of a fall just prior to the execution of her will as indicating something of her mental condition at that time.

Remoteness of Declarations.

It is of course essential to the admissibility of declarations as to the mental condition of a testator that they should be sufficiently close to the execution of the will to have some bearing on his condition at that time. In *Winston v. Elliott*, 169 Ala. 416, 53 So. 750, declarations made by a testator many years before he even thought of making a will as to where he had obtained the money with which he had bought his property and as to whether he had received it from his first wife were held to be incompetent because of their remoteness.

In *Helsley v. Moss*, 52 Tex. Civ. App. 57, 113 S. W. 599, an action to set aside a will because of mental incapacity and undue influence, declarations made by the testatrix many years before the execution of her will to the effect that if she made one all of her children should share alike were held to be inadmissible to prove her state of mind at the time of the execution of the will.

In *Gernert v. Straeffer*, 162 Ky. 605, 172 S. W. 1044, a will contest, evidence to prove an oral promise made by the testator many years before to give certain property to the contestants was held to be incompetent because it was too remote to have any bearing on the issues involved in the contest.

In the reported case it is held that a declaration made by a testator three and one-half years before the execution of his will that he would leave his property to the members of his family was too remote to have any probative force.

In *Smith v. Keller*, 205 N. Y. 39, 98 N. E. 214, it appeared that a testatrix had disinherited one daughter for marrying against her will and lived with a son and another daughter. After her decease the disinherited daughter brought suit to have the will set aside as invalid because of undue influence, and offered evidence as to declarations made by the testatrix subsequent to the execution of the will to the effect that she desired to change the will in favor of the contestant but could not do this because of the undue influence of her other children. This testimony was held not to be admissible on the issue of undue influence. The court said: "The declarations elicited by the questions expressly referred to herein were made from six to ten years after the date of the will, and they were inadmissible for that reason."

CISSNA LOAN COMPANY

v.

GAWLEY ET AL.

Washington Supreme Court—September 27,
1915.

87 Wash. 438; 151 Pac. 792.

**Usury — What Constitutes — Provision
for Acceleration of Maturity.**

Where a series of notes given for a loan do not reserve a usurious rate of interest if paid when due, but contain stipulations to the effect that default in payment shall accelerate maturity of the entire debt, which will render the interest, for the time the borrower had the use of the money under the acceleration clause, usurious, such notes are not void for usury: the excessive rate of interest after maturity of the debt being in the nature of liquidated damages, to be enforced only to the extent not unconscionable. [See note at end of this case.]

**Provision for Payment before Ma-
turity.**

Instalment notes carrying a legal rate of interest, but which would carry a usurious rate of interest if paid before maturity at borrower's option, are not void for usury, since the borrower is not obligated to pay before maturity.

Appeal from Superior Court, Whatcom county: HARDIN, Judge.

Action by Cissna Loan Company, plaintiff, against Hector Gawley et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Hadley, Hadley & Abbott, Thomas R. Waters and W. J. Biggar for appellant.
Craven & Greene for respondents.

[439] FULLERTON, J.—On April 8, 1910, the respondents, Hector Gawley and Jessie M. Gawley, his wife, executed and delivered to the Home Loan Company, a corporation, then doing business in the city of Bellingham, their joint and several promissory notes, ninety-six in number, each providing for the payment to the Home Loan Company of the sum of \$24.80. The notes were numbered from 1 to 96, inclusive, and were of like tenor and effect, save as to the time of maturity: the note numbered 1 maturing on the 8th day of the first following month, the note numbered 2 on the 8th day of the second following month, the note numbered 3 on the 8th day of the third following month, and so on for the remainder of the series. The terms of the several notes are sufficiently indicated by the terms of the first of the series, which we herewith set forth in full:

"(Note No. 1. Series No. 294.)

"Bellingham, Wash., April 8, 1910.

"On or before May 8, 1910, for value received, I promise to pay to the order of Home Loan Co. at its office, Bellingham, Wash., the sum of twenty-four 80-100 dollars, \$24.80. With interest at the rate of one per cent per month from maturity until paid.

"For value received, each and every person signing or endorsing this note binds himself as a principal and not as a surety, waives presentment, demand, protest and notice of nonpayment thereof, and agrees that the time of payment may be extended; and further promises and agrees that if this note is placed in the hands of an attorney for collection after it becomes due, to pay a reasonable attorney's fee, whether the collection is made by suit or otherwise, which fee shall be payable when this note is so placed for collection, and this note being one of the series of notes as indicated by [440] the series number hereon, and on each of the 96 notes, the entire series shall become due and payable upon default of any one of said notes, and if an action is brought to foreclose the mortgage given to secure these notes, consents that a deficiency judgment may be rendered against him.

"A discount of 5 per cent per annum will be allowed for the unexpired time on any note paid before due.

"Hector Gawley,
"Jessie M. Gawley."

The notes were secured by a mortgage upon certain real property belonging to the makers of the notes. The mortgage recited that it was executed in consideration of the sum of \$2,380.80, receipt of which was acknowledged, and was conditioned for the payment of the notes according to their tenor and effect. It was conditioned further to the effect that the mortgagors would keep the buildings on the mortgaged premises insured in a named sum, and in case of their failure so to do, that the mortgagee might insure the premises, whereupon the premiums paid for such insurance should become a lien upon the premises secured by the mortgage. It contained also a provision for a reasonable attorney's fee in case suit or action should be begun to foreclose the mortgage, and contained the usual accelerating clause to the effect that the whole of the sum should become due and payable in case of the failure of the mortgagors to pay any of such notes as they matured.

Subsequent to the execution of the notes and mortgage, the Cissna Loan Company, the appellant in this action, succeeded to the title and interest of the Home Loan Company in and to the same. Thereafter, by mutual agreement between the parties, the terms of the notes were changed so as to make the

clause therein relating to the discount read: "All unearned interest will be deducted from any note paid before due;" the makers consenting thereto in writing.

The makers of the notes paid them down to and including the note numbered 21, which became due February 8, 1912, but defaulted as to the remainder. This action was begun [441] by the Cissna Loan Company, as plaintiff, against the makers of the notes and mortgage, as defendants, after maturity of the note numbered 38, to recover upon the unpaid notes and to foreclose the mortgage. In its complaint the plaintiff set forth the notes and mortgage according to their terms and conditions, alleged that there was due thereon, at the time of the commencement of such proceedings, \$1,604.40; that it had expended \$14 in payment of insurance on the premises; that \$175 was a reasonable sum to be allowed it as attorney's fees, and for these sums demanded judgment.

The principal defense was that of usury. The defendants' evidence tended to show that the notes and mortgage were executed in consideration of an actual loan of \$1,600, which, they contended, if repaid according to the terms of the notes as they matured, or if recovery were permitted according to their terms in case of default in such payment, a rate of interest would be exacted for a loan or forbearance of money greater than twelve per centum per annum; the maximum rate of interest permitted by the statute.

The trial court found from the evidence that the actual amount of the loan was \$1,605; and that the sum reserved as interest therein was less than twelve per centum per annum, if the notes were paid according to their tenor and effect as they fell due, but that, because of the accelerating clause therein permitting the recovery of the whole sum of principal and interest prior to maturity in case of a default in the payment of any one of them, the contract was usurious. The court also found that the penalties imposed by the statute exceeded the amount of the loan, and that the plaintiff was not entitled to recover any part of the unpaid balance thereof. Judgment was thereupon entered cancelling the obligation sued upon. This appeal is from the judgment so entered.

We agree with the trial court that, had the makers of the notes paid them as they matured, they would not have paid interest on the principal sum borrowed in excess of twelve per centum per annum for the time they had the use of such principal [442] sum. The respondents have, however, offered a number of solutions of the mathematical problem involved which lead to a contrary conclusion. But without entering into details, we think the formulas employed in making the calculation inapplicable. The contract of loan is

not on its face usurious. It is made to appear so, if it so appears at all, by showing ulterior facts; by the showing that the actual consideration for the contract was a loan or forbearance of money in a sum less than the aggregate sum agreed to be repaid. Ulterior inquiry is thus permissible from the necessities of the case, since otherwise usury would always be concealed in the form of the contract, and the statute forbidding it thereby rendered nugatory. Hence the courts, in determining whether a particular transaction is usurious, disregard the form and look to the substance of the transaction. But in so doing they will not resort to refined theories, either for the purpose of making the transaction usurious, or of relieving it from usury. They will determine the time the borrower is to have the use of the principal sum loaned, and ascertain whether the interest reserved for such time exceeds the statutory rate.

Applying the principle to the present case, we find that the case is, in essence, a loan of a given sum of money to be returned in partial payments made at stated intervals in a given amount. The solution of the problem is, therefore, found by finding what per annum rate of interest will be paid on a loan of \$1,605 by the payment of \$24.80 monthly for ninety-six months; the payments to be applied on the loan according to the ordinary rule of partial payments. Such an ascertained rate will be found to be less than twelve per centum per annum; it will be found that the sum reserved as interest is equal to a rate per annum on the amount of the loan of between 10.5 per centum and 10.6 per centum per annum for the time the borrowers are permitted to have the use of the principal sum.

Since, therefore, the interest reserved does not exceed the maximum statutory rate if paid according to the terms of the [443] contract of loan, it remains to inquire whether the accelerating clauses of the contract render it usurious. The usual test for the existence of usury is, will the contract, if performed, result in producing to the lender a rate of interest greater than the maximum rate permitted by the statute, and was such result intended. The courts generally hold that stipulations in the contract to the effect that default in the payment of interest, or of an installment of the principal, shall accelerate the maturity of the entire debt are not usurious, even though the contract, if enforced according to the terms of the default, will result in giving the lender a rate of interest greater than the maximum statutory rate. They regard the excessive rate after maturity as in the nature of liquidated damages or penalties, to be enforced only to the extent that they are not unconscionable.

39 Cyc. 953; Crider v. San Antonio Real Estate, etc. Assoc. 13 Tex. Civ. App. 399, 37 S. W. 237, 46 S. W. 863; Taylor v. Buzard, 114 Mo. App. 622, 90 S. W. 126; Goodale v. Wallace, 19 S. D. 405, 9 Ann. Cas. 545, 103 N. W. 651, 117 Am. St. Rep. 902; Law Guarantee, etc. Soc. v. Hogue, 37 Ore. 544, 62 Pac. 380, 63 Pac. 690; Savannah Sav. Bank v. Logan, 99 Ga. 201, 25 S. E. 692; Richardson v. Campbell, 34 Neb. 181, 51 N. W. 753, 33 Am. St. Rep. 633.

Our own cases are to the same effect. In Blake v. Yount, 42 Wash. 101, 7 Ann. Cas. 487, 84 Pac. 625, 114 Am. St. Rep. 106, the action was upon a promissory note providing that, in case the interest accrued therein was not paid when due, the amount thereof should be added to the principal and the whole thereof, both interest and principal, should bear interest thereafter at the maximum rate permitted by statute. The defense was usury, but the court held the note not to be usurious, using the following language:

"Wherever the debtor by the terms of the contract can avoid the payment of the larger by the payment of the smaller sum at an earlier date, the contract is not usurious but additional, and the larger sum becomes a mere penalty. [444] The rule is stated in 29 Am. & Eng. Enc. of Law (2d ed) 507, as follows:

"Stipulations to the effect that if the debt be not paid at maturity it shall draw interest thereafter at rate greater than the statutory limit are now generally regarded as penalties to induce prompt payment, and as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such agreements are held to be free from usury."

See, also, Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L.R.A. 676; Thomson v. Koch, 62 Wash. 438, 113 Pac. 1110.

Tested by these rules, the notes are not usurious for the reason assigned by the respondents. The lender cannot, by the terms of the notes, exact from the borrowers, of his own volition, a greater rate of interest than the maximum rate permitted by the statute. This right, if it accrues to it at all, accrues by reason of the default of the borrowers, and this we hold, as we believe with the weight of authority, cannot make a contract illegal which would otherwise be legal if performed by the borrowers. As was said in Crider v. San Antonio Real Estate, etc. Assoc. supra:

"It is on the assumption that contracts will be performed according to their stipulations by the parties to them, and not upon the supposition that they will be violated, their legality should be determined. It would be an anomaly to make the violation of a contract the test of its legality; to say to a

party, 'If you perform your agreement according to its terms, it is valid and meets all the requirements of the law; but if you fail to observe its provisions, it *ipso facto* becomes illegal.' This would place it in the power of one by a breach of a legal agreement by his own wrong to avoid its performance and to visit the punishment due his own iniquity upon him whose rights he has violated. The party who violated his contract alone should suffer and be held liable for the consequences of its violation."

But the trial court seems to have rested its decision in part on the fact that the notes were payable before maturity at [445] the option of the borrowers, at an advanced rate of interest which would render them usurious if so paid. But we cannot think this fact justifies the conclusion that the notes are usurious. Such a payment would be voluntary on the part of the borrowers. They were in no way obligated to pay the loan before maturity. The agreement was thus in the nature of a penalty which the lender exacted for the privilege of paying before maturity. Not being capable of enforcement by him, it was not usurious. As was said in Eldred v. Hart, 87 Ark. 534, 113 S. W. 213:

"In the present case Hart had the option to let the loan run for the entire period of five years; and if he had done so, the undisputed facts show that he would have paid eight per cent interest. The parties had the right, when the contract was made, to divide up the payments for interest to suit their own convenience, and to have separate obligations given for all or any part of it.

"This seems to have been the plan adopted. If Hart had let the loan run for the full period of five years, he does not claim that he would have paid more than eight per cent interest. He could not have been compelled to have paid it before that time. He did not obligate himself to do so. He only obligated himself to pay the interest as it accrued before the principal sum fell due. So then it is undisputed that by the terms of the contract, as it could have been enforced against him, it was not affected with usury. The payment made by the appellee Hart was voluntary, and was in the exercise of an option given him by the contract.

"Where a debt, including both principal and interest and due by installments, if paid according to the terms of the contract, is free from usury, the transaction is not rendered usurious by the voluntary payment of the debt in full before some of the installments matured, although as a result the creditor would receive, in the aggregate, a sum amounting to more than the principal and the maximum legal rate of interest."

The foregoing considerations require a reversal of the judgment entered in the trial court. We think, however, that it would be

unconscionable to enforce the contract according to [446] the terms provided therein in case of a breach of the conditions. But, since the parties contracted for a rate of interest on the principal loan approximating 10.5 per centum per annum, it would be but just to allow interest on the principal sum of the loan at that rate, both prior and subsequent to the default. The lender also paid, on behalf of the respondents, the sum of \$14 in premiums for insurance on the mortgaged premises, and this sum should be added to the principal sum and draw interest at a like rate.

Making application of the rule, we find that there was due on the principal sum borrowed, after the payment of the note numbered 21, namely, on January 28, 1912, the sum of \$1,358.20, adding to this the insurance premium of \$14 makes a total of \$1,372.20. We also find that a reasonable attorney fee to be allowed the plaintiff is the amount demanded in the complaint, namely, \$175.

The judgment appealed from is therefore reversed, and the cause remanded with instructions to enter in favor of the plaintiff and against the defendants the usual judgment and decree of foreclosure in the sum of \$1,372.20, with simple interest thereon at the rate of 10.5 per centum per annum from January 8, 1912, together with an attorney fee of \$175.

Morris, C. J., Ellis and Main, JJ., concur.

NOTE.

Provision for Acceleration of Maturity of Debt on Default in Payment of Interest or Instalment of Principal as Usurious.

It seems to be well settled that a provision, in an agreement for the payment of money, which accelerates the maturity of the debt on default in payment of either interest or an instalment of principal does not constitute usury. *Wells v. Girling*, 4 Moo. C. Pl. 78, 1 Brod. & B. 447, 5 E. C. L. 142; *Georgia Southern, etc. R. Co. v. Mercantile Trust, etc. Co.* 94 Ga. 306, 21 S. E. 701, 47 Am. St. Rep. 153, 32 L.R.A. 208; *Moore v. Cameron*, 93 N. C. 51; *Garland v. Union Trust Co. (Okla.)* 165 Pac. 197; *Goodale v. Wallace*, 19 S. D. 405, 9 Ann. Cas. 545, 103 N. W. 651, 117 Am. St. Rep. 962; *Stuart v. Tenison Bros. Saddlery Co.* 21 Tex. Civ. App. 530, 53 S. W. 83; *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024, 23 Am. St. Rep. 332, 12 L.R.A. 93. See also *Cridler v. San Antonio Real Estate, etc. Assoc.* 13 Tex. Civ. App. 399, 37 S. W. 237, 46 S. W. 863, 89 Tex. 597, 35 S. W. 1047. And see the reported case.

In *Moore v. Cameron*, 93 N. C. 51, it appeared that money was borrowed, to be re-

paid within five years, with interest payable semi-annually at the rate of eight per cent. One of the provisions of the agreement was that in case of default of payment of any of the interest instalments the entire principal and interest should become due. It was held that there was no usury in the agreement. The court said: "Now can the form in which the obligation to pay interest is put be allowed the effect of making the debtor pay interest, when as such none does or can accrue? The defendants ascribe this result to the fact that bonds therefor are given, and the deed declares upon a failure to pay any one of them, that each shall become a present indebtedness without reference to their character as representing interest. This would be to sacrifice substance to form and thwart, by literal interpretation of a few words, the clear intent and understanding of both parties, in entering into the arrangement under which the securities were issued, and most oppressive in its operation on the debtor. The true and just construction is, in our opinion, that the lender reserves the right, in the contingency mentioned, to terminate the credit and recall what was then due of principal and interest without further indulgence or delay, and in order to this, to require a sale of the land conveyed for its security. This election exercised involves the surrender of all the outstanding interest bonds not required for what was then due, and so will the court adjudge."

In *Goodale v. Wallace*, 19 S. D. 405, 9 Ann. Cas. 545, 103 N. W. 651, 117 Am. St. Rep. 962, it appeared that the defendant executed a number of notes, payable at different times in consecutive order, for the payment of a mortgage debt due to the plaintiff. The mortgage contained a stipulation that in case of default of payment of any of the notes as they fell due, or of interest, all the notes and interest should become due and payable. On the question whether this proviso was binding the court said: "It is further contended by the appellants that as there was a stipulation in the mortgage that if the mortgagors should fail to pay any portion of the above-mentioned sum, either principal or interest, promptly at the times they should become due, the whole sum—both principal or interest—should at once become due and collectable, therefore the contract was clearly usurious, as the whole amount of the principal of the notes would become due and payable upon default in the payment of the first note; but this contention is untenable, for the reason that such stipulation is in the nature of a penalty from which the mortgagors could relieve themselves by a prompt payment of the notes when due. *Webb on Usury*, § 120; 29 Am. & Eng. Enc. of Law (2d ed.) p. 486. The author, in speaking of this class of cases,

says: 'So, if the provision for the payment of excessive interest is dependent on contingency which the borrower may avoid by paying the debt, with legal interest, the loan will not be deemed usurious.' *State v. Elliott*, 61 Kan. 518, 59 Pac. 1047; *Tholen v. Duffy*, 7 Kan. 405. A similar clause is frequently inserted in mortgages, but the stipulation has never been held as constituting a contract for the payment of usurious interest, so far as our researches extend."

In *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024, 23 Am. St. Rep. 332, 12 L.R.A. 93, the court said: "It is contended that as the deed of trust provides that on failure of the borrower to pay said note or either of said coupons, or failure to comply with any of the stipulations contained in said deed of trust, the whole sum of money secured thereby may without notice to the borrower, at the option of the lender or his assigns, and at his option only, be declared due and payable at once, and the trustee was authorized to take possession and sell the land; and as default was made in the payment of the coupon due December 1, 1887, and the whole amount was declared due, the whole five years interest became collectable according to the terms of the contract long before the termination of the five years, thus making the interest reserved greater on the happening of the contingency than 12 per cent per annum, and the contract usurious under the laws of this state. We do not think that a correct construction of the contract will make a greater amount of interest due and collectable upon it than shall have accrued on the principal calculated up to the date of collection at the rate named in the note; or in other words, that any unaccrued interest comes within the proper meaning of the stipulation."

So in *Wells v. Girling*, 4 Moo. C. Pl. 78, 1 Brod. & B. 447, 5 E. C. L. 142, it was said: "Blosset, Serjt. in moving for the rule contended, that if, according to the terms of the note, the whole 87*l*, 3*s*. had been paid upon a failure of the first instalment or any instalment prior to the last, a part of the 7*l*, 3*s*. which constituted the interest of the 80*l*, from the 11th of May, 1816, to the 24th of June, 1818, would have been paid before it became due as interest, and therefore the contract was usurious. He cited 2 Hawk. pl. cor. tit. Usury, and *Morse v. Wilson* (4 T. R. 353; *verba Ashhurst, J.*). . . . But the court was unanimously of opinion that this was a common stipulation for a penalty in case of a default, and not a usurious contract."

But in *Miller v. Ferguson* (Ky.) 47 S. W. 1081, the court said: "It was stipulated in the bond that, in case appellant got in arrears as to payment of as many as four of said notes, appellee should have the right to treat all as due and payable. . . . In

our opinion, the lower court erred in sustaining a demurrer to the answer, and rendering judgment for the entire amount claimed in the petition. In the first place, according to statements in the answer, which are to be taken as true on demurrer, the sum of \$650 was exclusively for loaned money; and, while the agreement to count interest thereon for five years might have been enforced at end of that period, no part of the principal and interest thus added together was collectable before, because the transaction would be thereby rendered usurious."

FINLEY

v.

ATLANTIC TRANSPORT COMPANY, LIMITED.

New York Court of Appeals—March 6, 1917.

220 N. Y. 249; 115 N. E. 715.

Dead Bodies — Property Right in Dead Body.

There is no right of property in a dead body in the ordinary commercial use of the term.

[See note at end of this case.]

Right of Dissection.

Under Penal Law (Consol. Laws, c. 40), § 2211, as to burial of dead bodies, right of dissection exists only when a coroner is authorized by law to hold an inquest, or when the next of kin authorizes dissection to learn the cause of death.

Duty to Bury.

At common law it is the duty of an individual under whose roof a poor person dies to carry the body decently covered to the place of burial, and the body cannot be cast out so as to expose it to violation or offend the feelings or injure the health of the living.

Unnecessary Burial at Sea.

Where a steamship passenger died, and the body was embalmed and put in such condition that it could have been carried to New York, the common-law duty of the steamship company was to carry the body to New York and to deliver it to the next of kin for burial, and for breach of such duty a son has a cause of action.

Actions — Novel Cause of Action.

That the action is novel, and there is no precedent, does not lead to a conclusion that there is no remedy for the alleged wrong.

Dead Bodies — Property Right in Dead Body.

A son has a legal right to the possession of the dead body of his father, and any un-

lawful interference with that right is an actionable wrong.

[See note at end of this case.]

Damages — Inference of Damage from Breach of Contract.

Whenever there is a breach of a contract for the invasion of a legal right the law infers some damage.

Dead Bodies — Action for Injury — Parties.

A son suing a steamship company which buried his deceased father's body at sea for mental anguish and personal damage need not join his brothers and sisters as plaintiffs.

Finley v. Atlantic Transport Co. 172 N. Y. App. Div. 907, affirmed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Action by H. Blair Finley, plaintiff, against Atlantic Transport Company, Limited, defendant. Judgment for plaintiff at Special Term of Supreme Court. Judgment affirmed by Appellate Division of Supreme Court. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Ray Rood Allen and *Norman B. Beecher* for appellant.

Gilbert H. Montague and *Walter D. Wile* for respondent.

[252] HOGAN, J.—The Appellate Division of the first department has certified in this case that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, as follows:

1. Does the complaint state facts sufficient to constitute a cause of action?

2. Is there a defect of parties in that the other next of kin of Clement B. Finley are not joined as parties plaintiff in this action?

[253] Briefly summarized, the complaint alleges that the defendant is engaged in the operation of a steamship line and employed in the transportation of passengers between England and the United States.

June 28th, one Clement B. Finley purchased from defendant a ticket entitling him to first-class passage from London to New York on the steamship Minneapolis, operated by defendant, and boarded the steamship, upon which there were none but first-class passengers and the crew. The steamship proceeded to the city of New York and docked at that port about six o'clock in the evening of July 7th, 1913.

The plaintiff is a son of Clement B. Finley, deceased. The latter at the time of his death had no wife living, but left the plaintiff and other sons and daughters. The plaintiff and Clement B. Finley, during his lifetime, resided at Chattanooga, Tennessee.

During the course of the voyage and about 7 o'clock in the morning of July 2d, 1913, Clement B. Finley died. Immediately upon

his death defendant took possession of his property and effects of the value of seven hundred fifty dollars, amongst which property and effects were letters indicating that plaintiff was a son of Clement B. Finley, and the address of the plaintiff; that the amount of the personal effects of the deceased greatly exceeded the sum necessary to defray the expenses of notice to plaintiff of such death, which might have been communicated to him at his address, together with the expense of embalming the body, transportation of the same to New York and giving it a decent burial.

Shortly after the death of Mr. Finley the defendant caused his body to be embalmed, whereby the body was kept in a perfect state of preservation and was made proof against decomposition for a period greatly exceeding the time ordinarily occupied by the voyage from the point at which the steamship was when Mr. Finley died to the docking point at New York city.

[254] It is further alleged that the defendant continued to carry the body of Mr. Finley until about five o'clock in the afternoon of July 6th, 1913, when the steamship approached tidal waters near Nantucket Shoals, Massachusetts, at which time defendant, though in possession of the property and effects of the deceased and information as to plaintiff's address as stated, and though the body was then in a perfect state of preservation and proof against decomposition, and while plaintiff was then and at all times ready, willing and able to receive the body for burial, determine the place of burial and defray all expenses incident thereto, nevertheless the defendant negligently, wrongfully and willfully failed and refused to notify plaintiff or any of the next of kin of the deceased of the death of Mr. Finley and failed and refused to transport the body to the docking point in New York and at the time when in or near said tidal waters negligently, wrongfully and willfully caused the body to be cast into the sea in a place unknown and inaccessible to plaintiff.

That on July 7th, 1913, about 2:30 P. M. defendant notified plaintiff that Clement B. Finley had died at sea, and plaintiff immediately notified defendant that he would procure an undertaker and meet the steamship at New York to take charge of the body; that when the steamship docked at New York, about six o'clock on the evening of that day, plaintiff and the undertaker in his behalf demanded of defendant the body of his father, Mr. Finley, for the purpose of burial; that defendant then and has since, wrongfully refused to deliver possession of the body to plaintiff, one of the next of kin of said deceased, or to the undertaker, and informed the undertaker and plaintiff that the body was disposed of at sea as above

described several hours before the steamship docked.

The complaint then alleges that the acts of defendant were negligent, wrongful and willful, a gross outrage upon plaintiff's rights and sensibilities and an unlawful [255] interference with and violation of his rights to the solace and comfort of a burial of the body of Clement B. Finley by the plaintiff and other next of kin, and the right of plaintiff to receive the body for the purposes of determining the place of burial and the burial of the same, whereby plaintiff was shocked and wounded in feelings, caused mental distress, anguish, suffering, expense, etc., for which he demands damages.

That there is no right of property in a dead body in the ordinary acceptation of the term is undoubtedly true when limited to a property right as understood in the commercial sense. Respect for the dead, the feelings of mankind for their deceased parents, relatives and friends has been recognized by the legislature and the courts. In this state, the Penal Law, section 2211, provides "except in the cases in which a right to dissect it is expressly conferred by law, every dead body of a human being, lying within this state, must be decently buried within a reasonable time after death." A right of dissection exists only when a coroner is authorized by law to hold an inquest *and no further*; or whenever and so far as the husband, wife or next of kin of the deceased, being charged by law with the duty of burial, may authorize dissection for the purpose of ascertaining the cause of death *and no further*; by order of the court in a criminal proceeding to ascertain the cause of death (Penal Law, § 2213); by medical colleges upon bodies delivered to them by hospitals, prisons, asylums, etc., provided no corpse shall be delivered or received if desired for interment by relatives or friends within forty-eight hours after death, or, if known to have relatives or friends, without the assent of such relatives or friends, etc. (Public Health Law (Cons. Laws, ch. 45), §§ 316, 317.)

At common law it is the duty of an individual under whose roof a poor person dies to carry the body decently covered to the place of burial and to refrain from doing anything which prevents in anywise a suitable burial. [256] The body cannot be cast out so as to expose the same to violation or to offend the feelings or injure the health of the living. (Reg. v. Stewart, 12 Ad. & El. 773, 40 E. C. L. 192.) In Patterson v. Patterson, 59 N. Y. 574, 583, 17 Am. Rep. 384, Judge Folger quoted from the case of Chapple v. Cooper, 13 M. & W. (Eng.) 252) with approval: "There are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it no great extension of the rule

to say, that it may be classed as a personal advantage and reasonably necessary to him," and from Reg. v. Stewart (supra): "This right existing, the law casts upon some one the duty of seeing that it is accorded."

What obligation, if any, was assumed by the defendant by reason of the embalming and preservation of the body? From the complaint we may assume that defendant in the operation of a first class steamship had supplied a person qualified to embalm the body of the deceased and had provided a suitable place for the storage of the same; that the body was kept in a perfect state of preservation and made proof against decomposition for a period greatly exceeding the time ordinarily occupied by the voyage from the point where the steamship was at the time of death and the city of New York. Having embalmed the body, defendant continued to carry the same until about five P. M., July 8th, 1913, a period of upwards of four days, when defendant buried it at sea in or near Nantucket Shoals at a time when the steamship was about twenty hours from port.

The question as to whether or not defendant was under a legal duty to embalm the body in the first instance is not presented on this appeal. The contractual relations, if any, between the deceased and the defendant are not alleged in the pleadings. The only question before us is what duty devolved upon the defendant in view of the situation it created. It had prepared the body in such manner that danger was not to be expected and could [257] not arise from the presence of the same on board the steamship. It carried the body on board the steamship four and one-half days before the burial of the same. Ample means to defray the expense of delivering the body at the port of New York were in possession of defendant, and plaintiff was at all times ready and willing to defray any expense incident to the delivery of the body to him for burial.

Under the circumstances and the facts alleged in the complaint a reasonable discharge of the common-law duty required defendant to transport the body to the port of New York and deliver it to the parties entitled to the possession of the same for burial. At the time of the burial at sea the body could have been carried to port without injurious effect. Had the steamship been passing through the harbor of New York and approaching its dock, it could scarcely be said that the defendant would be justified in casting the body into the water from whence it could not be reclaimed, thereby depriving the next of kin of the solace of giving the body a decent burial on land.

The action at bar may be, as is said, a novel one. The absence of precedent does not lead to a conclusion that there is no remedy

for the wrong alleged to have been inflicted upon the plaintiff. The principles to which attention has been called in connection with decisions of the courts in analogous cases when applied to the facts stated in the complaint sustain the right of action in plaintiff.

A right of action has been sustained for an unauthorized dissection or one contrary to the wishes or consent of the widow, heirs or next of kin (*Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. S. 471; *Darcy v. Presbyterian Hospital*, 202 N. Y. 259, 95 N. E. 695; Ann. Cas. 1912D 1238; *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 61 Am. St. Rep. 273, 38 L.R.A. 413; *Larson v. Chase*, 47 Minn. 308, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L.R.A. 85; *Phillips v. Montreal Gen. Hospital*, 33 Quebec Super. Ct. 483); for retaining organs [258] of a deceased body after autopsy or without consent (*Hassard v. Lehan*, 143 App. Div. 424, 128 N. Y. S. 161; *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 68 L.R.A. 956), and for mutilation of a body (*Georgia Medical College v. Rushing*, 1 Ga. App. 468, 57 S. E. 1083; *Kyles v. Southern R. Co.* 147 N. C. 394, 61 S. E. 278, 16 L.R.A. (N.S.) 405).

Counsel for appellant argued that plaintiff is not entitled to recover damages for injuries to his feelings, and even assuming the facts before the court, it is only chargeable with an error of judgment or at most with negligence, consequently a recovery for mental anguish cannot be sustained.

The plaintiff had a legal right to the possession of the body for burial and any unlawful interference with that right was an actionable wrong. The right preserved to the plaintiff was a common-law right, and the direct and proximate consequence of an actionable wrong is a subject for compensation. Whenever there is a breach of a contract or the invasion of a legal right the law infers some damage. (*Larson v. Chase*, 47 Minn. 307, 310, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L.R.A. 85.) In that case the action was to recover damages for the unlawful mutilation and dissection of a dead body, the only damages claimed being mental anguish, suffering and nervous shock. Such damages were held properly recoverable. The case of *Larson v. Chase* was cited and approved in *Darcy v. Presbyterian Hospital*, 202 N. Y. 259, 263, Ann. Cas. 1912D 1238, 95 N. E. 695.

The counsel next asserts that there is a defect of parties plaintiff in that the brothers and sisters of plaintiff are not joined as parties plaintiff in the action. The plaintiff here seeks only to recover such damages as are personal to him. As the son of the deceased he had a right to receive the body for burial, and no reason exists why he should be obliged to join other next of kin in an action wherein he seeks compensation personal to himself.

The order should be affirmed, with costs, the first question answered in the affirmative and the second question answered in the negative.

[259] POUND, J.—I concur in the result. The allegations of the complaint are to the effect that the body of deceased was needlessly and wantonly cast into the sea, in disregard of the feelings of the next of kin. This sufficiently states a cause of action. An indignity to the dead is an offense to the living. But it cannot be said that under ordinary circumstances the next of kin of a person who dies on shipboard have such a legal right to the possession of the body that they may recover damages because the burial is at sea. A decent committal of the body to the deep in accordance with the custom in such matters ordinarily discharges the duty which the law imposes. In this case, for example, if the death had occurred on the outward-bound voyage, what greater obligation would be implied in the absence of a special contract?

Hiscock, Ch. J., Cuddeback and Cardozo, JJ., concur with Hogan, J., and Pound, J., concurs in result in memorandum; Collin, J., dissents; Chase, J., not sitting.

Order affirmed.

NOTE.

The reported case, discussing the qualified right of property in a dead body possessed by the next of kin of the deceased, holds that an ocean carrier is liable to the next of kin of a passenger dying in the course of the voyage for burying the body at sea when it is feasible to bring it to port for interment. The cases discussing the right of property in the dead body of a human being are collated in the notes to *Louisville*, etc. R. Co. v. *Wilson*, 3 Ann. Cas. 128; *Beaulieu v. Great Northern R. Co.* 14 Ann. Cas. 462; *Darcy v. Presbyterian Hospital*, Ann. Cas. 1912D 1238, and *Keyes v. Konkell*, 75 Am. St. Rep. 423.

BARTON

v.

ALEXANDER ET AL.

Idaho Supreme Court—April 29, 1915.

27 Idaho 286; 148 Pac. 471.

Public Officers — Anti-nepotism Law — Title.

The title to the anti-nepotism bill or act (Laws 1915, c. 10) is sufficiently broad to include and cover all of the provisions of

said act and is not repugnant to the provisions of section 16, art. 3, of the state constitution.

[See note at end of this case.]

Construction — "Associates in Office."

"Associates in office" are those who are united in action; who have a common purpose; who share the responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform the duties jointly or as a body.

[See note at end of this case.]

Same.

The commandant of the Soldiers' Home is not an "associate in office" of the board of trustees of the Soldiers' Home.

[See note at end of this case.]

Same.

The phrase "associates in office," as used in said act, refers to officers who are required under the law to act together, each having substantially equal authority in matters coming before them as boards or councils under the law.

[See note at end of this case.]

Scope of Act.

Said act prohibits the officers therein named, or boards or councils composed of such officers, from appointing any one to office related to them or to any member of such board or council within the third degree by affinity or consanguinity.

[See note at end of this case.]

Same.

Said act prohibits the officers therein mentioned from making appointments on agreement or promise with other officers.

[See note at end of this case.]

Effect of Act — Payment of Salary after Illegal Appointment.

If a person is illegally appointed under the provisions of said act, the officer of the state, district, county, city, or other municipal subdivision of the state who pays out of any public funds under his control or draws or authorizes the drawing of any warrant or authority for the payment out of any public funds of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and may be punished as provided in the first section of said act.

[See note at end of this case.]

Appointments Prior to Act.

If a person is legally appointed and eligible to hold the office to which he is appointed, the proper board or officer is not prohibited by said act from passing upon and allowing the claim of such appointee for salary, or wages, although such appointee may be related to such officer or a member of the board which is required under the law to pass upon such claim.

[See note at end of this case.]

Validity of Anti-nepotism Act.

Said act is a police regulation, and its provisions are reasonable and enforceable and not unconstitutional.

[See note at end of this case.]

Construction of Act — Computation of Relationship.

Under the provisions of section 5705, Rev. Codes, the degrees of kindred are computed according to the rules of the civil law, which rules are applicable to the act in question.

[See note at end of this case.]

Retroactive Effect.

The provisions of said act do not operate retrospectively.

[See note at end of this case.]

Appointments Prior to Act.

Where appointments of persons related to officers within the prohibited degree have been made prior to the going into effect of said act, such appointees cannot legally be paid out of the public funds any salary or wages for services rendered subsequent to the going into effect of said act, to wit, the 8th day of May, 1915.

[See note at end of this case.]

Scope of Act — Political Divisions Embraced.

Irrigation, drainage, improvement, and school districts do not come within the provisions of said act, since they are not municipal subdivisions of the state and are not specially included in said act.

[See note at end of this case.]

Original application for writ of prohibition. Louise E. Barton, plaintiff, and Moses Alexander et al., defendants. The facts are stated in the opinion. ALTERNATIVE WRIT GRANTED.

C. W. Gibson and J. P. Pope for plaintiff.

J. H. Peterson, T. C. Coffin, E. G. Davis and Herbert Wing for defendants.

[289] SULLIVAN, C. J.—This is an original application in this court for a writ of prohibition to the board of trustees of the Soldiers' Home and to Colonel Robert Barton, commandant of said home, requiring them to show cause why they and each of them should not permit the petitioner to continue [290] in the discharge of her duties as matron of said Soldiers' Home on and after May 8, 1915.

It appears from the petition that the petitioner, or plaintiff, is now and ever since the 15th day of September, 1913, has been, the duly appointed, qualified and acting matron of the Soldiers' Home; that the board of trustees of said home is composed of the Governor, the Secretary of State and the Attorney General, and that the defendant Robert Barton is, and ever since the first day of June, 1913, has been, the duly appointed, qualified and acting commandant of said Soldiers' Home, and is the father of the plaintiff; that said board of trustees has control and supervision of said Soldiers' Home, including the appointment and removal from office of the plaintiff: that on February 18, 1915, the Governor approved what is commonly known as the "Anti-Nepotism Bill," which bill makes certain appointments of relatives to positions unlawful

and subjects the officer making such appointments to fine and removal from office; that on the 6th day of April, 1915, the plaintiff received a communication from said board of trustees notifying her that on and after the 8th day of May, 1915, the date when said anti-nepotism act becomes effective, her services would no longer be needed, for the following reasons and none other: 1st, that Col. Barton, commandant of the said Soldiers' Home, who, in the opinion of the board of trustees, is an associate in office of the members of said board, within the meaning of said act, is her father and therefore her appointment and continuance in office is unlawful under said act; 2d, that the furnishing of employment by the said board of trustees and the said Colonel Barton is a violation of the provisions of said act; that said act is a police measure and if the same attempts to provide against the appointment to office or employment of relatives by affinity or consanguinity within the third degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of the public funds or fees of office by the associate of any officer so related, it is unconstitutional and void as being unreasonable; [291] that said act, if it attempts to render unlawful the furnishing of employment to persons legally appointed prior to its enactment and approval under penalty of removal from office of the officer appointing such ineligible person, is unconstitutional and void as denying to the plaintiff and all others similarly situated, due process of law and equal protection of the laws under the constitution of the state of Idaho, and under sec. 14 of the amendments to the constitution of the United States; 3d, that if said act attempts to prohibit appointments as above set forth, the same is unconstitutional and void on the ground that the title fails to specify either of said grounds and is in violation of sec. 16, art. 3, of the constitution of the state of Idaho.

It is then alleged that the plaintiff is without any plain, speedy and adequate remedy in the ordinary course of law, and that she is beneficially interested in retaining her position as matron.

An alternative writ of prohibition was issued as prayed for, and on the return day the defendants demurred to the petition on the ground that the same did not state facts sufficient to entitle petitioner to the relief prayed for.

On the argument of the demurrer, counsel for the respective parties conceded that there were only questions of law involved in the case. The principal question is the constitutionality of the act known as the "Anti-Nepotism Bill," approved February 18, 1915.

and in case said act is held constitutional, a construction of the several provisions of said act is sought to be obtained.

Said act is as follows:

"An Act making it an offense for any executive, legislative, judicial, ministerial, or other officer of this state, or any district, county, city or other municipal subdivision of the state, to appoint or vote for the appointment of any person related to him by affinity or consanguinity within the third degree, to any clerkship, office, position, employment or duty in any department or office of this state, or of any district, county, city, or other municipal subdivision of the state of which the [292] person making or participating in the appointment may be an officer or employee, or to appoint any person so related to any other such officer in consideration of the agreement or promise of such other officer to appoint any person so related to the officer making such appointment; prohibiting the payment of any such ineligible person out of any public funds and providing for suitable punishment and removal from office for the violation of this act.

"Be It Enacted by the Legislature of the State of Idaho:

"Section 1. That an executive, legislative, judicial, ministerial, or other officer of the State or of any district, county, city or other municipal subdivision of the State, including road districts, who appoints or votes for the appointment of any person related to him or to any of his associates in office by affinity or consanguinity within the third degree, to any clerkship, office, position, employment, or duty, when the salary, wages, pay, or compensation of such appointee is to be paid out of public funds or fees of office, or who appoints or furnishes employment to any person whose salary, wages, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the third degree to any other executive, legislative, ministerial, or other public officer, when such appointment is made on the agreement or promise of such other officer or any other public officer to appoint or furnish employment to any one so related to the officer making or voting for such appointment, is guilty of a misdemeanor involving official misconduct and upon conviction thereof shall be punished by fine of not less than Ten (\$10.00) Dollars or more than One Thousand (\$1000.00) Dollars, and such officer making such appointment shall forfeit his office and be ineligible for appointment to such office for one year thereafter.

"Sec. 2. That an officer of this State or any district, county, city or other municipal subdivision of the State who pays out of any public funds under his control or who draws

or authorizes the drawing of any warrant or authority for the payment out of any public fund of the salary, wages, [293] pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in Section 1 of this Act."

The first question presented by counsel for the plaintiff involves the constitutionality of said act, and it is contended that the title is not sufficiently broad to cover all of the provisions of said act and is therefore repugnant to sec. 16, art. 3, of the state constitution, wherein it is provided that "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." It is contended that the title does not mention or refer to the provision in the body of the act which makes it unlawful for the officers named in said act to appoint or vote for the appointment of any person related to any of his "associates in office" within the third degree. As to the main purpose or object of said constitutional provision, see Sutherland on Statutory Construction, sec. 111; Cooley's Const. Lim. 6th ed. p. 178; *Turner v. Coffin*, 9 Idaho 338, 74 Pac. 962; *Katz v. Herrick*, 12 Idaho 1, 86 Pac. 873.

The bill as originally introduced in the Senate contained identically the same title that it did after its amendment, passage and approval by the Governor, except that the last four words of the title, to wit, "and declaring an emergency," were stricken out. The first section of said act was amended by inserting therein the words, "or to any of his associates in office." Other minor amendments were made that are not involved in the questions here presented.

The title to said act is nearly as long as the act itself, and is almost an index of the act. In fact, it contains much more than is required by said constitutional provision as a title to such an act. The following would have been a sufficient title to said act: "An act prohibiting the appointment to public office of any person related to the officer making the appointment, by affinity or consanguinity within the third degree; prohibiting the exchange of such appointments by [294] public officers, and prescribing penalties for the violation thereof." Such a title would fully express the object and purpose of the act. However, we think the title amply sufficient and not repugnant to the provisions of said section of the constitution. It is broad enough to include that provision of the act which prohibits the appointment of any person related to the officer named or to any of

his "associates in office," by affinity or consanguinity within the third degree. We therefore hold that said title is sufficiently broad to cover all of the provisions of said act.

In this case it is conceded that the only reason why said board of trustees has notified the plaintiff that on and after May 8, 1915, the date when said bill becomes effective, her services will no longer be needed, is because she is the daughter of Commandant Barton, who, in the opinion of the board, is "an associate in office" of the members of the board, within the meaning of said act.

An "associate in office" is one who shares the office or position of authority or responsibility, and not an appointee who does not share the responsibility or authority of the office. "Associates in office" are those who are united in action; who have a common purpose; who share responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform duties jointly or as a body. Under the provisions of the law the commandant is an appointee of said board and has entire control and management of the Soldiers' Home under such rules and regulations as may be prescribed by said board, and has no authority or equality with the members of the board in making such rules or regulations or in his own appointment or in the appointment of any other appointee that said board has authority to make. Clearly, he is not an "associate in office" as said phrase is used in said act. There is, therefore, no good reason, so far as the record shows, why the plaintiff should not be retained in her present position as matron of the Soldiers' Home, and if the board desires to retain her, it may do so and will not violate any of the provisions of said act.

[295] The phrase "associates in office," as used in said act, refers to officers who are required under the law to act together, for instance, as a board or city council, each having substantially equal authority in matters coming before them as a board or council under the law, and said act was intended to and does prohibit such officers or boards or councils from appointing anyone to office related within the prohibited degree to either or any of such officers who are members of such board or council. But such officers who have independent duties to perform, aside from those coming before them as members of a board or council, are not "associates in office" in the performance of those independent duties. For instance, the Governor has many duties to perform under the law that he must perform independently of any board of which he may be a member or of any associate in office. So with the Secretary of State, the Attorney General and other state, county and

municipal officers. Those officers are not "associates in office" of anyone in performing those independent duties where they act independently of any other person or officer.

Said act absolutely prohibits officers who are not "associates in office" from making appointments on "agreement or promise" with other officers. The law thus makes it a penal offense for an officer to appoint one related to another officer within the prohibited degree upon an agreement or promise; and if such person is illegally appointed, the officer of the state, district, county, city or other municipal division who pays out of the public funds under his control, or who draws or authorizes the drawing of any warrant or authority for payment out of the public funds, the salary, pay or compensation of such ineligible person, knowing him to be ineligible, is also guilty of a misdemeanor and may be punished as provided in the first section of said act.

The legislature has thus provided a double check on the appointment by officers of relatives within the prohibited degree. First, it is made a penal offense to appoint such a person, and, second, it is made a penal offense for another officer to pay the salary or compensation of such appointee, [296] knowing him to be ineligible or illegally appointed. For instance, the law prohibits the trustees or city council of any village or city from employing anyone related within the prohibited degree to any member of such board of trustees or council; or county commissioners from appointing anyone to any position who is related to either of the county commissioners within the prohibited degree. And again: "If the sheriff agrees with the assessor, or has an understanding with him that if he will appoint a relative of his (the sheriff) in his office, he will appoint a relative of the assessor under him, such an agreement or understanding is prohibited by said act, and if such things are done, the one who disburses the compensation or salaries to such appointees is made criminally liable if he, knowing of such arrangement, pays such salary or compensation.

However, it was not intended to penalize an officer who pays out of the public funds or who draws or authorizes the drawing of warrants on the public funds or who allows claims for the salary, wages, pay or compensation of other appointees who have been legally appointed, although the officer allowing such claims or drawing the warrant or paying out the funds may be related to such appointee within the prohibited degree. For example: The Governor could appoint as his private secretary a person related within the third degree to the Secretary of State, if there were no agreement or promise such as is mentioned in the first section of said act between

the Governor and the Secretary of State, as the Governor has the exclusive right to make such an appointment without the concurrence or assistance of any other officer; and the Secretary of State and the Governor, as members of the board of examiners, are not prohibited by said act from passing upon and allowing the claim of such appointee for salary or wages.

It is next contended that since said act is a police regulation, its provisions are unreasonable and unenforceable, and unconstitutional for that reason, and that it contravenes the provision of the constitution of the state in that it is an infringement by the legislative department of the distinct [297] functions of the executive and judicial departments of government and attempts to bind succeeding legislatures in the appointment of its officers; that it limits and tends to destroy the official functions of constitutional officers; that it limits the constitutional rights of officers to appoint qualified persons to, and violates the right of said persons to hold, appointive office; that it forfeits public office and makes persons ineligible for reappointment on the ground of misdemeanor, and that for those reasons it is against public policy and unconstitutional.

We are unable to concur in those contentions, since we believe it to be within the legislative power to prohibit officers from appointing persons to office related to them by affinity or consanguinity, in the interest of efficiency in public service and for the best interests of the people and of the municipal subdivisions of the state, and as a legitimate police regulation, in regard to which the law-making power may legislate, and reasonable legislation in regard thereto is constitutional and enforceable.

Nepotism is recognized as an evil that ought to be eradicated and stamped out, and we know of nothing in the state constitution that prohibits the legislature from passing reasonable regulations in regard thereto.

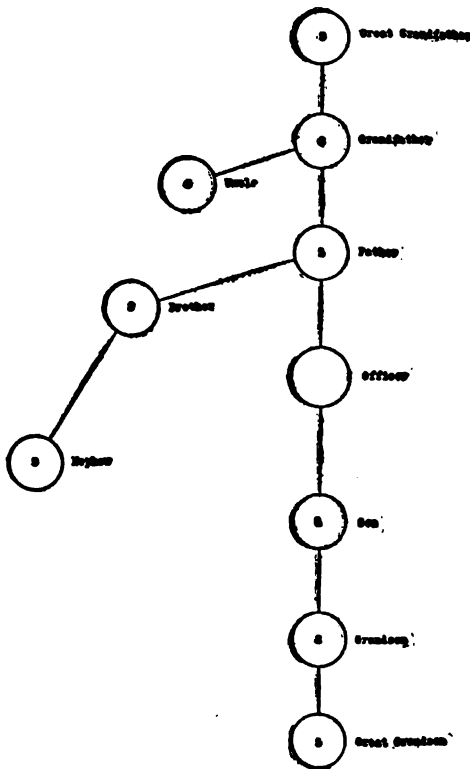
Since said act prohibits officers from appointing or voting for the appointment of any person related to them by affinity or consanguinity within the third degree, the question is presented as to under what law the degrees of relationship must be computed; that is, whether under the canon or common law, or under the Roman or civil law.

Under the provisions of sec. 5705, Rev. Codes, the degrees of kindred are computed according to the rules of the civil law and not the common law. That is the rule established in this state. It is evident that the legislative intent was to have the degrees of kindred under the act in question computed under the civil law. In computing degrees of affinity and consanguinity the civil law is generally followed in all the states of the

Union. (4 Kent's Commentaries, 14th ed. bottom p. 473.)

[298] If the degrees of relationship were to be computed under the rules of the canon or common law, it would place the officer who is required to appoint a deputy or other officer in a very embarrassing and dangerous position, since under the rules of the common law the third degree of relationship exists between the public officer and all children, grandchildren and great-grandchildren of the great-grandfathers and great-grandmothers of such public officer. It might require experts in geneology to trace the degree of relationship between an officer appointing and the appointee in order to protect the officer from the penal provisions of the act in question. Under the civil law, it is an easy matter to determine who come within the third degree of relationship by affinity or consanguinity. Under the act in question an officer cannot appoint the following relatives of either himself or his wife: Parents, grandparents and great-grandparents; uncles and aunts; brothers and sisters; children, grandchildren, great-grandchildren; nephews and nieces. The following diagram may make the matter a little clearer:

[299]



[300] It will be observed from the above that cousins do not come within the prohibited third degree.

We hold that under said act, in determining the degrees of relationship, the civil law must be followed.

The next question presented is whether said act affects appointments made prior to its becoming operative or prior to its going into effect, and was it intended that the act should operate retrospectively?

The first section of said act provides that any of the officers therein named "who appoints or votes for the appointment of any person related to him," etc., is "guilty of a misdemeanor involving official misconduct, and upon conviction thereof shall be punished by fine . . . and shall forfeit his office and be ineligible for appointment to such office for one year thereafter." The legislature by using that language evidently did not intend to make an official guilty for acts done prior to the date of said act that were not crimes at the time said acts were done, and the language, "who appoints or votes for the appointment of a person related to him," clearly indicates that the legislature did not intend to make said act retrospective or *ex post facto*. If it did so intend, the law would be absolutely void for attempting to make an act a crime when it was not a crime at the time the act was performed. *Ex post facto* laws are prohibited by sec. 16, art 1, of the constitution of this state and are also prohibited by the provisions of the constitution of the United States. Nor is there anything in the title of the act that would indicate that the legislature intended that the act should have a retroactive effect.

However, sec. 2 of said act provides that any officer therein named who "pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment out of any public funds of the salary, wages, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in section 1 of this act." Taking into consideration the purview of said act, it is clear that the legislature did not intend that any ineligible appointee [301] should receive or draw any pay from the public funds after said act had gone into effect, even though he had been appointed prior to the going into effect of said act. The court having arrived at that conclusion, the appointees referred to cannot legally draw or be paid out of the public funds any salary or wages for services rendered subsequent to the going into effect of said act, to wit, the 8th day of May, 1915. Therefore all officers referred to in said act should see to it that their appointees are eligible under the provisions of said act from the date said act goes into effect.

Several questions are involved or arise in the practical application of this law, and owing to the numerous officials who are vi-

tally interested in the construction to be placed upon this act, we will suggest a few of those questions and the conclusion of the court upon them.

First, is the head of one department of the state, county or city government liable if he appoints to office a person related within the prohibited degree to the head of another department? The head of one department is not liable under said law for the appointments made by the heads of other departments where he is not an "associate in office" and cannot, under the law, participate in such appointment.

The next question is: "If an appointee of one department of the state, county or city government is related within the prohibited degree to a member of the state board of examiners or the board of county commissioners or the city council, can such boards approve a claim for such appointee's salary without rendering themselves liable under the provisions of the second section of said act?"

Since the head of one department cannot control the appointments of another department, the board which is called upon to allow the claims of appointees is not liable under the provisions of said section for allowing claims of appointees who have been legally appointed, although such appointees may be related within the prohibited degree to a member of the board or person who allows or pays such claims.

The next question is: Is it permissible under the provisions of said act for certain members of a board, such as, for instance, [302] the board of county commissioners, city council or trustees of a village, without the concurrence of the third member, to appoint to office a person related within the prohibited degree to such third member?

The clear intention of the law was to prohibit such appointments, for if by collusion or agreement two members of a board were to appoint to office a person related to the third member within the prohibited degree, it would be a very easy matter to evade the provisions of said law where appointments were to be made by boards. Such appointments are prohibited. This applies equally to all state boards and all other boards of municipal subdivisions of the state, since the members of said boards, when acting as boards are "associates in office."

The next question is: Are school districts, irrigation, drainage and improvement districts included within the provisions of said law?

It will be observed from the title that it applies to municipal subdivisions of the state and the first section of said act is in part as follows: "That executive, legislative, judicial, ministerial or other officer of this state or of any district, county, city, or other municipal subdivision of the state, including road

districts," etc. The title as well as the body of the act clearly indicates that it was intended to apply to municipal subdivisions of the state and also to road districts. The act having especially enumerated only one subdivision, to wit, a road district, that is not a municipal subdivision, all other subdivisions of the state which are not municipal subdivisions are excluded, hence it does not apply to school districts, irrigation districts, drainage districts or improvement districts, since they are not municipal subdivisions of the state. This court held in *Fenton v. Ada County*, 20 Idaho 392, 119 Pac. 41, that a school district is not a municipal corporation within the meaning of sec. 6, art. 7, of the constitution. Said act is only intended to apply to municipal subdivisions of the state and road districts.

This proceeding was brought for the purpose of obtaining from this court the proper construction to be placed upon [303] the several provisions of said anti-nepotism act. No question has been raised in regard to the power and authority of the board to discharge the petitioner without giving any reason for such discharge, but it is conceded that the board does not desire to discharge her at the present time, at least, unless under the provisions of said act they would be guilty of a misdemeanor and become liable under the penal provisions of said act if they retained her after said act goes into effect.

As we view it, it will not be necessary for this court to direct the peremptory writ of prohibition to issue, since we hold that the defendants, as a board of trustees of the Soldiers' Home, may retain the plaintiff as matron of the Soldiers' Home, if they desire to do so, and by so doing they will not violate any of the provisions of said anti-nepotism act.

No costs are allowed in this case.

Budge and Morgan, JJ., concur.

NOTE.

Validity and Construction of Anti-Nepotism Law.

The reported case involves an Idaho statute (Laws 1915, c. 10) known as the "Anti-nepotism Bill," making it an offense for any officer to appoint or vote for the appointment of a person who is related to him or to his "associates in office" by affinity or consanguinity within the third degree. The court sustains the statute, holding that its subject is fully expressed in the title and that the act is a proper exercise of the police power and does not invade the executive province or limit unduly the functions of constitutional officers. Construing the statute the court holds that the commandant of a

Soldier's Home is not an "associate in office" of the trustees of the Home, and that accordingly the trustees are at liberty to appoint to a position in the Home a daughter of the commandant. The court proceeds to construe the act in several particulars not involved in the case, holding that the heads of co-ordinate departments are not "associates in office" but that fellow members of a state or municipal board are, and that the act does not apply to school districts, irrigation, improvement or drainage districts.

The reported case appears to be the only decision involving an act designed to prevent nepotism in appointments to office. The validity of legislation of that character would seem to be fully sustained by the cases holding that the legislature may prescribe such qualifications for the holding of a statutory office as it sees fit so long as it does not interfere with any qualification prescribed by the constitution. See the notes to *State v. Goldthait*, 19 Ann. Cas. 737, and *People v. McCormick*, Ann. Cas. 1915A 338.

NEVADA COUNTY BANK

v.

SULLIVAN.

Arkansas Supreme Court—February 7, 1916.

122 Ark. 235; 183 S. W. 169.

Appeal and Error — Scope of Review — Evidence to Support Finding of Chancellor.

The chancellor's findings on issues of fact, as to which the evidence was conflicting, not against the preponderance of the evidence, will not be disturbed.

Damages — Liquidated Damages Distinguished from Penalty.

Where plaintiff enters into a written contract with the defendant bank to tear down its old building and to erect a new two-story building, which should be completed by August 15, 1912, and to pay the owner \$10 per day as liquidated damages for delay in completion, and the bank's quarters on the lower floor are not completed and accepted until December 15th, and the upper floor later, during which delay the damages to the bank are indeterminate and difficult of ascertainment, though it is shown that the sum named bears a fair proportion to the damages discussed and manifestly contemplated by the parties in case of delay, and to the damages sustained, the stipulation is one for liquidated damages, and not for a penalty.

[See note at end of this case.]

Appeal from Nevada Chancery Court: SHAVER, Chancellor.

Action by J. A. Sullivan, plaintiff, against Nevada County Bank, defendant. From judgment rendered, defendant appeals. The facts are stated in the opinion. MODIFIED.

Horace E. Rouse for appellant.

McRae & Tompkins for appellee.

[237] SMITH, J.—On May 1, 1912, appellee entered into a written contract with the building committee of the Nevada County Bank by which he agreed to tear down and clear away the debris of its old building and construct, according to plans and specifications therefor, a new two-story brick building for the sum of \$10,000, payable on estimates of the architect every two weeks in such sum as would not exceed 90 per cent of the value of labor and material furnished since the last preceding estimate, except that the final estimate should be for the balance due under the contract.

The contract provided that the building should be completed on or before August 15, 1912, and contained the following provision:

"And the contractor agrees to pay to the owner the sum of \$10 per day as liquidated damages for each and every day which shall elapse between the time of completion and the time of actual completion."

The building was not completed within contract time, the lower floor not being completed and accepted until December 15, 1912, and the upper floor was not entirely completed until about February 15, 1913.

During the progress of the building certain extra work was ordered and after the completion of the building, a controversy arose over the cornice of the building and damages were claimed against appellees for defective work alleged to have resulted from the failure to follow the plans and directions of the architect. The parties undertook to adjust their differences and each made the other a proposition for a settlement, but each proposition was rejected. Whereupon appellee commenced suit for the balance which he alleged was due him, and sought to enforce a lien on the building to secure this sum.

As has been said, only the first floor of the building was ready for occupancy by December 15, at which time appellee wrote the following letter:

[238] "Prescott, Ark., December 14, 1912.

"Building Committee Nevada County Bank, Prescott, Ark.

"Gentlemen: You may occupy the first floor of the bank building being erected by me under contract with you, without such occupancy in any way being considered an

acceptance of the job or a waiver of any of the terms and provisions of my contract with you.

"Yours truly,
"J. A. Sullivan."

Upon receipt of this letter, appellant occupied the lower floor of the building, but we do not understand the proof to show that appellant would have had tenants ready to move into and occupy the offices on the second floor. Upon the contrary, the proof appears to be that even now some of those rooms are unoccupied. There was conflicting evidence upon the question of responsibility for the delay in the completion of the building, but the chancellor found that issue in favor of appellant. And there was also conflicting evidence upon the question of extra work and defective work, and we think the chancellor's finding on those questions is not against the preponderance of the evidence.

The important question in the case is whether the provision for the payment of \$10 for each day's delay was a stipulation for a penalty or an agreement for liquidated damages. The contract allowed about three and one-half months for the erection of the building, and a contractor of much experience testified that sixty days would ordinarily have been sufficient time for the erection of the building where reasonable diligence was used in pushing the work. It was shown on behalf of appellant that its old building was torn down and carted off, and that the bank moved into the general mercantile store of a Mr. Hamilton across the street, where a space of about 8x12 or 14 feet was furnished, and for which a charge of \$10 per month was made. Mr. Hamilton permitted this use of his store only until the time when it had been represented the bank building would be completed, after which time he demanded for his own use this space, whereupon the officers [239] of the bank moved into a part of the building used by Mr. Hamilton as an office, and shared there with Hamilton a standing desk from which the bank's business was transacted. There was no provision for keeping cash except in a cash drawer, and the bulk of the money was kept in the vaults of a competitive bank, while a part of the books were kept in a warehouse, and others in the competitive bank, and the remainder in their own safe on the street, and that other things and valuable papers were kept in the vaults of the competitive bank, to which place they were required to go when any of them were needed. It was also shown that \$8,000 had been borrowed from a bank in Little Rock to be used in paying for this building, and under the loan contract this money could be

Ann. Cas. 1917D—47.

used for no other purpose, and was kept on deposit with the bank from which it had been borrowed, during all of which time interest was being paid on it at the rate of 6 per cent per annum. It was shown that there was much expense in moving and removing from Hamilton's stores as well as inconvenience and annoyance, during which time appellee was being prodded to complete the building. The cashier of appellant bank testified that he had no facilities for transacting the bank's business, that he lost some of the records temporarily, and that there was constant annoyance in keeping up with the records because of the lack of proper places to put them, and that there was no way to measure the annoyance and trouble of having no facilities for the transaction of the bank's business and that this condition spoiled his business and ruined his collections for that fall, and that \$10 per day would not, and did not cover the actual loss sustained by the bank by reason of being kept out of their building. That the fall of the year is the season for general collections and the acquisition of new depositors, and that there were deposits which the bank failed to get because of its lack of facilities.

In answer to all of this, it is insisted that appellee is not responsible for appellant's failure to properly equip itself for business, and that if its loans were not paid, the [240] interest continued to run, and that the rental value of the building was the measure of the damages.

The court found that appellee complied with his contract except for the delay, and that he was entitled to credit for the extras claimed, but declared the stipulation herein set out to be a penalty and unenforceable, and that it was placed in the contract to insure performance, and not for compensation; that the damages are easy of ascertainment, and are measured by the rental value of the building, and fixed appellant's damages for the delay from August 15 to December 15 at \$125 per month, and from December 15 to February 15, at \$50 per month, which damages were deducted from the sum found due appellee, having a balance in his favor of \$66.63, for which amount a judgment was rendered. It was decreed that appellant was entitled to nothing as liquidated damages nor for defects in the cornice, and that appellant had waived its claim, if any it had, to liquidated damages, and found adversely on appellant's counterclaim, except a small item which was allowed on the rents as set out above.

There was an appeal and a cross-appeal, and it is now insisted that appellant waived any claim for liquidated damages by reason of the fact that at the time when such

damages were due, if they were due at all, appellant paid appellee certain money which did not leave still due appellee a sufficient sum to pay these damages. But it was shown that \$500 was paid appellee under a mutual mistake, as a result of which mistake appellant did not know of this \$500 payment at the time it made the payment said to constitute the waiver, and it was further shown that the money was advanced to pay the claims of certain materialmen.

There are an almost unlimited number of cases which discuss the principles of law which are to be applied in determining whether or not a provision like the one here contained is an agreement for liquidated damages or a stipulation for a penalty. A large number of the leading cases on this subject is cited in the case note to *Webster v. Bosanquet*, an English case reported in 24 Ann. Cas. [241] 1019, and in the cases of *Madler v. Silverstone*, 34 L.R.A.(N.S.) 1, and *Evans v. Moseley*, 50 L.R.A.(N.S.) 889.

But we need not go beyond the reports of our own State for an abundance of authority upon this subject. See, *Williams v. Green*, 14 Ark. 329; *Young v. Gaut*, 69 Ark. 114, 61 S. W. 372; *Lincoln v. Little Rock Granite Co.* 56 Ark. 405, 19 S. W. 1056; *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. 1093; *Lawrence County v. Stewart*, 72 Ark. 525, 81 S. W. 1059; *Nevada County v. Hicks*, 38 Ark. 557; *Haldeman v. Jennings*, 14 Ark. 329; *Blackwood v. Liebke*, 87 Ark. 545, 113 S. W. 210; *Chickasawba R. Co. v. Crigger*, 83 Ark. 364, 103 S. W. 1153; *Westbay v. Terry*, 83 Ark. 144, 103 S. W. 160; *Tidwell v. Southern Engine, etc. Works*, 87 Ark. 52, 112 S. W. 152; *Cox v. Smith*, 93 Ark. 371, 125 S. W. 437, 137 Am. St. Rep. 89; *Wait v. Stanton*, 104 Ark. 16, 147 S. W. 446; *Dilley v. Thomas*, 106 Ark. 279, 153 S. W. 110; *Kimbrow v. Wells*, 112 Ark. 133, 165 S. W. 645; *Glascock v. Rosengrant*, 55 Ark. 376, 18 S. W. 379.

The principles which control in the decision of this question have been applied to an almost infinite variety of conditions, and an apparent contradiction in some of the cases grows out of this fact. But there appears to be no substantial difference in the declaration of the principles themselves. An early and the leading case on this subject is that of *Williams v. Green*, *supra*, which case is recognized as an authority everywhere, and has been widely cited and quoted from. Our last case on this subject is that of *Montague v. Robinson*, 122 Ark. 163, 182 S. W. 558.

The case upon which appellee chiefly relies, and the one said to be controlling here, is that of *Wait v. Stanton*, 104 Ark. 16, 147 S. W. 446. But the principles announced there are in harmony with numerous other declarations of the court on this subject,

and when these controlling principles were applied to the facts of that case, the court was constrained to hold the provision of that contract for the payment of damages to be a penalty. Under the facts of that case, the damages were of easy ascertainment, and were measured by the rental value of the property, and the damages provided for were entirely disproportionate to any damages, which in the contemplation of the parties, could have been sustained by delay in the nonperformance of the contract.

[242] The instant case is clearly distinguishable on the facts from the case of *Wait v. Stanton*, *supra*. The building here contracted for was primarily a bank building intended for use in connection with that business, and only the second floor of the building was intended for rental purposes. At the time of making this contract, the parties must necessarily have contemplated that damages would result from delay in the construction of the building and in the very nature of the case these damages would be indeterminate and difficult of ascertainment, and as we view this evidence, it is even now impossible to determine with that degree of certainty which should exist for a jury to assess damages, what these damages were. Who can know what damages appellant sustained from loss of business through the lack of facilities to transact business? It is obvious that these facilities were indispensable to the successful conduct of the banking business, and it is manifest from the very date fixed for the completion of this contract that it was appellant's desire to have its building ready for occupancy before the beginning of its busy season. The evidence is that these conditions were discussed before the contract was signed, but even though such was not the case, it must have been manifest at the time the contract was made that damages would result from delay in its performance, and that this damage would be indeterminate and difficult of ascertainment. Moreover, the sum named is shown to bear a fair proportion to the damage sustained, indeed, the cashier of the bank says that the damage exceeded that amount. But it is not necessary that we find the fact so to be. It is sufficient to support the finding that these liquidated damages for the sum named appear to bear some reasonable proportion to the damage contemplated, and such we find the facts to be.

It follows, therefore, that the court erred in not allowing appellant's claim for the liquidated damages provided by the contract. The decree will, therefore, be [243] modified to allow appellant \$1,220 on that account and to disallow the \$600 allowed it on account of the rent, and the cause will be remanded with directions to the court below to enter a decree accordingly.

NOTE.**Whether Stipulated Forfeiture for Breach of Contract a Penalty or Liquidated Damages.**

Introductory, 739.

Intent of Parties, 739.

Construction of Terms of Contract:

Contract Using Expression "Penalty" or "Liquidated Damages," 741.

Contract for Performance of One Specific Act or Involving Several Undertakings, 744.

Proportion of Actual Damages to Sum Named, 746.

Certainty or Uncertainty of Damages:

Damages Certain or Capable of Ascertainment, 750.

Damages Uncertain and Incapable of Ascertainment, 751.

Introductory.

The purpose of this note is to review the recent cases which discuss the question whether a stipulated forfeiture for a breach of a contract is to be considered as a penalty or as liquidated damages. The earlier cases are collated in the notes to *Stony Creek Lumber Co. v. Fields*, 1 Ann. Cas. 242; *Western Gas Constr. Co. v. Dowagiac Gas, etc. Co.* 10 Ann. Cas. 224; *Webster v. Bosanquet*, Ann. Cas. 1912C 1019, and *Stillwell v. Paepcke-Leicht Lumber Co.* 108 Am. St. Rep. 42.

The importance of the distinction between a penalty and liquidated damages lies in the fact that if the stipulated forfeiture is considered as liquidated damages the parties are bound by it and the full amount may be recovered without proving actual damages. If, on the other hand, it is considered as a penalty, one of the parties may be relieved of it, as the courts have the power to look into the amount to see whether it is unconscionable, and they may restrict the injured party to the actual damages he may have suffered. Thus, in *Ann Arbor Board of Commerce v. Security Trust Co.* 225 Fed. 454, 140 C. C. A. 486, the court said: "If the contract is construed to mean 'liquidated damages,' the recovery for a breach is the sum stipulated without proof of actual damage. If it is construed to mean 'penalty,' the recovery is only for the actual damage sustained." In *Illinois Surety Co. v. U. S.* 229 Fed. 527, 143 C. C. A. 595, the court said: "The general rule is that in case of a penalty the measure of damages is the actual loss which has been sustained as a result of the breach where this can be ascertained. But in the case of liquidated damages there can be a recovery of the whole amount where such a recovery

is consistent with the policy of the law." See also *Dwyer v. Moore Furniture Co.* 178 Ill. App. 562. And see generally the cases cited throughout this note.

Intent of Parties.

Whether a stipulated forfeiture for the breach of a contract is to be regarded as a penalty or as liquidated damages, depends primarily on the intent of the parties which is to be ascertained not only from the language of the contract but from the surrounding circumstances.

United States.—*Motschman v. U. S.* 47 Ct. Cl. 373; *Pacific Hardware, etc. Co. v. U. S.* 48 Ct. Cl. 399; *Carnegie Steel Co. v. U. S.* 49 Ct. Cl. 403; *Morris v. U. S.* 50 Ct. Cl. 154; *Union Pac. R. Co. v. Mitchell-Crittenden Tie Co.* 190 Fed. 544, 111 C. C. A. 396; *York Haven Paper Co. v. York Haven Water, etc. Co.* 194 Fed. 255; *Bedford v. Miller*, 212 Fed. 368, 129 C. C. A. 44; *Bankers' Surety Co. v. Elkhorn River Drainage Dist.* 214 Fed. 342, 130 C. C. A. 650.

Alabama.—*Walshe Mfg. Co. v. W. T. Smith Lumber Co.* 72 So. 73.

California.—*Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707.

Colorado.—*Gougar v. Buffalo Specialty Co.* 26 Colo. App. 8, 141 Pac. 511; *Moore v. Kline*, 26 Colo. App. 334, 143 Pac. 262.

District of Columbia.—*Emack v. Campbell*, 14 App. Cas. 186.

Florida.—*Greenblatt v. McCall*, 67 Fla. 165, 64 So. 748.

Hawaii.—*Colby v. Bailey*, 5 Hawaii 152.

Illinois.—*Mikelaiczak v. Kruppa*, 254 Ill. 209, 98 N. E. 257; *Van Hannel v. Higley*, 172 Ill. App. 88; *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388; *U. S. Cast Iron Pipe, etc. Co. v. Chicago*, 185 Ill. App. 558; *Advance Amusement Co. v. Franke*, 188 Ill. App. 457, judgment affirmed 268 Ill. 579, 109 N. E. 471.

Massachusetts.—*Wheaton Bldg. etc. Co. v. Boston*, 204 Mass. 218, 90 N. E. 598; *Winston v. Pittsfield*, 221 Mass. 356, 108 N. E. 1038.

Minnesota.—*Nostdal v. Morehart*, 132 Minn. 351, 157 N. W. 584.

New Mexico.—*Keinath v. Reed*, 18 N. M. 358, 137 Pac. 841.

North Carolina.—*Rhyne v. Rhyne*, 160 N. C. 559, 76 S. E. 469.

Ohio.—*Jacobs v. Shannon Furniture Co.* 32 Ohio Cir. Ct. Rep. 51.

Oregon.—*Krausse v. Greenfield*, 61 Ore. 502, Ann. Cas. 1914B 115, 123 Pac. 392; *Strode v. Smith*, 66 Ore. 163, 131 Pac. 1037; *Rainier v. Masters*, 79 Ore. 534, 154 Pac. 426, L.R.A.1916E 1175, rehearing denied 79 Ore. 540, 155 Pac. 1197, L.R.A.1916E 1178.

Pennsylvania.—*Williams v. Golden*, 247 Pa. St. 397, 93 Atl. 505.

Texas.—Grayson v. Marshall, 145 S. W. 1034; Orenbaum v. Sowell, 153 S. W. 905; Reinhardt v. Borders, 184 S. W. 791.

West Virginia.—Beury v. Fay, 73 W. Va. 460, 80 S. E. 777.

Canada.—McPhee v. Wilson, 25 U. C. Q. B. 169; Hamilton v. Moore, 33 U. C. Q. B. 100, 275, 520; Townsend v. Toronto, etc. R. Co. 28 Ont. 195.

Thus in *Bankers' Surety Co. v. Elkhorn River Drainage Dist.* 214 Fed. 342, 130 C. C. A. 650, it appeared that a drainage district contracted for the straightening out of a river channel. The contract required that the work should be done within a certain time, and contained a clause that the contractor should forfeit \$30 per day as liquidated damages for delay. It was held that it was the intention of the parties that the forfeiture should be liquidated damages and not a penalty, it appearing that the amount of actual damage would be uncertain depending on the weather conditions. The court said: "The court has no dispensing powers, and the inquiry always is, not whether the parties have acted wisely in respect to the stipulations embodied in their contract, but rather what was the meaning and intent of the parties at the time the contract was entered into; and when that is clearly ascertained from the language used by the parties themselves, it must be given effect."

In *Nakagawa v. Okamoto*, 164 Cal. 718, 130 Pac. 707, it was said: "In determining whether a provision in a contract is for liquidated damage or for a penalty, 'the fundamental rule, so often announced, is that the construction of these stipulations, depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made.' (Id.)"

In *Gougar v. Buffalo Specialty Co.* 26 Colo. App. 8, 141 Pac. 511, the court said: "Whether a sum named in a contract is to be regarded as liquidated damages or as a penalty depends upon the intention of the parties as it appears from the nature of the contract, the situation of the parties, and the attending circumstances, and not merely upon the language used (*Carson v. Arvantes*, 10 Colo. App. 382, 385, 386, 50 Pac. 1080; *Sanford v. Belle Plaine First Nat. Bank*, 94 Ia. 680, 63 N. W. 459, 19 Am. & Eng. Enc. of Law [2d ed.] 396, 13 Cyc. 92, 93; 2 Page on Contracts, §§ 1172, 1173); and in case of doubt, whether a sum fixed by contract is a penalty or liquidated damages, the courts lean toward the former construction." See to the same effect *Moore v. Kline*, 26 Colo. App. 334, 143 Pac. 262.

In *Van Kannel v. Higley*, 172 Ill. App. 88, it was said: "Much of the trouble en-

countered in harmonizing the authorities upon this point will disappear, if we will remember that the real intention to be sought for is as to whether or not the parties, after having mutually and in good faith considered and calculated the actual damages, intended the sum fixed by their contract to be accepted as compensation for the breach of the contract, or merely as security or penalty for the breach thereof. It ought to be permissible to contracting parties to avoid all litigation and settle the question as to the amount of damages that shall be paid for the violation of their contracts, subject only to the condition that they do in good faith settle such damages on the basis simply of what they mutually determine to be reasonable and just compensation. . . . In determining the intent of the parties to the contract courts must look to the entire instrument, and give such construction that every clause shall have some effect, if possible, and for such purpose will, so far as practicable, view the contract from the position of the parties at the time it was made, in order to understand their language in the sense in which it was used, and will permit examination into the question of damages to determine whether or not the enforcement of its provisions would work a hardship upon the obligor."

In *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388, it appeared that the plaintiff made a contract with the defendant to supply it with gate valves for its waterworks, and among its provisions were that time was one of the "essential conditions of this contract," that "a failure to deliver the valves within the time fixed will work an injury to the city" and that the damages thus arising "cannot be calculated with any degree of certainty." It was held that because these provisions clearly expressed the intention of the parties, a stipulation that the defendant should forfeit \$10 for every day's delay beyond a specified date was for liquidated damages and not a penalty. The court said: "It is often a difficult matter to determine whether a contract provision like the one here involved shall be construed as a provision for liquidated damages or only as a penalty. The primary and most essential principle of construction is to ascertain the meaning and intent of the parties, by reference to the contract itself, the subject-matter thereof, the terms used to express the intent, and the circumstances under which the contract was made. The fact that parties fix a sum to be paid in case of a breach of the contract and call that sum 'liquidated damages' is not conclusive, but is one of the circumstances tending to prove the actual intent of the parties."

In *Strode v. Smith*, 66 Ore. 163, 131 Pac. 1032, it appeared that the defendants leased from the plaintiffs a certain property for thirty-five years agreeing to forfeit four thousand dollars if they did not erect a specified building thereon. It was held that the intention of the parties to consider this forfeiture as liquidated damages was plainly shown by their inability to ascertain just what would be the actual damages resulting from a breach. The court said: "The transaction was a plain contract which the parties apparently understood and clearly expressed in their writings. Their intention then being plain, there is no good reason for the court to say that the parties meant something other than that expressed in their agreement. The sum fixed does not appear to be, and is not shown to be, disproportionate to either the actual or presumed damages. It does not appear that one party to the contract was a victim of oppression. The loss naturally resulting from nonperformance of the stipulation was vague and uncertain, and as declared in the bond itself was a proper subject of contract between the parties. We cannot declare as a matter of law that the damages agreed upon are so excessive as to justify the court in declaring that the stipulation should be treated as a penalty."

In *Krausse v. Greenfield*, 61 Ore. 502, 123 Pac. 392, it appeared that the plaintiffs agreed to furnish to the defendants a number of shoes to sell in their retail business, and the defendants agreed to pay 20 per cent of the invoice price of any goods remaining unsold for 90 days. This stipulation was construed as an undertaking on the defendant's part to pay the plaintiffs for any damages which the goods would necessarily sustain by their removal from the plaintiff's stock and by their use in retail trade, and was held to constitute liquidated damages. The court said: "Compensation and not penalty affords the measure usually employed to determine the amount of damages to which a party is entitled by reason of a failure of the adverse party to keep or perform the terms of his agreement. The intention of the parties in this respect is controlling, however, when it satisfactorily appears that when a written contract was effected they anticipated the possible injury and fixed upon a just and reasonable sum of money as applicable to the entire consequence that might arise from a breach of the agreement, in which case the damages thus determined upon are recoverable."

In *Jacobs v. Shannon Furniture Co.* 32 Ohio Cir. Ct. Rep. 51, it appeared that the plaintiff entered into a contract with the defendant for five years' employment at a

salary of \$1,800 per year and a certain per cent of the profits per annum; and it was furthermore agreed that if the plaintiff should be discharged within twenty-five months, the defendant should pay him \$1,750 as damages. That payment was held to be liquidated damages and not a penalty. The court said: "Whether a stipulation in any given case is to be regarded as penalty or liquidated damages becomes a question of intention to be reflected from the whole instrument in connection with the subject-matter. The form in which the stipulation is clothed may be considered, but is not conclusive. In final analysis, the stipulation for damages must be read and considered along with all other provisions, the general scope and subject-matter of the contract, from which must be determined whether the parties intended thereby to fix a fair and just amount for the actual damages likely to arise, or an arbitrary amount as mere penalty to secure performance."

Construction of Terms of Contract.

CONTRACT USING EXPRESSION "PENALTY" OR "LIQUIDATED DAMAGES."

While the intention of the parties is an important element in ascertaining whether the sum named shall be considered as a penalty or liquidated damages, yet this intention must be ascertained from the language of the contract in connection with its subject-matter and the circumstances surrounding it. The fact that the parties to a contract may name this sum as "penalty" or "liquidated damages" is to be carefully considered, yet that is not the only thing to be looked to, as the term "penalty" or "liquidated damages" may be employed under circumstances showing that such is not really the meaning of the parties. *Pacific Hardware, etc. Co. v. U. S.* 48 Ct. Cl. 399; *Board of Commerce v. Security Trust Co.* 225 Fed. 454, 140 C. C. A. 486; *Gay Gee Amusement Co. v. Cave*, 177 Ill. App. 250; *Miller v. Duntley*, 182 Ill. App. 205; *Zenor v. Pryor*, 57 Ind. App. 222, 106 N. E. 746; *Eikenberry v. Thorn* (Ind.) 112 N. E. 112; *Kaplan v. Gray*, 215 Mass. 269, 102 N. E. 421; *Feinsot v. Burstein*, 78 Misc. 259, 138 N. Y. S. 185; *Ould v. Spartanburg Realty Co.* 94 S. C. 184, 77 S. E. 866; *Grayson v. Marshall* (Tex.) 145 S. W. 1034; *Wright v. Bott* (Tex.) 163 S. W. 360; *Beury v. Fay*, 73 W. Va. 460, 80 S. E. 777; *Pelee Island Nav. Co. v. Doty Engine Works Co.* 23 Ont. L. Rep. 402, 18 Ont. W. Rep. 599; *Knapp v. Carley*, 30 Ont. W. Rep. 940.

Thus in *Pacific Hardware, etc. Co. v. U. S.* 48 Ct. Cl. 399, the court said: "Courts have frequently decided that the sum stipu-

lated to be paid on the breach of an agreement to be, from the nature of the case, a penalty, notwithstanding the strongest language showing the apparent intention of the parties to be that it should be paid in full as liquidated damages. So, too, cases are numerous in which the parties have used the term 'penalty,' which seems on its face to impart a forfeiture rather than a valuation of damage, yet the stipulated sum, from the very nature of the case, should be considered as liquidated damages and recoverable in full. Page on Contracts (sec. 1172) says, in substance, that the use of either of these terms in a contract is not conclusive; that liquidated damages may appear from the context of the contract to be really a provision for a penalty and will be so treated. On the other hand, a contract for a penalty may be shown by the intention of the parties to be liquidated damages. The question, therefore, must be determined by surrounding conditions and the intent of the parties to the contract."

In *Board of Commerce v. Security Trust Co.* 225 Fed. 454, 140 C. C. A. 486, it was said: "The rule therefore prevailing in the courts of the United States—and, it may be said, generally, in the state courts—is that 'liquidated damages' may be read 'penalty,' and 'penalty,' 'liquidated damages,' according to the contract itself and the circumstances of the case; and that, when the parties have used the language 'liquidated damages,' the language chosen by them shall prevail in its legal meaning, unless the nature of the contract and the circumstances show an intention to provide a penalty."

In *Gay Gee Amusement Co. v. Cave*, 177 Ill. App. 250, it appeared that there was a clause in a lease which provided that a sum of money could be retained by a lessor at his option "as and for liquidated damages and not as a penalty." It was held to be a penalty in spite of the fact that it had been called liquidated damages in the lease. The court said: "The thing that usually settles the question as to whether liquidated damages or a penalty is meant in such contracts, is a disclosure in the contract that the parties agreed upon the actual damages to be paid and intended that said sum and no other sum should be paid and accepted as the actual damages for the breach. The fixing of liquidated damages by two parties is supposed to be done to prevent any litigation or further inquiry into the question of damages. Leaving it optional to appellee to accept the sum as liquidated damages is a point against the contention that the damages to be paid were irrevocably fixed and settled by the parties. So, also, if by the contract we determine that only the actual, or the exact damages of appellee, are to

be recovered in case of default, that argues that the damages fixed are to be considered as a penalty, as in case the sum fixed be declared a penalty only actual damages sustained can be recovered."

In *Zenor v. Pryor*, 57 Ind. App. 222, 106 N. E. 746, it appeared that certain persons entered into a contract for the sale of land on the instalment plan, and it was agreed that if the defendant did not carry out his part of the contract, he would "forfeit as liquidated damages" an amount equal to the purchase price. It was held that this sum was a penalty and not liquidated damages, because notwithstanding the use of the term "liquidated damages," the word "forfeit" implied a penalty, and combined with the fact that the amount was too large to give a just compensation, it showed that the parties had intended a penalty. The court said: "The particular cases, however, all recognize that, where the contract leaves in doubt the question whether the sum specified therein by the contracting parties was intended as liquidated damages or a penalty, the tendency of the courts is in favor of that interpretation which makes such specified sum a penalty. *Merica v. Gurget* (1905) 36 Ind. App. 453, 464, 75 N. E. 1083, and cases cited; *Wilkes v. Bierne* (1910) 68 W. Va. 82, 69 S. E. 366, 31 L.R.A.(N.S.) 937, 939, and authorities cited; *Mt. Airy Milling, etc. Co. v. Runkles* (1912) 118 Md. 371, 376, 84 Atl. 533, L.R.A.1915E 373; 1 *Pomeroy, Eq. Jurisp.* (2d ed.) § 440. The cases also recognize and announce that 'the form of the instrument does not control, for the courts will look beyond that to the subject of the contract and to the consequences that will probably flow from a breach of its terms and conditions.' *Jaqua v. Headington* [114 Ind. 310, 16 N. E. 527]. And "if upon the whole agreement the court can say that the sum stipulated to be paid was intended to be a penalty," the court will so treat it, without regard to how the parties have designated it." *Bell v. Scranton Coal Mines Co.* (1910) 59 Wash. 659, 110 Pac. 628. See also *Sanford v. Belle Plaine First Nat. Bank* (1895) 94 Ia. 680, 63 N. W. 459."

In *Eikenberry v. Thorn* (Ind.) 112 N. E. 112, it appeared that a contract for an exchange of properties provided for the doing of numerous things, and also contained a clause whereby either of the parties who "failed to comply with all the conditions herein" should pay \$3,000 damages. It was held that this called for a penalty and not for liquidated damages because the same damages would be payable for the breach of any of the conditions no matter how small, and this rendered the interpretation of the stipulation doubtful. The court said: "If it appears from the whole instrument that

the parties knowingly, mutually agreed in advance upon a definite amount to be paid by the defaulting party to the other in case of a breach or repudiation of the contract, such agreement will control, unless it is inconsistent with other provisions of the contract, or is unreasonable or unconscionable in view of the probable damages that may result from a breach of such contract. The use of particular words or phrases, such as damages, penalty, forfeit, liquidated damages, and the like is not conclusive, but they are to be duly considered in connection with the other provisions of the contract in determining whether the stipulation as to damages in case of a breach shall be considered as a penalty or as liquidated damages."

In *Kaplan v. Gray*, 215 Mass 269, 102 N. E. 421, it appeared that the plaintiff was the owner of a patent for constructing a shades for road lamps for vehicles. The defendant contracted with him to construct for one year at least one thousand shades to be paid for at the rate of one dollar per shade. He also deposited with the plaintiff the sum of five hundred dollars to be applied to the payment of the last five hundred shades, but if he failed to make one thousand shades, it was to be forfeited as "fixed, liquidated and ascertained damages." The defendant manufactured only twenty-five shades and paid twenty-five dollars instead of one thousand dollars. It was held that the contract provided for liquidated damages, and that the plaintiff could retain only the five hundred dollar deposit. The court said: "It is true that the use of the words 'liquidated damages' is not decisive, and in some cases, notwithstanding such designation, it may be apparent from the terms of the entire contract and an examination of the subject-matter that the money is to be treated as a penalty. But such is not the situation here. The contract contained numerous stipulations for a breach of which it would be difficult, if not practically impossible, accurately to determine the damages. Such, for instance, are those requiring the defendants to keep up the quality of the shades, to mark and number each one as provided in the agreement, to keep and render accurate accounts, and to settle for royalties monthly. Considering the subject-matter of the contract, it was a territorial right for a newly patented lamp, the success of which was problematical. Apparently the defendants were willing to risk not more than five hundred dollars in the venture in addition to the one dollar to be paid for each lamp shade they could find a customer for; and the plaintiff was willing to accept the certainty of that amount, with the prospect of more in the event of the defendant's success in introducing the shades to their customers."

In *Feinsot v. Burstein*, 78 Misc. 259, 138 N. Y. S. 185, the court said: "It is, of course, well established that parties have a right to agree that, in case of a breach of covenant, a certain sum shall be fixed in advance as the damages for that breach. If they have actually agreed that the sum to be paid on a breach represents an estimate of the damages sustained, the party in default must pay these damages even though the agreement uses words such as 'forfeit' or 'penalty.' On the other hand, though the parties, in their agreement, have used words such as 'liquidated damages,' the courts will regard the clause for the payment of a fixed sum upon the happening of a breach as a penalty or forfeiture, if it appears that the parties did, in fact, regard the sum fixed as a penalty and not as an estimate of probable damages fixed in advance. In determining whether or not a sum agreed upon is, in fact, a penalty or liquidated damages, the courts must consider 'the actual intention of the parties, so far as it can reasonably and fairly be ascertained from the language of the contract, and from the nature of the surrounding circumstances of the case.'"

In *Knapp v. Carley*, 3 Ont. W. Rep. 940, it appeared that a contract for the exchange of land contained the following provision: "We, the said parties hereto, agree to forfeit to each other the sum of two hundred dollars in case either fails to comply with the conditions of the above agreement." It was held that the provision was for liquidated damages and not for a penalty though the word "forfeit" was used. The court said: "The word 'forfeit' is perhaps more consistent with the idea of a penalty than a sum payable as liquidated damages, and the latter term is not used. That is not, however, conclusive either way. The question is one of law, to be decided upon a consideration of the whole instrument, and the principle upon which it is to be decided is simply to ascertain the real intention of the parties. Having regard to the moderate sum named, and the fact, as I take it to be, that the loss which would accrue to the other party from a failure of one of them to perform the agreement on his part cannot be accurately or reasonably calculated in money antecedently to the breach, I think that the sum which the parties have named should be treated as liquidated."

In *Pelee Island Nav. Co. v. Doty Engine Works Co.* 23 Ont. L. Rep. 402, it was said: "It is competent to parties to contract that a sum which, according to the canons of construction, would be held to be a penalty, shall not be a penalty but shall be an assessment of damages, and, if such an intention is clearly established by admissible evidence, effect should be given to it. Here, unless the actual language of the contract

is inconsistent with the interpretation which prima facie the words suggest, that interpretation should be placed upon it."

In *Beury v. Fay*, 73 W. Va. 460, 80 S. E. 777, it appeared that the plaintiff and the defendant entered into a contract to exchange several thousand acres of mineral and timber lands consisting of numerous tracts, and a deposit of \$10,000 was made by one of the parties under an express agreement that it should be paid to the other as liquidated damages in case the depositor failed to carry out his part of the contract. This was held to show the intent of the parties that the deposit should be considered as liquidated damages for a breach of the contract. The court said: "The designation of the sum to be forfeited as liquidated damages is not conclusive. 19 Am. & Eng. Enc. of Law (2d ed.) 400. If the actual damages resulting from the breach were readily ascertainable and the forfeiture flagrantly disproportionate thereto, the latter might well be treated as a penalty although denominated liquidated damages by the contract. *Charleston Lumber Co. v. Friedman*, 64 W. Va. 161, 19 Am. & Eng. Enc. of Law (2d ed.) 402 to 410. But whether the damages contemplated were at all or readily ascertainable the record fails to disclose. As to that the evidence is very meager. A decisive element appears, however, in the actual deposit of the money under a stipulation for payment of it in case of breach. It is generally regarded as conclusive. 19 Am. & Eng. Enc. of Law (2d ed.) 413; 1 Sedg. Dam. sec. 414. Deposit of the money and the agreement that it be paid over puts the question of intent beyond the shadow of a doubt."

CONTRACT FOR PERFORMANCE OF ONE SPECIFIC ACT OR INVOLVING SEVERAL UNDERTAKINGS.

As an aid to the construction of a contract, the general rule has been laid down that where the damages arise from the breach of a contract requiring only one act, the actual amount of damages being difficult to ascertain, a stipulated forfeiture will be construed to be liquidated damages. See *Fleishman v. Rahmstorf*, 226 Fed. 443, 141 C. C. A. 273. But where a contract has several provisions, damages for the nonperformance of some of which are readily ascertainable and for others not, and one sum is named as damages for the breach of any of them, the sum is construed as a penalty. *Ford Motor Co. v. Armstrong*, 30 Times L. Rep. (Eng.) 400, 58 Sol. J. 456; *Empire Loan, etc. Co. v. McRae*, 5 Ont. L. Rep. 710; *Brussels v. Ronald*, 11 Ont. App. 605; *Chicago, etc. R. Co. v. Dockery*, 195 Fed. 221, 115 C. C. A. 173; *O'Brien v. Illinois Surety*

Co. 203 Fed. 436, 121 C. C. A. 546; *Greenblatt v. McCall*, 67 Fla. 165, 64 So. 748; *Weber v. Moy*, 183 Ill. App. 200; *Eikenberry v. Thorn* (Ind.) 112 N. E. 112; *Kuter v. State Bank*, 96 Kan. 485, 152 Pac. 662, *order modified* 97 Kan. 375, 164 Pac. 1009; *Decker v. Pierce*, 191 Mich. 64, 157 N. W. 384; *Summit v. Morris County Traction Co.* 85 N. J. L. 193, 88 Atl. 1048, L.R.A.1915E 385; *Gibbs v. Cooper*, 86 N. J. L. 226, 90 Atl. 1115; *City Nat. Bank v. Kelly* (Okla.) 151 Pac. 1172; *Ross Tin Mine v. Cherokee Tin Min. Co.* 103 S. C. 243, 88 S. E. 8; *Western Macaroni Mfg. Co. v. Fiore*, 47 Utah 108, 151 Pac. 984; *Miller v. Moulton*, 77 Wash. 325, 137 Pac. 491.

In *Ford Motor Co. v. Armstrong*, 30 Times L. Rep. (Eng.) 400, 58 Sol. J. 456, it was held that where the plaintiffs agreed to sell to the defendant their cars which the defendant was not to resell below a certain price, the sum of 250l to be forfeited for the breach of this or other conditions, the forfeit was to be construed as a penalty, because it was to be paid for the breach of any one of several clauses of the contract.

In *Brussels v. Ronald*, 11 Ont. App. 605, it appeared that the plaintiffs gave to the defendant a bonus of \$20,000 to help him in the manufacture of steam engines and farming instruments, he to give a mortgage on the factory premises to be conditioned on his conducting the manufacturing business for twenty years, keeping \$30,000 invested in the factory during that period and insuring the buildings and plant in the plaintiffs' favor. The defendant broke his agreement, and the plaintiffs started a foreclosure action. It was held that the mortgage was in the nature of a penalty and not liquidated damages, and actual damages must be proved by the plaintiffs. The court said: "The first question is one which depends upon the intention of the parties, to be gathered from the instruments. The principle is, that, although the parties may have used the term 'liquidated damages,' yet if the court can see, upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on nonperformance of any of the stipulations of the deed, they will . . . consider it as being in the nature of a penalty only." *Green v. Price*, 13 M. & W. (Eng.) 695, 701, 16 M. & W. 346. Here the parties have neither designated the principal sums as liquidated damages, nor have they in terms expressed an intention that the bonus, *qua* bonus shall be repaid wholly or in part in any given event. I think the rules of construction applicable are those laid down in the cases of *Davies v. Penton*, 6 B. & C. 216 [13 E. C. L. 147], and *Reynolds v. Bridge*, 6 El. & Bl. 528 [88 E. C. L. 528].

In the former *Bayley, J.*, says, p. 223: "Where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty." And in *Reynolds v. Bridge*, Mr. Justice Coleridge [6 El. & Bl.] 541 [88 E. C. L. 541], after referring to the case of an agreement to pay a particular sum which is much less than the sum named as payable upon the breach, says: "Then comes the case where there are several provisions, the breach of some of which will produce an ascertainable damage, but the breach of others an uncertain damage. In that case . . . inasmuch as there is one provision in respect of which the sum cannot be taken as liquidated damages, it cannot be so taken for any provision; for, if it could, the contract would mean liquidated damages in one case and not in another."

In *Chicago, etc. R. Co. v. Dockery*, 195 Fed. 221, 115 C. C. A. 173, it appeared that a railroad company had agreed to build and maintain a station and stock yards on a tract of land for ten years as part consideration for its sale, and the agreement contained the stipulation that the railroad company would pay \$5,000 as liquidated damages for a breach of the contract. It was held that the stipulated sum was really a penalty and not liquidated damages, because the railroad had agreed to do several things, any one of which would have called for the forfeit, and that the plaintiff could recover only the actual damages which he could show he had suffered as a result of the breach. The court said: "The authorities also quite generally hold that, where there are several undertakings or agreements in a contract, the damages for the nonperformance of some of which are readily ascertainable, and for others not, and one sum is named as damages for a breach of any of them, such sum will be regarded as a penalty only, and not as liquidated damages for the breach of any single stipulation."

In *Greenblatt v. McCall*, 67 Fla. 165, 64 So. 748, it appeared that the plaintiff in error had made an agreement with the defendant in error to purchase \$300 worth of patterns and then to purchase patterns to the value of \$30 per month. The contract further provided that if it was broken by one party, the other would be released from the agreement and receive as liquidated damages two-thirds of the value of the patterns still remaining to be delivered. The contract also contained several other provisions. It was held that the sum to be forfeited was in the nature of a penalty and not liquidated damages. The court said: "Where a fixed sum is named to secure the performance

of a contract containing stipulations of widely differing importance, for any of which the stipulated sum is an excessive compensation, the designated sum may be regarded as a penalty. When the fixed amount is in law a penalty, the plaintiff must, among other essentials, allege and prove the damage actually resulting from the breach, and not merely claim the specific sum fixed in the contract."

In *Weber v. Moy*, 183 Ill. App. 200, it was held that where a lease contained several provisions, damages for the breach of some of which were ascertainable, and a sum was made payable for the breach of any of them, it was a penalty.

In *Decker v. Pierce*, 191 Mich. 64, 157 N. W. 384, it appeared that the owners of a moving picture business sold it with a stipulation that they would not engage in the exhibition of moving pictures in the same town for two years, or hire themselves out to any one else engaged in that business for the same space of time. The contract contained several other provisions. It was also agreed between the parties that a forfeiture of \$500 should be made for a breach of the agreement as liquidated damages. It was held to be a penalty, because the same forfeit would be due for the breach of any of the provisions. The court said: "The rule established at an early day in Michigan was the following: Where, by the terms of a contract, a sum is mentioned as 'liquidated damages' for a nonperformance of several distinct stipulations of very different degrees of importance, and this sum is to be payable equally on a failure to perform the least, as of that to perform the most important or whole of them together, it is in legal effect a penalty, and not stipulated damages."

In *Summit v. Morris County Traction Co.* 85 N. J. L. 193, 88 Atl. 1048, L.R.A.1915F. 385, it appeared that the defendant accepted a franchise from the plaintiff to run a trolley line. The conditions were many and various, and the defendant gave a bond for the faithful performance of all of them. It was held that the bond was a penalty rather than liquidated damages. The court said: "The rule to be gathered from our decided cases is this: That when damages are to be ascertained for the breach of a single stipulation contained in an agreement, and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages (*Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132, 26 Atl. 140, 19 L.R.A. 456, 39 Am. St. Rep. 626; *Robinson v. Centenary Fund, etc. Aid Soc.* 68 N. J. L. 723, 54 Atl. 416); but where the

agreement contains disconnected stipulations of various degrees of importance, the sum named therein to be paid in case of a failure of performance will be considered as a penalty, unless the agreement specifies the particular stipulation or stipulations to which the liquidated damages are to be confined."

In *Western Macaroni Mfg. Co. v. Fiore*, 47 Utah 108, 151 Pac. 984, the court said: "The general rule is that, where an agreement imposes several distinct duties or obligations, of different degrees of importance, and the same sum is named as damages for the breach of either indifferently, the sum is to be regarded as a penalty. 13 Cyc. 93; *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194; *El Reno v. Cullinane*, 4 Okla. 457, 46 Pac. 510; notes 34 L.R.A. (N.S.) 23. When the question of whether a contract provides a penalty or liquidated damages is in doubt, the contract ordinarily will be regarded as providing a penalty. If the stipulation is a penalty, it, as such, will not be enforced, but simply the actual damages sustained, if less than the amount of the penalty."

The general rule which has just been discussed is, however, subject to the modification that where a contract has several provisions of varying importance, a forfeiture to be paid on the breach of any one of them may be in the nature of liquidated damages if the damages caused by the breach are not ascertainable. See *Dunlop Pneumatic Tyre Co. v. New Garage, etc. Co.* 83 L. J. K. B. (Eng.) 1574, 30 Times L. Rep. 625; *Schrader v. Lillis*, 10 Ont. 358; *Craig v. Dillon*, 6 Ont. App. 116; *Los Angeles Olive Growers' Assoc. v. Pacific Surety Co.* 24 Cal. App. 95, 140 Pac. 295; *Berghuis v. Schultz*, 119 Minn. 87, 137 N. W. 201. In *Schrader v. Lillis*, supra, it appeared that certain persons formed themselves into a cigar manufacturers' association in opposition to the Cigar Makers' Union, and entered into an agreement to pay \$500 as liquidated damages if any one of them broke any of the clauses of the contract. It was held that the stipulated sum should be considered as liquidated damages rather than as a penalty because while the contract contained a condition for the payment of money for the breach of varying conditions, the actual damages for the breach of any one of them were difficult of ascertainment.

In *Craig v. Dillon*, 6 Ont. App. 116, it appeared that the defendant had trespassed on the property of the plaintiff by placing stones there and commencing to build a stone fence. He then entered into an agreement with the plaintiff that he would remove the stones before a certain date provided a re-survey of the property, which he had the privilege of making, did not show that that part of the property really belonged to him;

and he furthermore promised that if he failed to keep this agreement he would pay \$200 as liquidated damages. He did not have the survey made nor did he remove the stones and fence by the specified time. It was held that this forfeit was liquidated damages for the failure to do a specified act, as the removal of the stones and fence was one act.

In *Los Angeles Olive Growers' Assoc. v. Pacific Surety Co.* 24 Cal. App. 95, 140 Pac. 295, it appeared that a contract was made by which a person was to do several things varying in importance and was to forfeit \$1,100 for the breach of any of the terms. A bond was given to secure performance. It was held that this bond was in the nature of liquidated damages, because under the statute (Cal. Civil Code, par. 1675) the parties to a contract might decide on liquidated damages in all cases where it would be impracticable or difficult to fix the actual damages arising from a breach. The court said: "Says Mr. Pomeroy in his work on Equity Jurisprudence, section 443: 'Where an agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all of such provisions, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages.' Applying this rule, respondent insists that the sum of one thousand dollars damages stipulated in the contract must be regarded as a penalty. Looking to the code, however, we find the rule modified by section 1670 of the Civil Code, as follows: 'Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.' The next section, 1671 of the Civil Code, provides: 'The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.' It thus appears that an agreement whereby the parties to a contract fix the amount of damages for a breach of its obligations in anticipation thereof may be enforced as a valid contract where, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

PROPORTION OF ACTUAL DAMAGES TO SUM NAMED.

The fact that the sum named in a contract to be paid on a breach is wholly disproportion-

tionate to the actual damages sustained, will lead the courts to hold that it was the intention of the parties to stipulate for a mere penalty to secure performance and not for liquidated damages. *Colgrove v. Gundy*, 17 Dominion L. Rep. 45, 28 West. L. R. (Alberta) 731; *Pacific Hardware, etc. Co. v. U. S.* 48 Ct. Cl. 399; *The Columbia*, 197 Fed. 661, affirmed in 199 Fed. 990, 117 C. C. A. 666; *Elgin, etc. R. Co. v. Northwestern Nat. Bank*, 165 Ill. App. 35; *Standard Brewery v. Johnston*, 191 Ill. App. 5; *J. I. Case Threshing Co. v. Souders*, 48 Ind. App. 503, 96 N. E. 177; *Elzey v. Winterset*, 172 Ia. 643, 154 N. W. 901; *Mt. Airy Milling, etc. Co. v. Runkles*, 118 Md. 371, 84 Atl. 533, L.R.A. 1915E 373; *Dubinsky v. Wells Bros. Co.* 218 Mass. 232, 105 N. E. 1004; *Schommer v. Flour City Ornamental Iron Works*, 129 Minn. 244, 152 N. W. 535; *Buchanan v. Louisiana Purchase Exposition Co.* 245 Mo. 337, 149 S. W. 26; *Nichols, etc. Co. v. Beyer*, 168 Mo. App. 686, 153 S. W. 794; *Ward v. Haren*, 183 Mo. App. 569, 167 S. W. 1064; *Jackson County Light, etc. Co. v. Independence*, 188 Mo. App. 157, 175 S. W. 86; *Baerenklau v. Peerless Realty Co.* 80 N. J. Eq. 26, 83 Atl. 375; *Shields v. John Shields Constr. Co.* 81 N. J. Eq. 286, 86 Atl. 958; *New York v. Palladino*, 146 App. Div. 850, 131 N. Y. S. 807; *Godt v. Henigson*, 135 N. Y. S. 666; *Poppenberg v. Owen*, 84 Misc. 128, 146 N. Y. S. 478; *Cleveland v. Connelly*, 33 Ohio Cir. Ct. Rep. 64; *Graham v. Lebannon*, 240 Pa. St. 337, 87 Atl. 567; *Palestine Ice, etc. Co. v. Connally (Tex.)* 148 S. W. 1109; *Stener v. Schultz*, 69 Wash. 677, 125 Pac. 1026; *Wilkes v. Biernie*, 68 W. Va. 82, 69 S. E. 366, 31 L.R.A.(N.S.) 937.

Thus in *Colgrove v. Gundy*, 17 Dominion L. Rep. 45, 28 West. L. Rep. (Alberta) 731, it was held that where the defendant agreed to pay by instalments the purchase price of property and was to be allowed a discount of \$6,000 for the prompt payment of an instalment of nine thousand dollars, this was a penalty because it was entirely disproportionate to the damages.

In *The Columbia*, 197 Fed. 661, affirmed in 199 Fed. 990, 117 C. C. A. 666, it appeared that the libellant agreed to construct a steamship within a certain number of days and promised to pay demurrage at the rate of \$100 per day for overtime in completing the ship. The libellant was twenty-nine and one-half days longer than the contract time in finishing the ship and the claimant demanded \$2,950 under this agreement. It was held that such a provision in the contract for the payment of a fixed sum for its breach, whether as a penalty or as liquidated damages, would not be enforced where it appeared that no damage had been incurred.

In *Standard Brewing Co. v. Johnston*, 191 Ill. App. 5, it appeared that the defendant in consideration of \$800 and the loan of a complete set of saloon fixtures agreed to buy from the plaintiff all of his domestic beer at the usual market price for a period of five years, and in case of a breach to pay the sum of \$1000 damages. The defendant carried out his agreement until within six months of the end of the term and then violated the contract. It was held that the forfeiture should be construed as a penalty even though the words "liquidated damages" had been used, as the amount was so grossly disproportionate to the actual damages as to be unfair, and in such a case the courts would declare that the parties intended a penalty.

In *Elgin, etc. R. Co. v. Northwestern Nat. Bank*, 165 Ill. App. 35, it appeared that a dredging company agreed to do certain work for a railroad company, the work to be completed on a certain date, with the proviso that in case of delay the dredging company was to pay \$250 per day as liquidated damages. The work was not completed; but the dredging company made an assignment for the benefit of creditors and the trustee appointed by the court completed the work at a later date. The railroad company refused to make the last payment of \$1,700 on the theory that it had been forfeited by the delay. It was held that that amount was a penalty and not liquidated damages, because it was out of all proportion to the damages suffered. The court said: "Where the amount agreed to be paid for the breach of the contract greatly exceeds the actual damages suffered on account of the delay—that is to say, if the amount agreed to be paid is out of proportion to the probable damage sustained, the court will be disposed to treat the stipulated sum as a penalty and not liquidated damages. The fact that parties fix a sum to be paid and call it liquidated damages, does not always control the question as to the measure of the recovery for the breach of the contract, and if the clause fixing the amount of damages appears to have been inserted to secure prompt performance of the agreement, it will be treated as a penalty and not more than actual damages proved can be recovered."

In *Schommer v. Flour City Ornamental Iron Works*, 129 Minn. 244, 152 N. W. 535, it was held that where the plaintiff was apprenticed to the defendant for four years, and it was agreed that one dollar per week should be held out of his wages to be forfeited in case he did not carry out his contract, the forfeiture was a penalty and not liquidated damages. The court said: "Defendant contends that the provision for retaining one dollar per week of plaintiff's wages entitled defendant to that amount as liquidated damages for plaintiff's breach of the contract.

To determine when such provisions are in the nature of a penalty and when they fix the amount of damages recoverable for a breach of the contract has given the courts much trouble. The law adopts as its guiding principle that the injured party is entitled to receive a fair equivalent for the actual damages necessarily resulting from failure to perform the contract and no more. If the damages which follow a breach of the contract may be ascertained and measured with reasonable readiness and certainty by the application of the ordinary rules of law, a provision purporting to fix such damages at an amount materially different from the actual damages is held to be a penalty. If substantial damages may follow a breach and such damages cannot be ascertained or measured by the ordinary rules, a provision for liquidated damages not manifestly disproportionate to the actual damages will be sustained. There is no hard and fast rule which can be applied in all cases, and each case must be determined according to its own peculiar facts, bearing in mind that a provision which clearly disregards the guiding principle cannot be given effect as fixing the amount recoverable, and that doubts are usually to be resolved in favor of that construction which will give the injured party his actual damages."

In *Nichols, etc. Co. v. Beyer*, 168 Mo. App. 686, 153 S. W. 794, it appeared that in a contract for the sale of a threshing machine, a certain amount was to be paid down, the balance in equal instalments. The contract also contained a clause providing that in case of a breach the vendee was to forfeit fifteen per cent of the purchase price which would be \$480. There was a breach of the contract within eleven days of its signing, and the vendor claimed the forfeiture. It was held to be a penalty, as a loss of \$480 so soon after the making of the contract would be unreasonable. The court said: "As has been often said, the general rules by which the courts are to construe such agreements are well enough understood and defined, the difficulty lying in the application of the rules to particular cases, for there is frequently an apparent ingredient of both penalty and liquidated damages. Ordinarily, the court must look to the subject-matter of the contract and the intention of the parties. [May v. Crawford, 150 Mo. 504, 51 S. W. 693.] The courts do and should favor construing forfeiture stipulations to be penalties rather than liquidated damages. [13 Cyc. 95.] This is because in ordinary contracts the aggrieved party should recover no more than the amount of loss he has suffered. . . . Again, it is the duty of the court to examine the entire contract and the surrounding circumstances of the particular case, and from

it all determine whether the sum stated was inserted after an endeavor on the part of the parties to the contract to fix the compensation in case of a breach, or whether it was intended merely to deter a breach. . . . True it is, they called it 'liquidated damages,' but their misnomer is no reason for this court to be led astray; the language is not conclusive. [13 Cyc. 91.] And certainly not in a case where the measure of damages is easily ascertainable, and where from the entire contract and from the particular item it appears to have been inserted as 'scare money,' and put in not to compensate but to deter a breach; nor in a case where the amount fixed is so out of proportion to the ordinary fluctuation in the market price of as staple an article as a threshing outfit—and that in a period of only two and one-half months."

In *Jackson County Light, etc. Co. v. Independence*, 188 Mo. App. 157, 175 S. W. 86, it appeared that the defendant granted a franchise to the plaintiff to furnish natural and artificial gas to the city, and the plaintiff deposited \$5,000 as security for carrying out the agreement. Artificial gas was furnished to the defendant, but the company was unable to bring the natural gas into the city. An action was brought to recover the deposit, but the defendant claimed a breach of the contract in not furnishing natural gas. It was held that the deposit was a penalty, and that as the defendant had not suffered any damage the plaintiff was entitled to the \$5,000. The court said: "In this case no damage has been sustained by the city for failure to bring natural gas to the city limits. The city hasn't natural gas it is true, but it did not have when the contract was made, nor has it been deprived of natural gas by reason of the contract and appellant's failure to obtain it. The city apparently had a chance or hope of getting it which afterwards turned out to be groundless through no fault of appellant. Liquidated damages can be recovered only when there is more than nominal damages to the other party. [Werner v. Finley, 144 Mo. App. 554.] The deposit, therefore, can only be considered as a forfeiture. And forfeitures are not looked upon with favor, but contracts providing therefor will be strictly construed in determining whether or not a forfeiture will be declared. [Albers v. Merchants' Exch. 140 Mo. App. 446; Tetley v. McElmurry, 201 Mo. 382; King v. Hartford, L. etc. Ins. Co. 133 Mo. App. 612.] Certainly a forfeiture will not be declared as a matter of law when such declaration must rest upon a construction which would make the contract strange, paradoxical, and futile, when there is a reasonable construction disclosed by the contract, the nature of its subject-matter, and

the circumstances surrounding the parties at the time of the creation of the contract."

In *Buchanan v. Louisiana Purchase Exposition Co.* 245 Mo. 337, 149 S. W. 26, it appeared that the plaintiffs leased some land to the defendant company for exposition grounds for \$12,000 per year with the agreement that there should be a forfeiture of \$86 for every day's delay in turning over the property after the expiration of the lease. When the exposition was over the defendant employed a wrecking company to remove buildings which had been erected thereon, but the latter did not complete the job until 150 days after the expiration of the lease. The plaintiffs brought an action for \$24,000, the amount of the forfeiture. It was held that the sum stipulated was a penalty, because it was an unreasonable amount and that the plaintiffs could recover only such damages as they could prove they had actually suffered by the delay. The court said: "Disregarding nomenclature and turning to the essential character of the damages referred to in the contract, a comprehension of their real nature can be arrived at by considering (1) whether the damages following a breach of the agreement are such as can be definitely or readily ascertained by evidence or fixed rules of computation; or, on the other hand, whether the damages are such that it would be difficult, if not impossible, to measure them by any exact pecuniary standard or calculate them with approximate accuracy. In the first instance, if the amount stipulated is greatly disproportionate to the loss following a breach of the contract, the court will construe it to be a penalty and restrict the recovery to such damages as were actually suffered. In the second instance, if the amount specified appears to be a reasonable estimate of undefinable and unascertainable damages, the court will construe it as a proper liquidation and enforceable according to the agreement of the parties."

In *Poppenberg v. Owen*, 84 Misc. 126, 146 N. Y. S. 478, it was said: "It, however, may be said as a general proposition, that courts are disposed to regard with disfavor agreements by which the damages of parties to them are fixed at stated amounts regardless of the actual losses sustained. Such agreements have been held valid and binding in certain cases and under certain circumstances. The disposition of the courts, however, is to treat such engagements rather in the nature of a provision for a penalty than as liquidated damages, particularly in cases where the stipulated sum is clearly disproportionate to actual losses sustained, and where the actual damages are easily and readily ascertainable, as they were in the case at bar."

In *Palestine Ice, etc. Co. v. Connally* (Tex.) 148 S. W. 1109, it appeared that a contract for the purchase of machinery consisting of numerous parts to be manufactured at the order of the buyer contained a stipulation that in the event of the buyer's failure to receive the machinery or any part of it, the buyer would pay a specified per cent of the amount of the contract and a part of the attorney's fees if placed in the hands of an attorney for collection as liquidated damages. It was held that the stipulated forfeiture was a penalty, as the amount was disproportionate to the actual damages suffered, and the seller could recover only what he had actually lost. The court said: "The object of the law in awarding damages is to compensate the complainant for loss wrongfully occasioned to him. The justification for denying him a right to recover a sum specified in his contract to be paid in the event of a breach thereof lies in the fact that such sum is in excess of the sum certainly ascertainable (as it is here) by established rules of law necessary to compensate him for the loss he has sustained. In such a case, if the sum stipulated to be paid should be treated as a penalty because it exceeds the actual loss, we see no reason why, when it is less than the actual loss, it should not be treated as a penalty. In the one case to permit a complainant to recover the stipulated sum would be to allow him more than compensation for his loss, and to the extent of the excess punish the defendant; while in the other case to limit the complainant to a recovery of the sum stipulated would be to deny him compensation for his loss, and to the extent of the denial punish him. The purpose of the law would be as entirely defeated in the one case as in the other."

The courts also hold the converse of the rule just discussed, namely, that where stipulated damages arising from a breach of a contract bear a fair proportion to the actual damages suffered and show that the parties intended that there should be a fair compensation to the party injured, then the forfeiture will be construed as liquidated damages and not a penalty. *Board of Commerce v. Security Trust Co.* 225 Fed. 454, 140 C. C. A. 486; *Morris v. U. S.* 50 Ct. Cl. 154; *George v. Roberts*, 186 Ala. 321, 65 So. 245; *Scott v. McCraw, etc. Co.* 119 Ark. 133, 177 S. W. 901; *Nevada County Bank v. Sullivan*, 122 Ark. 235, 183 S. W. 169; *Martin v. Lott*, 144 Ga. 660, 87 S. E. 902; *Bartholomae, etc. Brewing, etc. Co. v. Modzelewski*, 269 Ill. 539, 109 N. E. 1058, *affirming* judgment 183 Ill. App. 352; *Scott v. Mayfield*, 153 Ky. 278, 155 S. W. 376; *Hedrick v. Firke*, 160 Mich. 549, 135 N. W. 319; *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418; *Myers-Goldberg Neckwear Co. v. Grossman*, 167 Mo. App. 722,

151 S. W. 163; Pankonin v. Gorder, 97 Neb. 337, 149 N. W. 811; Brooklyn Structural Steel Corp. v. Lechtman, 92 Misc. 164, 155 N. Y. S. 220; Gottschall v. Kapp, 47 Pa. Super. Ct. 102; Vaulx v. Buntin, 127 Tenn. 118, 153 S. W. 481; Marsh v. Phillips (Tex.) 144 S. W. 1160; Kaufman v. Christian-Wathen Lumber Co. (Tex.) 184 S. W. 1045; Edwards v. Johnston, 23 Wyo. 384, 152 Pac. 273.

Thus in *Bartholomae, etc. Brewing, etc. Co. v. Modzelewski*, 269 Ill. 539, 109 N. E. 1058, affirming judgment 183 Ill. App. 352, it appeared that the plaintiff agreed to manufacture beer for the sole use of the defendant and lend him saloon furniture as long as he kept his contract to buy from the plaintiff. Another clause provided that if the defendant failed to purchase the beer he should forfeit \$50 per month until the contract expired. It was held that the forfeiture was liquidated damages, it being merely a fair compensation for the damages suffered by the plaintiff. The court said: "Under such circumstances the stipulated sum will not be held to be a penalty, where, from a consideration of the whole instrument, its object and purpose and the circumstances surrounding the parties at the time of its execution, it is clear the parties intended it as the measure of compensation in case of a breach of the contract (19 Am. & Eng. Enc. of Law (2d ed.) 398; 13 Cyc. 93, 94, 98); and there is nothing to indicate fraud or circumvention, or that the amount specified is unreasonable or disproportionate to the amount of damages which might reasonably be anticipated as likely to result from a breach of such contract."

In *Axe v. Tolbert*, 179 Mich. 556, 146 S. W. 418, it appeared that a firm of brokers entered into an agreement with the owner of a farm whereby they received an option for one year with the understanding that if the owner sold the property himself within that time the brokers should receive one-half the regular commission. It was held that the stipulated forfeiture was liquidated damages, as the amount stipulated was not disproportionate to the actual damages, the brokers proving that they had spent six months' time in trying to sell the farm.

In *Vaulx v. Buntin*, 127 Tenn. 118, 153 S. W. 481, the court said: "The courts always consider the proportion that the sum stipulated bears to the actual damages suffered in determining whether the former is to be treated as a penalty. Sutherland on Damages, sec. 279 et seq.: 13 Cyc. 96. While an apparent excess of stipulated damages over actual damages is not conclusive of the question, and does not absolutely fix the stipulated sum as a penalty, we are of opinion that stipulated damages will never be

treated as a penalty where there is no disproportion, but, on the contrary, practical equality, between the stipulated sum and actual damages."

Certainty or Uncertainty of Damages.

DAMAGES CERTAIN OR CAPABLE OF ASCERTAINMENT.

The possibility of ascertaining what the actual damages are is another test in determining whether a stipulated forfeiture is a penalty and what are liquidated damages. If the actual damages suffered by the injured party are certain or easy to calculate then a stipulated forfeiture agreed on by the parties is deemed to be a penalty and the actual loss must be proved. *Wait v. Stanton*, 104 Ark. 9, 147 S. W. 446; *Montague v. Robinson*, 122 Ark. 163, 182 S. W. 558; *Weinreich Estate Co. v. A. J. Johnston Co.* 28 Cal. App. 144, 151 Pac. 667; *Wilson v. Agnew*, 25 Colo. App. 109, 136 Pac. 96; *Segal v. Goldberg*, 191 Ill. App. 188; *Benfield v. Croson*, 90 Kan. 661, 136 Pac. 262; *Metz v. Clay* (Kan.) 165 Pac. 809; *Muehlebach v. Missouri, etc. R. Co.* 166 Mo. App. 305, 148 S. W. 453; *Dryer v. Kistler*, 118 Minn. 112, 136 N. W. 750; *Golden v. McKim*, 37 Nev. 205, 141 Pac. 676; *Union Estates Co. v. Adlon Constr. Co.* 84 Misc. 599, 147 N. Y. S. 783; *Haber v. Schonzeit*, 159 N. Y. S. 68; *Hocksprung v. Young*, 27 N. D. 322, 146 N. W. 547; *Home Pattern Co. v. Mascho*, 46 Okla. 55, 148 Pac. 131; *Childs v. Moore* (Okla.) 157 Pac. 333; *San Marco First Nat. Bank v. Smith* (Tex.) 160 S. W. 311.

Thus in *Wilson v. Agnew*, 25 Colo. App. 109, 136 Pac. 96, it was held that a deposit with a landlord to secure the performance of a lease was a penalty, the actual damages suffered by the landlord being easily ascertainable.

In *Segal v. Goldberg*, 191 Ill. App. 188, it was held that a deposit given by a lessee to secure his agreement to restore a wall at the end of the lease was a penalty and not liquidated damages, since the cost of putting up the wall could be calculated with approximate certainty.

In *Benfield v. Croson*, 90 Kan. 661, 136 Pac. 262, it appeared that a stock of merchandise to be valued at the cost price of each article was to be exchanged for a tract of land to which a certain value was assigned, and the contract further provided for a forfeiture of \$500 to be left in the hands of a third person. It was held that the forfeiture was a penalty and not liquidated damages, because the actual damages were easily ascertainable and the forfeiture having been fixed at an arbitrary amount with-

out regard to compensation only actual damages could be recovered.

In *Dryer v. Kistler*, 118 Minn. 112, 136 N. W. 750, it appeared that the defendant gave to the plaintiff a bond for \$1,000 conditioned on his conveying within six months a right of way which the plaintiff had already acquired by prescription. The bond was held to be a penalty because the damages were merely nominal, and if any had been incurred, they could easily be ascertained.

In *Haber v. Schonzeit*, 159 N. Y. S. 68, a clause in a lease calling for a deposit of \$1,000 as liquidated damages in case of a breach was held to be a penalty where the tenant remained in possession at the expiration of the lease, because any unpaid rent and cost of repairs could be easily ascertained.

In *San Marcos First Nat. Bank v. Smith* (Tex.) 160 S. W. 311, a stipulation in a building contract for \$20 per day liquidated damages in case of a delay beyond a specified date was held to be a penalty where the damages were easily ascertainable and the forfeit was much larger than the actual damages. The court, quoting from the case of *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467, said: "It is to be conceded, that although the parties to a contract have named a specified sum of money as liquidated damages for its breach, the courts may in certain cases treat the provision as a penalty, and restrict the recovery to the actual damages which have accrued. But it seems to us that the authorities lay down no satisfactory rule by which in every case it is to be determined when a provision of that character is to be construed as fixing the damages, and when as merely naming a penal sum. If the damages be in their very nature uncertain or their amount indeterminate, the sum specified will be treated as fixing by stipulation the amount of the recovery. But the difficulty arises in cases in which the damages are reasonably susceptible of ascertainment. There, as we think, the authorities leave us at sea, without any accurate chart to direct our course. It would seem that if the expressed intention of the parties to a contract should govern, in every case where they say that a certain sum shall be paid as liquidated damages in case of its breach, it should be construed as fixing the amount of a recovery; and yet, as we have said, notwithstanding such a provision, in certain cases the damages may be limited to a just compensation for the loss which has been suffered. Therefore the principle would appear to be that, although a sum be named as 'liquidated damages,' the courts will not so treat it unless it bear such proportion to the actual damages that it may reasonably be presumed to

have been arrived at upon a fair estimation by the parties of the compensation to be paid for the prospective loss. If the supposed stipulation greatly exceed the actual loss—if there be no approximation between them, and this be made to appear by the evidence—then it seems to us, and then only, should the actual damages be the measure of the recovery."

In *Montague v. Robinson*, 122 Ark. 163, 182 S. W. 558, it was said: "There is an increasing tendency on the part of courts to construe such contracts as stipulations for liquidated damages rather than as agreements for penalties. *Sun Printing, etc. Assoc. v. Moore*, 183 U. S. 642, 22 S. Ct. 240, 46 U. S. (L. ed.) 366. And such contract should be so construed where, from a prospective view of the contract, it appears that it was contemplated that damages would flow from a failure to perform the contract, that such damages would be indeterminate or difficult of ascertainment, and that the sum named bears some reasonable proportion to the damages which the parties contemplated might flow from a failure to perform. Another test frequently applied in determining whether a contract should be construed as containing a penalty, or as providing for liquidated damages, is this: Was it contemplated that the contract might be substantially performed, or that there might be a total failure to perform, and would the same sum be recoverable in either case? Where the contract's provisions answer this question affirmatively, it is construed to be a penalty."

DAMAGES UNCERTAIN AND INCAPABLE OF ASCERTAINMENT.

On the other hand, where the actual damages for the breach of a contract are uncertain and can be ascertained with great difficulty if at all, a stipulation for the forfeiture of a fixed sum will ordinarily be held to be liquidated damages.

England.—*Sainter v. Ferguson*, 7 C. B. 716. 62 E. C. L. 716; *Fletcher v. Dyché*, 2 T. R. 32.

Canada.—*Knowlton v. Mackay*, 29 U. C. C. P. 601; *Snider v. McKelvey*, 27 Ont. App. 339.

United States.—*Crane Co. v. U. S.* 46 Ct. Cl. 343; *Morris v. U. S.* 50 Ct. Cl. 154; *Compania Mexicana, etc. v. Waite*, 196 Fed. 227; *Johnson v. Southwestern Surety Ins. Co.* 206 Fed. 486; *Bankers' Surety Co. v. Elkhorn River Drainage Dist.* 214 Fed. 342; *Board of Commerce v. Security Trust Co.* 225 Fed. 454, 140 C. C. A. 486; *Fleischman v. Rahmstorf*, 226 Fed. 443, 141 C. C. A. 273; *U. S. v. Rubin*, 233 Fed. 125.

Arkansas.—*Dilley v. Thomas*, 106 Ark. 274, 153 S. W. 110; *Kimbrow v. Wells*, 112

Ark. 126, 165 S. W. 645. And see the reported case.

California.—McComber v. Kellerman, 162 Cal. 749, 124 Pac. 431.

Connecticut.—Associated Hat Manufacturers v. Baird-Unteidt Co. 88 Conn. 332, 91 Atl. 373; Dean v. Connecticut Tobacco Corp. 88 Conn. 619, 92 Atl. 408; Banta v. Stamford Motor Co. 89 Conn. 51, 92 Atl. 665; Schoolnick v. Gold, 89 Conn. 110, 93 Atl. 124; Rabinowitz v. Apter, 90 Conn. 1, 96 Atl. 157.

Delaware.—In re Ross, 95 Atl. 311.

District of Columbia.—District of Columbia v. Harlan, etc. Co. 30 App. Cas. 270.

Florida.—Southern Menhaden Co. v. How, 71 Fla. 128, 70 So. 1000.

Hawaii.—Colby v. Bailey, 5 Hawaii 152.

Illinois.—Parker-Washington Co. v. Chicago, 207 Ill. 136, 107 N. E. 872; Gewirtz v. Abraham, 171 Ill. App. 433; Berger v. Nants, 172 Ill. App. 623; Standard Brewery v. Schmalhausen, 175 Ill. App. 629; Glaser v. Schrader, 192 Ill. App. 478.

Indiana.—Burley Tobacco Soc. v. Gillaspay, 51 Ind. App. 583, 100 N. E. 89.

Kentucky.—Gropp v. Perkins, 148 Ky. 183, 146 S. W. 389; Scott v. Mayfield, 153 Ky. 278, 155 S. W. 376; Hughes v. Hughes, 162 Ky. 505, 172 S. W. 960.

Maryland.—Graham v. Cooper, 119 Md. 358, 86 Atl. 991; Baltimore Bridge Co. v. United Rys. etc. Co. 125 Md. 208, 93 Atl. 420; Cowan v. Meyer, 125 Md. 450, 94 Atl. 18.

Minnesota.—Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; Quigley v. C. S. Brackett Co. 124 Minn. 366, 145 N. W. 29; Chapman v. Propp, 125 Minn. 447, 147 N. W. 442; Dyer v. Cowdin, 168 Mo. App. 649, 154 S. W. 156; Wainscott v. Haley, 185 Mo. App. 45, 171 S. W. 983.

New Jersey.—Kuntz v. Tonnele, 80 N. J. Eq. 373, 84 Atl. 624; McClintic Marshall Constr. Co. v. Chosen Freeholders, 83 N. J. Eq. 539, 91 Atl. 881; Wood v. Ocean City, 85 N. J. Eq. 328, 96 Atl. 489; Tilton v. McLaughlan, 83 N. J. L. 107, 84 Atl. 1044.

New York.—Posner v. Rosenberg, 149 App. Div. 272, 133 N. Y. S. 704; Feyer v. Reiss, 154 App. Div. 272, 138 N. Y. S. 964; Edward E. Buhler Co. v. New York Dock Co. 170 App. Div. 486, 156 N. Y. S. 457; Whitson v. Sheffield Farms-Slawson-Decker Co. 76 Misc. 180, 136 N. Y. S. 560; Federal Sign System Electric v. Soutsos, 132 N. Y. S. 761; Stimpson v. Minsker Realty Co. 154 N. Y. S. 496.

North Dakota.—Gile v. Interstate Motor Car Co. 27 N. D. 108, 145 N. W. 732, L.R.A. 1915B 109.

Ohio.—Hattersly v. Waterville, 26 Ohio Cir. Ct. Rep. 226; Fish v. Robinson, 33 Ohio Cir. Ct. Rep. 393.

Oklahoma.—Deming Invest. Co. v. Baird, 32 Okla. 393, 122 Pac. 676; Dillon v. Ringleman, 155 Pac. 563.

Oregon.—Hull v. Angus, 60 Ore. 95, 118 Pac. 289; Yuen Suey v. Fleshman, 65 Ore. 606, Ann. Cas. 1915A 1072, 133 Pac. 803.

Pennsylvania.—Ambridge v. Pittsburg, etc. St. R. Co. 234 Pa. St. 157, 82 Atl. 1105.

Texas.—Walsh v. Paducah M. E. Church South, 173 S. W. 241; Gillespie v. Williams, 179 S. W. 1101; Foos Gas Engine Co. v. Fairview Land, etc. Co. 185 S. W. 382; Miller v. Chicago Portrait Co. 195 S. W. 620.

Utah.—Dopp v. Richards, 43 Utah 332, 135 Pac. 98.

Washington.—Eilers Music House v. Oriental Co. 69 Wash. 618, 125 Pac. 1023; Barrett v. Munro, 69 Wash. 229, 124 Pac. 369; Grand Union Laundry Co. v. Carney, 88 Wash. 327, 153 Pac. 5.

Thus in *Sainter v. Ferguson*, 7 C. B. 716, 62 E. C. L. 716, wherein it appeared that an apothecary's assistant promised in a contract of employment not to practice for himself within a distance of seven miles from Macclesfield under an agreement to pay 500*l*, the forfeiture was held to be liquidated damages, because the actual damages that might have been suffered by the apothecary were uncertain.

In *Fletcher v. Dyche*, 2 T. R. (Eng.) 32, it appeared that two persons made a contract that one of them would perform certain work for the other within a limited time or pay a stipulated sum. The stipulation was held to be for liquidated damages, because the exact amount of actual damages would be difficult to prove. The court said: "The object of the parties in naming this weekly sum was to prevent any altercation with respect to the quantum of damages which the defendant might sustain by reason of the non-performance of the contract. It would have been difficult for the jury to have ascertained what damages the defendant had really suffered by the breach of the agreement; and therefore it was proper for the contracting parties to ascertain it by their agreement. So that this is a case of stipulated damages, and it is not to be considered as a penalty."

In *Snider v. McKelvey*, 27 Ont. App. 339, it appeared that the defendant sold to the plaintiff a house and his medical practice and agreed not to practice within a radius of five miles of the village under the penalty of forfeiting \$400. The forfeiture was held to be liquidated damages on the principle that it was uncertain what the profits would be, and therefore the parties could name their own damages. The court said: "In agreements for the sale of a business containing covenants against carrying on a similar business within certain limits on the breach of which a certain sum is to be paid, this sum has

frequently been held to be recoverable in full as being liquidated damages, on the principle that it was stipulated to be paid on the breach of a condition of uncertain value."

In *Johnson v. Southwestern Surety Ins. Co.* 206 Fed. 486, the court said: "When there is no adequate means of ascertaining the damages from a breach of a contract, the parties may, perhaps, by apt language, fix in advance the amount payable in that event, and, where the actual damages are necessarily so speculative and uncertain as to be incapable of definite ascertainment, the sum stipulated in the bond will be regarded as liquidated damages, and may be recovered without proof of actual damages, unless it is so manifestly so disproportionate to the injury as to be unconscionable."

In *Board of Commerce v. Security Trust Co.* 225 Fed. 454, 140 C. C. A. 486, it appeared that a board of commerce made a contract with a manufacturing company, agreeing to help them in certain ways if they would move to Ann Arbor and keep a certain specified pay roll, and the company also stipulated to pay \$10,000 as liquidated damages if they failed in their contract. Within a few months after their arrival at Ann Arbor they went into voluntary bankruptcy, and the board of commerce put in its claim for the \$10,000. It was held that since the actual damages were not ascertainable, the forfeiture was liquidated damages.

In *Fleischman v. Bahmstorf*, 226 Fed. 443, 141 C. C. A. 273, it appeared that the seller of a stock of goods agreed not to re-engage in business for three years under a forfeit of \$2,000. The stipulated sum was held to be liquidated damages, as the actual loss to the buyer would be difficult to ascertain, and the forfeiture did not appear to be disproportionate, the stock of goods having been sold for practically that amount. The court said: "In general, it may be said that the contracting parties are permitted to agree upon the precise amount of damages to be paid in all cases in which the damages are uncertain in their nature, or difficult to ascertain, or impossible to be estimated with certainty, and this is especially true of contracts such as that which is here under consideration."

In *U. S. v. Rubin*, 233 Fed. 125, it was said: "A feature, if not, indeed, the controlling feature, in cases of this kind, is whether the actual damages suffered are capable of admeasurement. If they are, then the payment of a stipulated sum not related to the actual damages partakes of the character of an arbitrary penalty, against the enforcement of which equity will relieve. When the damages are not so capable, and the stipulated sum is not unconscionable, and is within the limits of a fair and reasonable estimate of what the damages may

Ann. Cas. 1917D—48.

well be, although definite proofs are not within reach, there the stipulated sum may not be regarded as a penalty. In a word, the enforcement of its payment would not be inequitable. Let it always be remembered the legal obligation is complete. Defendant can be relieved only in equity. If there is no equity in the application for relief, none should be accorded. There is sometimes, in these cases, a subsidiary question. There may be the added feature of an express agreement that the stipulated sum is agreed damage. The legal contract with this added feature may be as unconscionable as it would be without it, and obviously a court of equity may grant relief as readily in the one case as the other. No one seeking to secure the power to enforce an inequitable bargain can deprive a court of equity of its power to grant equitable relief. Such a stipulation does, however, enter into the equitable considerations involved. If the transaction were near the border line between arbitrary penalty and agreed liquidation of damages, such an agreement between the parties might become a deciding element in the case."

In *Kimbrow v. Wells*, 112 Ark. 126, 165 S. W. 645, it appeared that a lumber dealer in a small town sold out his business with an agreement that he would not carry on any business within the town, and promised that if he did so he would forfeit \$2.50 per day. The forfeiture was held to be liquidated damages, because the damages were difficult to ascertain and the amount agreed on was reasonable. The court said: "No general rule exists in all cases as to distinguishing a penalty from liquidated damages, and each case must depend, to a great extent, upon its own peculiar facts. The general rule is that where the damages arising on a breach of a contract are uncertain and difficult of ascertainment, a stipulation for the payment of a designated sum as liquidated damages, if reasonable, will be sustained, and the question of whether the damages are difficult of ascertainment is to be determined from a consideration of the status of the parties at the time the contract was entered into and not at the time it was broken." See also the reported case.

In *Associated Hat Manufacturers v. Baird-Unteidt Co.* 88 Conn. 332, 91 Atl. 373, it appeared that the by-laws of an association provided that each member should pay \$5,000 as liquidated damages for a violation of or failure to comply with all of the orders, prohibitions and regulations of the association, and one of the members was proceeded against for his failure to comply with a resolution that all members should keep "open shop." The provision was held to be for liquidated damages because an actual loss from such a breach was uncertain and inca-

pable of being fixed in advance and was not susceptible of proof or of a precise appraisal. The court said: "The association intended—if the language used means what it says—this sum to be regarded as liquidated damages upon a breach. Its intention, so definitely expressed, should be given due weight, but it is not controlling, for the law regards the substance of things rather than their form. It will 'look at the entire agreement, its scope, purpose, and subject-matter, and may consider the result of a breach thereof, and the reasonableness of the sum agreed to be paid therefor, under all the circumstances of the case.' *New Britain v. New Britain Telephone Co.* 74 Conn. 326, 332, 50 Atl. 881, 1015. So viewing this by-law in its proper setting—of the facts surrounding its making and its breach—we see that there is no standard furnished for ascertaining the damages for the breach of a resolution of the plaintiff. We see, too, that the damages from a breach must be uncertain and incapable of exact estimate in advance of breach, and, after breach, are neither readily susceptible of proof nor of precise appraisal."

In *Banta v. Stamford Motor Co.* 89 Conn. 51, 92 Atl. 665, it appeared that the defendant company agreed to build a gasoline yacht for the plaintiff within a certain time, and if it failed to do so it was to pay a forfeit of \$5 per day for the delay. The boat was not completed within the prescribed time, and the plaintiff could not use it for a fall cruise as he had planned. The forfeiture was held to be liquidated damages, as the actual loss was unascertainable, yet the amount itself was reasonable. The court said: "These cases determined that, when certain conditions co-exist, the provision for the payment of a stipulated sum in the event of a breach of contract will be regarded and enforced as one for liquidated damages. These conditions, clearly brought out in the opinions in these cases, are (1) the damages to be anticipated as resulting from the breach must be uncertain in amount or difficult to prove; (2) there must have been an intent on the part of the parties to liquidate them in advance; and (3) the amount stipulated must be a reasonable one, that is to say, not greatly disproportioned to the presumable loss or injury."

In *Schoolnick v. Gold*, 89 Conn. 110, 93 Atl. 124, it appeared that the defendant owned and carried on a large commercial business bringing in as gross receipts \$10,000 per year and he sold it to the plaintiff for \$800, agreeing not to open another business within a certain distance of the other store "under the sum of \$2,000 which is to be as liquidated damages." The forfeiture was held to be liquidated damages because of the uncertainty as to the actual loss of the plain-

tiff. The court said: "Where contracts not to engage in some particular business or profession in a particular locality have provided for the payment of a stipulated sum in case of breach, the courts have generally construed them as liquidated damages, and have taken the contrary position only where it was manifest either that the stipulated sum was unreasonable, or that the parties had intended to fix a penalty."

In *Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157, the court said: "A provision 'for the payment of a stipulated sum in the event of a breach of a contract will be regarded and enforced as one for liquidated damages,' provided certain conditions exist, namely: (1) that the damages to be anticipated are uncertain in amount or difficult to prove; (2) that the parties intended to liquidate them in advance; and (3) that the amount stipulated is a reasonable one, that is, not greatly disproportionate to the presumable loss or injury." In *District of Columbia v. Harlan, etc. Co.* 30 App. Cas. (D. C.) 270, it was said: "There is nothing to prevent the parties from stipulating in advance that a certain sum shall be the damages which one shall forfeit to the other for failure to perform the conditions of a valid contract. Especially is this true where the damages to be sustained are uncertain in amount and cannot easily be ascertained." In *Berger v. Nants*, 172 Ill. App. 623, it appeared that the defendant agreed to sell to the plaintiff a number of first grade eggs to be delivered weekly for two months and a quantity of second grade eggs for the same period and delivery. Each party deposited \$500 to be forfeited if there was a breach of the contract. The deposit was held to be liquidated damages because the damages could not be precisely ascertained by reason of the fluctuation of the price of eggs, and this uncertainty had been the reason for making the deposit. The court said: "It is frequently difficult to ascertain from the language of a contract and the surrounding circumstances, whether the parties intended that a sum which is agreed to be paid as damages for the violation of the agreement shall be considered as liquidated damages or only as a penalty. The primary question is to determine the meaning and intent of the parties from the contract itself, the subject-matter thereof, the terms used to express the intent, and the circumstances under which the contract was made."

In *Burley Tobacco Soc. v. Gillaspay*, 51 Ind. App. 583, 100 N. E. 89, the court quoting *Sedgwick on Damages*, 2d ed. sec. 405, said: "Whenever the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation,

and is, in fact, reasonable in amount, it will be allowed by the court as liquidated damages. This rule will be found to be applicable to all contracts, and really involves the consideration of the subject in the three following aspects: That of the intent of the parties; that of the reasonableness of the contract; and that of the weight allowed by the court to the language employed."

In *Gropp v. Perkins*, 148 Ky. 183, 146 S. W. 389, it appeared that the defendants sold their business to the plaintiff with the promise not to engage in the same business within a certain defined territory and for a limited time, and agreed to pay a forfeiture in case they failed to keep their agreement. The forfeiture was held to be liquidated damages since the actual damages were uncertain and incapable of being ascertained and the amount was not oppressive or unduly out of proportion to the loss which actually arose from the breach. The court said: "At one time the courts did not look with favor upon contracts providing for liquidated damages. Their tendency was to construe the language as a penalty, and to permit a recovery of actual damages only. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intention, even when it would result in a recovery of the amount stated, as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. *U. S. v. Bethlehem Steel Co.* 205 U. S. 105 [27 S. Ct. 450, 51 U. S. (L. ed.) 731]; *Sun Printing, etc. Assoc. v. Moore*, 183 U. S. 642 [22 S. Ct. 240, 46 U. S. (L. ed.) 306]. And it is now the generally accepted doctrine that where a contract has been made not to engage in a particular profession or business within stated limits, and the damages resulting from a breach of the contract are necessarily very uncertain and difficult of ascertainment, and the parties have provided a sum certain to be paid in the case of a breach, and the sum so named is not unjust or oppressive or out of all proportion to the damages which would actually result from the breach, such agreement is construed as liquidated damages, rather than as a penalty, and it is held, therefore, that the sum so fixed by the parties may be recovered, where the provisions of the contract are violated."

In *Hughes v. Hughes*, 162 Ky. 505, 172 S. W. 960, it was held that where a divorced husband agreed to pay his wife \$35 per week in lieu of alimony, and in case of a failure to pay that amount for six months to forfeit \$3,500 to her, the forfeiture was liquidated damages since the actual damages were unascertainable, it being impossible to calculate

the length of her life. The court said: "We know of no rule for determining the probable consequences of the breach of this contract, as to the appellee, or what she would suffer by it, because it is impossible to determine the length of her years, except the probable length estimated by the tables of mortality, and for that reason it could not be considered that the thirty-five hundred dollars was a penalty for the failure of appellant paying six monthly payments under this contract. Looking at the whole contract, it is impossible to fail to see that it was agreed and understood that in the event the appellant should be in default, that the amount agreed upon by them as a settlement of the breach should be thirty-five hundred dollars, and it is apparent, from the nature of the case, and the tenor of the agreement, that, in the language of the *Cyc. of Law and Procedure*, page 90, *supra*, 'that the damages when the contract was made was the subject of actual and full calculation and adjustment between the parties.' The consequences of a breach of this contract by appellant would have been that he would have escaped the payment of the monthly payments for the remainder of the life of appellee, and appellee would have lost them, and the probable consequence is that the amount of money which would have been saved by appellant and lost by appellee would have amounted to the sum sued for, or practically so."

In *Baltimore Bridge Co. v. United Rys. etc. Co.* 125 Md. 208, 93 Atl. 420, the court said: "From the authorities given . . . it may be stated as a settled rule of law, that where the parties, at or before the time of the execution of the contract, agree upon and name a sum therein to be paid as liquidated damages, in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, that the amount so named in the agreement will be regarded as liquidated damages and not as a penalty, unless the amount so agreed upon and inserted in the agreement be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. And whether it is excessive or whether the damages are incapable of exact ascertainment should be determined from the subject-matter of the contract considered in the light of all the surrounding facts and circumstances connected therewith and known to the parties at the time of its execution. That these questions should be considered and determined from the contract itself, its subject-matter and the surrounding facts and circumstances connected therewith with which the parties are confronted at the time of its execution, is made necessary in order to ascertain the intention of the parties,

which is one of the essential factors in deciding whether the stipulation is for liquidated damages or is a penalty."

In *Wainscott v. Haley*, 185 Mo. App. 45, 171 S. W. 983, it appeared that the plaintiff and defendant agreed to exchange their homesteads and stipulated for a certain sum to be paid by the party failing to keep the contract to the other. Thereafter the wife of the defendant refused to join in the deed. It was held that the stipulated sum was liquidated damages because of the difficulty in estimating the actual damages, the market value of land not being fixed by law. The court said: "The remaining issue that the amount stipulated in the contract as liquidated damages should be construed as a penalty must also be decided against defendant. The question is one of law for the court (*May v. Crawford*, 150 Mo. 504; *Dyer v. Cowden*, 168 Mo. App. 649) and where parties are sui juris and stand on equal footing, the courts will not interfere with their right to make their own contracts and will not assume that an agreement for the liquidation of damages in fact is for the imposition of a penalty, unless it clearly appears that the sum agreed upon is out of all reasonable proportion to any loss that could result from a breach of the contract. The tests usually applied by the courts in the solution of such questions are, first, the language employed in the contract; second, the subject-matter, and third, the intention of the parties, the last being regarded as the most important consideration, and where the enforcement of the intention expressed in the phraseology would work no absurdity or oppression the parties must be presumed to have intended to say what they did say, and such intention should be given full effect."

In *Wood v. Ocean City*, 85 N. J. Eq. 328, 96 Atl. 489, the court said: "The rule laid down by our court of errors and appeals in *Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132, 141, 26 Atl. 140, 19 L.R.A. 456, 39 Am. St. Rep. 626, in relation to contractual stipulations for liquidated damages, is that when damages are to be ascertained by the breach of a single stipulation, and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages."

In *Whitson v. Sheffield Farms-Slawson-Decker Co.* 76 Misc. 180, 136 N. Y. S. 560, it appeared that the defendant was employed by the plaintiff to drive one of its milk

wagons and deposited a sum of money with the latter to be forfeited if he failed to account for any sums received from customers within 48 hours. The forfeiture was held to be liquidated damages because the actual loss suffered would be unascertainable at the commencement of the contract and might depend on extrinsic circumstances outside of the agreement, and the amount itself was not on the face of the contract out of proportion to the probable loss.

In *Hattersly v. Waterville*, 26 Ohio Cir. Ct. Rep. 226, it appeared that a railroad company deposited a check with a municipal corporation as a guarantee of good faith and for the faithful performance of a contract. This deposit was held to be liquidated damages, the circumstances being such that proof of damage in case of breach would be practically impossible. The court said: "In our judgment this check should be held to be stipulated damages and not as a penalty or as a security for damages proven. We think it was the intention of the parties, at least, that it was clearly the understanding of the village and it was known by the other parties that the village so understood it. It is a case peculiarly for the rule of stipulated damages; there are authorities that hold that a municipal corporation cannot maintain an action for damages upon such a contract as this, unless they are stipulated. The damages in this case are remote and in a measure speculative and it would be difficult, if not impossible, to prove what the damage was to the village or its inhabitants for the failure of the railroad company to build the road through its streets; nor could any citizen be able to show what the damage had been to him or his property; and this being true, it is a case where the parties should be permitted to agree upon a stipulated amount in advance as the damages in case the contract is not carried out."

In *Miller v. Chicago Portrait Co. (Tex.)* 195 S. W. 619, the court said: "The authorities seem to establish beyond question that where a contract is made not to engage in a rival business in a certain locality and provision is made for the payment of a stipulated sum on a breach, such amount is treated as stipulated damages, rather than as a penalty. However, the weight of authority seems to be that, although liquidated damages are provided for in such contracts, such provision does not oust equity jurisdiction unless it appears from the contract that it was the intention of the parties thereto that the damages should be the only remedy, and that no equitable remedy was contemplated."

HILLIS ET AL.

v.

KESSINGER ET AL.

Washington Supreme Court—November 9,
1915.

88 Wash. 15; 152 Pac. 687.

**Evidence — Weight — Deposition as
Compared with Oral Testimony.**

The weight and credibility of the testimony of witnesses whether oral or by deposition, having by proper instructions been entirely left to the jury, instructing them to give to the testimony of one testifying by deposition the same credence and weight as if he were present and testifying in open court, is not error.

[See note at end of this case.]

**Judgment — Non Obstante Veredicto
— Motion after Entry of Judgment.**

A motion for judgment notwithstanding verdict, invoking no discretion and being interposed after entry of judgment, must be denied.

Appeal from Superior Court, Pierce county: CABD, Judge.

Action by John W. Hillis et al., plaintiffs, against H. P. Kessinger et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. **AFFIRMED.**

J. B. Keener for appellants.

Warren H. Lewis for respondents.

[15] HOLCOMB, J.—Appellants assign the following grounds of error: (1) The court erred in refusing to instruct a verdict for the appellants; (2) the court erred in denying appellants' motion for judgment notwithstanding the verdict; (3) the court erred in denying appellants' motion for a new trial. In argument, it is stated by appellants that all the evidence covering these assignments of error is so intermingled that they can best be discussed together.

[16] It is claimed that the only evidence introduced by the respondents in support of their allegations of conspiracy, misrepresentation, and fraud was that of one J. W. Stout, whose testimony was taken by deposition in California, and was unsupported by any other testimony; that his whole testimony showed unfriendliness towards Mr. Kessinger, which he admitted; that the testimony of respondent Hillis in regard to the transaction was unsupported by any other testimony produced or offered by respondents. With these contentions we do not agree. The record shows that the

testimony of respondent Hillis alone, if the jury believed it in preference to the testimony of appellants and their witnesses, was sufficient to support their verdict. The testimony of Hillis was corroborated by the testimony of Stout in his deposition. It is urged by appellants that, since Stout was not present in court at the trial, the jury who heard his testimony read had no opportunity to observe his conduct and demeanor while testifying; his interest, if any, in the result of the suit; his feeling, bias, or prejudice, if any is shown; his fairness or lack of fairness, and any other facts and circumstances appearing at the trial which will tend to credit or discredit his testimony; that therefore the court erred in giving the following instruction:

"The court instructs the jury to give to the testimony of a witness testifying by deposition the same credence and weight as if said witness were present and testified in open court before you."

The deposition itself shows that the appellants were represented at the taking of the deposition, and conducted an extended cross-examination, whereby it was disclosed that the witness Stout was not a thoroughly indifferent witness, but was to some extent antagonistic to appellants, and disclosed his feeling and bias toward appellants, whereby his fairness or lack of fairness, and any and all other facts and circumstances appearing at the trial which would tend to credit or discredit him, saving and excepting only that the [17] jury could not observe his demeanor while testifying, were clearly before the jury to govern them in considering the weight and credibility of his testimony. The instruction to the jury complained of manifestly meant no more than that the jury were to consider the testimony of the witness Stout, testifying out of court by a deposition, as the testimony of a witness in the trial, and that they might not disregard it, but were to give it such credence and weight as they would give to a witness testifying personally before them; but with the further qualifications, which the court gave in other instructions, that they were the sole and exclusive judges of the facts; that they were to reconcile the testimony of witnesses if possible on the hypothesis of the truth; that they were to take into consideration, in judging of the weight and credibility of the testimony, the conduct and demeanor of the witness while testifying; his interest, if any, in the result of the suit; his feeling, bias, or prejudice, if any is shown; his fairness or lack of fairness; and any other facts and circumstances appearing at the trial which will tend to credit or discredit the testimony of any witness in the case; and that, if they believed that any

witness knowingly and wilfully testified falsely as to any material fact in the case, they were at liberty to entirely disregard such testimony, except in so far as the testimony was corroborated by other credible testimony or by facts and circumstances proven at the trial.

Appellants cite a number of authorities to the effect that the best evidence, of course, is the testimony of the witness himself given in the presence of the jury. *Thornton v. Britton*, 144 Pa. St. 126, 22 Atl. 1048; *Glanton v. Griggs*, 5 Ga. 424; *Hammock v. McBride*, 6 Ga. 178; *Anderson v. Ferguson-Bach Sheep Co.* 12 Idaho 418, 10 Ann. Cas. 395, 86 Pac. 41; *The Lakme*, 118 Fed. 972, 55 C. C. A. 466; *Wales v. Newbould*, 9 Mich. 45. All these authorities go to the question of the weight of the testimony given through the medium of a deposition, as against the weight of the testimony of the witnesses testifying [18] personally in the presence of the court or jury; but it is stated in 14 Ency. Evidence, 117-119:

"Probably there is no rule of law which accords to depositions a less degree of weight than the oral testimony of the witness would be entitled to receive. In many cases statements will be found which go to show that the courts in actual practice regard evidence given by deposition as unsatisfactory; and some courts have even gone so far as to declare them unreliable. The basis of this view is that the court or jury has no opportunity to judge of the witness' manner or conduct while testifying; furthermore the same chance does not exist to exhaustively cross-examine the witness and correct mistakes in the testimony."

In *Voss v. Prier*, 71 Ind. 128, the trial court gave an instruction lessening the value and credibility of the testimony of a witness testifying by deposition. The supreme court, in reversing the judgment in that case, said:

"In giving this instruction, the court substantially, and almost literally, followed an instruction, . . . copied and approved in the case of *Carver v. Louthain*, 38 Ind. 530, and was thereby, we regret to have to say, led into an error . . . we may know, as a matter of fact derived from common observation, that testimony communicated in the form of deposition does not generally make so decided an impression on a jury as that orally given in open court, but the law does not as a rule recognize the inferiority of testimony embodied in depositions, to testimony given orally at the trial."

The jury in the instant case had the opportunity to apply all of the tests suggested to them by the instructions of the court, which were in conformity with the usual tests applied in such cases, except to observe the conduct and demeanor of the witness while

testifying. All of the other matters were fully covered by the cross-examination conducted by appellants at the taking of the deposition. The entire weight and credibility of the testimony of the several witnesses, whether oral or by deposition, was left by the court entirely to the jury.

[19] As was said in the case of *The Lakme*, supra, notwithstanding the fact that the jury cannot judge of the demeanor of the witness while upon the stand, "nevertheless there are other landmarks than can be taken hold of." The interest, antagonism, and bias of the witness testifying by deposition were plainly manifest; but if the facts to which he testified were corroborated by other testimony and by other inferences legitimately to be drawn in the case, then the jury were not at liberty to disregard the testimony of such witness, notwithstanding his interest or bias, and the court could not by any instruction so tell them. There was no error in giving the instruction.

Neither was there error in refusing to instruct a verdict for appellants. The testimony in behalf of the respondents was ample, as stated before, to support the verdict. That being the case, there was no error in denying appellants' motion for judgment notwithstanding the verdict, nor in denying appellants' motion for a new trial. The motion for judgment notwithstanding the verdict invoked no element of discretion and was interposed after judgment was entered on the verdict, which, under the authority of *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, and *Paich v. Northern Pac. R. Co.* 82 Wash. 581, 144 Pac. 919, must necessarily have been denied. The motion for a new trial was based upon six statutory grounds and was denied generally by the court. The court having exercised its discretion, we will not interfere.

There is no error. Judgment affirmed.

Morris, C. J., Mount and Parker, JJ., concur.

NOTE.

Relative Weight of Deposition and Oral Testimony.

View that Deposition is Inferior to Oral Testimony.

There is some conflict of opinion as to whether a distinction is to be drawn between the weight of a deposition and that of oral testimony, but in the greater number of jurisdictions oral testimony is held to be the superior in weight. *Attwood v. Small*, 6 Cl. & F. 232, 2 Jur. N. S. 200, 226, 246, 7 Eng. Rep. (Reprint) 684; *Rusk v. The Freestone*, 2 Bond 234, 21 Fed. Cas. No. 12,143; *Mann*

v. Darden, 6 Ala. App. 555, 60 So. 454; Hammock v. McBride, 6 Ga. 178; Anderson v. Ferguson-Bach Sheep Co. 12 Idaho 418, 10 Ann. Cas. 395, 86 Pac. 41; Sawyer v. Sawyer, Walk. Ch. (Mich.) 48; State v. Howard, 118 Mo. 127, 24 S. W. 41; Fisher v. Carroll, 41 N. C. 485; Thornton v. Britton, 144 Pa. St. 126, 22 Atl. 1048; Love v. Braxton, 5 Call. (Va.) 537. See also Ridgeway v. Wharton, 6 H. L. Cas. 238, 4 Jur. N. S. 173, 27 L. J. Ch. 46, 5 W. R. 804, 10 Eng. Rep. (Reprint) 1287; Peterkin v. McFarlane, 9 Ont. App. 429; Robinson v. Catheart, 3 Cranch C. C. 377, 20 Fed. Cas. No. 11,947; Griffin v. State, 15 Ga. 476; Baylor v. Smithers, 1 T. B. Mon. (Ky.) 6; McGinley v. U. S. Life Ins. Co. 8 Daly (N. Y.) 390; Kennedy v. Pawnee Trust Co. 34 Okla. 140, 126 Pac. 548; Cotton v. Huidekoper, 2 Pen. & W. (Pa.) 149.

Thus in *Anderson v. Ferguson-Bach Sheep Co.* supra, the court said: "It is a self-evident proposition to every court and lawyer that the personal presence and testimony of a witness is preferable in every instance, and that depositions, on the other hand, are very unsatisfactory."

In *Thornton v. Britton*, 144 Pa. St. 126, 22 Atl. 1048, it was said: "The best evidence, of course, is the testimony of the witness himself, given in the presence of the jury. A deposition is not a full equivalent, and especially if much time has elapsed, or the litigation has taken another turn."

So in *Hammock v. McBride*, 6 Ga. 178, the court, holding that the oral testimony of a witness was much better evidence than his deposition, discussed the question as follows: "When it is recollected that depositions are admitted, only from the necessity of the case; that they are an unsatisfactory species of evidence not known to the common law, and in derogation of it; that it is but a secondary character, and is therefore subject to the rule of law which forbids such evidence when better evidence exists, and is in the power of the parties; that the oral testimony of the witness, in the presence of the court and jury, is much better evidence than his deposition can be; we feel constrained to rule that, whenever it is in the power of the party, he is bound to resort to it, and that he will not be allowed to substitute a kind of proof inferior in its nature."

In *Mann v. Darden*, 6 Ala. App. 555, 60 So. 454, it was held that the weight and credibility to be given the testimony of a witness when testifying *ore tenus* was necessarily different from that given to it when in the form of a deposition. The court said: "The data afforded the trial court or jury as triers of the facts by an observance of the witness, when delivering his testimony *ore tenus*, gives an advantage in weighing the credibility of the statements of the witness not imparted

by the paper writing, when reduced to that form of testimony, and the jury should not be instructed by the court to give the same weight and credibility to this testimony in making their verdict, for they did not have the opportunities afforded for doing so."

In *State v. Howard*, 118 Mo. 127, 24 S. W. 41, in speaking of testimony taken by deposition, the court said: "Testimony taken in this way is regarded in point of law of a secondary nature to *viva voce* testimony where witnesses are subjected to the ordeal of cross-examination, and such depositions are inferior and weaker in point of force and effect to testimony delivered *ore tenus*. And the obvious reason given is that a witness will frequently depose that in private which he would be ashamed to certify before a public tribunal."

So in *Fisher v. Carroll*, 41 N. C. 485, the court said that the mode of trying facts at law by the examination of witnesses in the presence of a jury was preferable to that of using depositions for the following reason: "Many are stuffed with impertinent matter, and very frequently the parties, by not apprehending the point of the case, omit, upon the examination or cross-examination, to ask the very questions which bear upon the important facts."

In *McGinley v. U. S. Life Ins. Co.*, 8 Daly (N. Y.) 390, the court said that it would be extremely difficult for an appellate court to find that a verdict was against the evidence if the jury decided according to oral testimony and against deposition evidence.

But in *Sapp v. Atkinson*, 1 Add. Ecc. 162, 2 Eng. Ecc. 64, the court observed that a deposition had some advantages with which examinations of witnesses in open court, *viva voce*, were not attended. Sir John Nicholl in his opinion said: "It is said, and very truly, that in *viva voce* examinations, the court and jury have the benefit of seeing the witness, and of collecting, from his manner and deportment, whether the substance of his evidence be true or false. This advantage is denied to our mode of examining witnesses; but then it has others, with which examinations of witnesses in open court, *viva voce*, are not attended. It affords us an opportunity of considering, maturely, the story which the witness has told, deliberately, of balancing the parts of that story one with another, so as to form an adequate opinion of its probability or improbability—finally, of inspecting its general tone and character—which last to those, the habit of whose life it is to consider written testimony, may ordinarily furnish as accurate a test of the forwardness or shyness of a witness, of his proneness to add or suppress, and the like, as his manner and deportment could do if the witness himself were examined in open court

—where, it may be added, very erroneous impressions of these are, sometimes at least, liable to be formed, from the mere embarrassment of witnesses, of a certain character, under that course of examination.”

In a number of cases, while not discussing the relative weight of a deposition and oral testimony the courts have adverted to the unsatisfactory nature of testimony by deposition. Thus in the Matter of Buchan, 16 Misc. 204, 38 N. Y. S. 1124, wherein a witness though living but an hour's ride from the place of trial declined to appear in open court for examination, and her testimony was taken under a commission, the court said: “In an examination on a commission, counsel representing an adverse interest are generally at a disadvantage, as they have not the same opportunity of changing or discrediting statements of the witness which an examination before the court would afford them.” In *Hanton v. Griggs*, 5 Ga. 424, the court said that the taking of testimony by deposition was at best a very imperfect way of arriving at the truth. See to the same effect *Summers v. McKim*, 12 Serg. & R. 405. So in the case of *The Lamke*, 118 Fed. 972, 55 C. C. A. 466, the court in commenting on the disadvantage in judging the weight of testimony taken by deposition as compared to oral testimony said: “When the testimony of the witnesses is taken before commissioners, or by deposition, as in the present case, the court is deprived of the opportunity of seeing them, of judging the weight to be given them by their manner and appearance upon the witness stand, and the opportunity afforded of asking questions concerning doubtful matters, which always materially aids a court or jury in determining the reasonableness of their statements, and affords safe guides for arriving at the probability or improbability of the story they tell.” Likewise in *Untermeyer v. Freund*, 37 Fed. 342, the court said briefly: “A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.” And in the case of *The Penobscot*, 103 Fed. 205, the court said that the testimony of witnesses examined carries conviction where there is a conflict between such testimony and that introduced by deposition. In the case of *The Monterey*, 153 Fed. 935, the court said: “The testimony has been wholly taken by deposition, and this decision is rendered without the court's seeing or hearing any witness, and therefore without the great advantage always gained therefrom.” And in the case of *The Jeremiah*, 10 Ben. 326, 13 Fed. Cas. No. 7,289, it was said: “All the evidence in the case was taken by deposition, which does not afford the same opportunities for correcting

mistakes in testimony, as in case of testimony given before the court when the parties and witnesses are all present.” See also *Sickles v. Gloucester Co.* 3 Wall. Jr. (C. C.) 186, 22 Fed. Cas. No. 12,840.

View that Deposition is Equal to Oral Testimony.

In some jurisdictions testimony introduced by deposition is held to be as good evidence as oral testimony. *Olcese v. Mobile Fruit, etc. Co.* 112 Ill. App. 281, *affirmed* 211 Ill. 539, 71 N. E. 1084; *Millner v. Eglin*, 64 Ind. 107, 31 Am. Rep. 121 (*overruling* *Carver v. Louthain*, 38 Ind. 530); *Voss v. Prier*, 71 Ind. 128; *Works v. Stevens*, 76 Ind. 181; *Rush v. Landers*, 107 La. 549, 32 So. 95, 57 L.R.A. 353. And see the reported case. See also *Nash v. Cars*, 92 Ind. 216.

Thus in *Works v. Stevens*, *supra*, it was held that the law did not as a rule recognize the inferiority of testimony embodied in depositions to testimony given orally at the trial. The court said: “While it is doubtless true in many cases, and perhaps in most cases, the testimony of a witness orally given is much more likely to make a decided impression, one way or the other, upon the minds of the jury, than if communicated in the form of a deposition; while the appearance and manner of testifying of some witnesses might produce conviction of the truth of what they were stating, in others, their manner and appearance might operate very disparagingly upon their testimony. When the evidence is in the shape of depositions, there is no rule than can be laid down by which we can accurately judge whether the testimony should be more or less favorably considered, than if given orally in the presence of the court and jury.”

In *Olcese v. Mobile Fruit, etc. Co.* 112 Ill. App. 281, *affirmed* 211 Ill. 539, 71 N. E. 1084, it was held that an instruction by the court advising the jury that a deposition was as good and competent evidence as if the witnesses had been present and testified by parol in open court was in accord with a statute which read as follows: “Every deposition may be read as good and competent evidence in the cause in which it shall be taken as if such witness had been present and examined by parol in open court on the hearing or trial thereof.”

So in *Voss v. Prier*, 71 Ind. 128, the court, although holding that the testimony of witnesses whose depositions had been taken was entitled to the same confidence as was that of witnesses who had testified orally, said that the relative value of the two classes of testimony depended on the facts of, and the circumstances attending, each particular case, and not on any inexorable rule.

[1917] A. C. 406.

BOWMAN ET AL.

v.

SECULAR SOCIETY, LIMITED.

England—House of Lords—May 14, 1917.

[1917] A. C. 406.

Wills—Validity—Gift Subversive of Religion.

A testamentary gift to an incorporated society, whose purpose is to promulgate the doctrine that human conduct should be based on natural knowledge and not on supernatural belief and that human welfare in this world is the proper end of all thought and action, is valid.

[See note at end of this case.]

[407] Appeal from an order of the Court of Appeal affirming an order of Joyce, J. [1915] 2 Ch. 447.

Charles Bowman, by his will dated September 14, 1905, devised and bequeathed his residuary real and personal estate to his trustees upon trust after the death of his wife for sale and conversion, and to stand possessed of the proceeds, subject to certain annuities, "upon trust for the Secular Society Limited of 2 Newcastle Street Farringdon Street London" (the respondents).

The testator made a codicil to his will not material to the purposes of the present appeal, and he died on April 21, 1908.

The testator's widow died on October 18, 1914.

On November 25, 1914, the respondent society took out an originating summons asking for payment over to them of the residue of the testator's estate and administration of the estate so far as necessary.

The appellants, the next of kin of the testator, disputed the validity of the residuary gift to the respondent society on the ground that the objects of the society were unlawful.

The respondent society was registered on May 27, 1898, as a company limited by guarantee under the Companies Acts, 1862 to 1893, with a memorandum and articles of association.

The objects of the society as stated in clause 3 of the memorandum of association were as follows:—

"(A) To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action.

"(B) To promote the utmost freedom of enquiry and the publication of its discoveries.

[408] "(C) To promote the secularisation of the State, so that religious tests and observances may be banished from the Legislature, and Executive, and the Judiciary.

"(D) To promote the abolition of all support, patronage, or favour by the State of any particular form or forms of religion.

"(E) To promote universal secular education, without any religious teachings, in public schools maintained in any way by municipal rates or imperial taxation.

"(F) To promote an alteration in the laws concerning religion, so that all forms of opinion may have the same legal rights of propaganda and endowment.

"(G) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens.

"(H) To promote the recognition of Sunday by the State as a purely civil institution for the benefit of the people, and the repeal of all Sabbatarian laws devised and operating in the interest of religious sects, religious observances, or religious ideas.

"(I) To purchase, lease, rent or build halls or other premises for the promotion of the above objects.

"(J) To employ lecturers, writers, organisers or other servants for the same end.

"(K) To publish books, pamphlets, or periodicals.

"(L) To assist by votes of money or otherwise other societies or associated persons or individuals who are specially promoting any of the above objects.

"(M) To have, hold, receive and retain any sums of money paid, given, devised or bequeathed by any person, and to employ the same for any of the purposes of the society.

"(N) To co-operate or communicate with any kindred society in any part of the world.

"(O) To do all such other lawful things as are conducive or incidental to the attainment of all or any of the above objects."

At the hearing of the summons the appellants tendered certain evidence as to the course of business of the respondent society. Joyce, J., however, rejected this evidence, and held that the legality of the society must be determined solely upon a consideration of its memorandum and articles of association; and he held, further, [409] that there was nothing in either the memorandum or articles subversive of morality or contrary to law. He was therefore of opinion that the residuary gift was valid.

The Court of Appeal (Lord Cozens-Hardy M.R., Pickford, L.J., and Warrington, L.J.) affirmed the decision of the learned judge upon both points.

G. J. Talbot, K.C., and J. Arthur Price for appellants.

Tomlin, K.C., and Hon. Malcolm Macnaghten for respondent.

Calder Woods & Pethick, solicitors for appellants.

Stoneham & Sons, solicitors for respondent.

[418] LORD FINLAY, L.C.—My Lords, the question in this case is as to the validity of a bequest of residue to the respondents, the Secular Society, Limited.

The right of the respondents to payment was attacked by the present appellants, the next of kin of the testator, upon the ground that the objects of the respondents' society were such that the bequest was not enforceable. The respondents took out an originating summons, dated November 25, 1914, for the payment over of the residue to them. Joyce, J., decided in their favour, and his decision was upheld by the Court of Appeal.

The decision of the case must turn upon the proper construction of the memorandum of association of the respondents' society and the view to be taken of the law of England with regard to bequests for such purposes as are therein enumerated.

The memorandum of association, so far as material, is as follows:

"(3) The objects for which the company is formed are:—

"(A) To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief; and that human welfare in this world is the proper end of all thought and action.

"(B) To promote the utmost freedom of enquiry and the publication of its discoveries.

[419] "(C) To promote the secularisation of the State, so that religious tests and observances may be banished from the Legislature, the Executive, and the Judiciary.

"(D) To promote the abolition of all support, patronage, or favour by the State of any particular form or forms of religion.

"(E) To promote universal secular education, without any religious teaching in public schools maintained in any way by municipal rates or imperial taxation.

"(F) To promote an alteration in the laws concerning religion, so that all forms of opinion may have the same legal rights of propaganda and endowment.

"(G) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens.

"(H) To promote the recognition of Sunday by the State as a purely civil institution

for the benefit of the people, and the repeal of all Sabbatarian laws devised and operating in the interest of religious sects, religious observances, or religious ideas."

In my opinion the governing object of the society is that which is stated in paragraph 3 (A) of the memorandum of association, and the other objects stated in the memorandum under heads (B) to (H) of the 3rd paragraph are subsidiary. I agree with what is said by the founder of the respondent society in an article from the *Freethinker*, June 19, 1898, which is in evidence, "Clause A is of the highest importance and governs everything else." It was argued on behalf of the respondents that some, at all events, of the objects of the society are not affected by any taint of illegality, e. g., that 3(D) and (E), which state disestablishment and universal secular education as objects to be promoted, are in themselves harmless. It is, of course, the fact that either of these two objects may be advocated from motives which are entirely friendly to religion. But if (A) is the governing object, then these and all the other clauses in the memorandum must be read by its light; in other words, all the other clauses in the 3rd paragraph are so many ways of carrying into practical application the principle enunciated in the 1st clause of paragraph 3. That clause, in my opinion, lays down quite clearly that human conduct should not be based upon supernatural [420] belief. This amounts to a negation of all religion, including, of course, the Christian religion, as governing human conduct. If the influence of supernatural motives is to be eliminated, the Christian religion is discarded in common with all forms of religion in the ordinary sense of the term.

I think, therefore, that the memorandum shows that the object of the society was to promote in various ways the principle that human conduct should be based upon natural knowledge only, and that human welfare in this world is the proper end of all thought and action. Is a legacy in favour of a society which exists for such a purpose enforceable by English law?

Two preliminary points were taken on behalf of the respondents. They contended, first, that the certificate of incorporation is conclusive to show that the objects of the society are not unlawful and, secondly, that some of the objects were not unlawful, and that it cannot be presumed that the legacy in question would be applied to any but lawful objects. We were informed that these points were argued on behalf of the respondents in the Court of Appeal. No notice is taken of either of them in any of the judgments, and the Court must have considered that they had been disposed of in the course of the argument. In my opinion neither is tenable.

[1917] A. C. 406.

The society was registered on May 27, 1898, as a company limited by guarantee under the Companies Acts. The statute then in force was the Companies Act, 1862 (25 & 26 Vict. c. 89). The 18th section deals with the effect of registration and enacts that the certificate of incorporation shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with, and s. 192 repeats this provision and adds that the certificate is to be conclusive evidence that the company is authorized to be registered under the Acts. The amending Act of 1900 (63 & 64 Vict. c. 48) enacts by its 1st section that the certificate shall be conclusive evidence that all the requisitions of the Companies Acts in respect of registration and in matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under the Companies Acts. This provision appears to have been introduced into the Act of 1900 to get rid of some doubts which had been raised by what was said in the case of *In re National Debenture, etc. Corp.* [421] [1891] 2 Ch. 505, to the effect that if, in fact, only six persons had subscribed the memorandum, incorporation would not have been validly effected, and it is repeated in the 17th section of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). It was argued before us that the society could not have been properly incorporated if its objects were illegal, and that, as the certificate is conclusive to show that the company is one authorized to be registered and duly registered, it follows that it cannot for any purpose be contended that the objects are illegal. In my opinion this argument is an attempt to extend the effect of these enactments beyond their fair meaning and manifest object. What the Legislature was dealing with was the validity of the incorporation, and it is for the purpose of incorporation, and for this purpose only, that the certificate is made conclusive. This first preliminary point, in my opinion, fails. The second point also fails on the true construction of the memorandum with which I have dealt above. Taken in themselves, some of the objects, as stated in the memorandum, may be harmless, but they cannot be taken by themselves. They are mere applications of the governing principle stated in 3(A), and we are driven back upon the question of whether that object is legal.

Mr. Talbot, on behalf of the appellants, contended that it was illegal on two grounds. First, that it is criminal to attack the Christian religion, however decent and temperate may be the form of attack. Second, that a Court of law will not assist in the promotion of such objects as that for which this society is formed, whether they are criminal or not.

In support of the first of these propositions it was contended that to attack the Christian religion is blasphemy by the common law of England, and that the view put forward upon this subject by the late Lord Coleridge, C. J., is erroneous. Lord Coleridge laid it down in the case of *Reg. v. Ramsay*, 15 Cox C. C. 231, 238, that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy." This view was controverted by Sir James Fitzjames Stephen, who, in his *History of the Criminal Law*, vol. 2, pp. 449-476, on a review of the authorities, maintained that blasphemy consisted in the character of the matter published and not in the manner in [422] which it is stated, and that any attack on the Christian religion, in whatever language expressed, constituted the offence of blasphemy at common law. A reply to the arguments of Sir J. F. Stephen was made by Mr. Aspland, of the Middle Temple, Barrister-at-Law, in a pamphlet entitled "*The Law of Blasphemy*," published in 1884, in which the authorities up to date are collected and examined.

If Sir J. F. Stephen's view be right, any pamphlet or speech in promotion of the governing object of the respondent society would be criminal and in every sense illegal. In my opinion the appellants have failed to establish that all attacks upon religion are at common law punishable as blasphemous. There are no doubt to be found in the cases many expressions to the effect that Christianity is part of the law of England, but no decision has been brought to our notice in which a conviction took place for the advocacy of principles at variance with Christianity, apart from circumstances of scurrility or intemperance of language.

The earliest prosecution for blasphemy in the common law Courts was in the reign of Charles II.; in earlier times probably such cases were dealt with by the Ecclesiastical Courts.

The main cases on this subject prior to *Reg. v. Ramsay*, 15 Cox C. C. 231, 238 are: (1) *Taylor's Case*, 1 Vent. 293; (2) *Rex v. Woolston*, Fitzg. 64, 2 Stra. 834, 1 Barn. K. B. 162; (3) *Rex v. Williams*, 26 How. St. Tr. 653 (in connection with which *Rex v. Carlile*, 3 B. & Ald. 167, 5 E. C. L. 252 and *Rex v. Eaton* (1812) 31 How. St. Tr. 927, should be referred to); (4) *Rex v. Waddington*, 1 B. & C. 26, 8 E. C. L. 12; (5) *Reg. v. Hetherington*, 15 Jur. 529, 4 How. St. Tr. N. S. 563.

In the cases numbered 1, 3, 4, and 5 it is apparent on the face of the reports that the language used was scurrilous and offensive. This is less apparent in the reports of No. 2 (*Rex v. Woolston*, Fitzg. 64, 2 Stra. 834, Barn. K. B. 162. But examination of the

libels in respect of which informations in that case were filed—namely, Mr. Woolston's first, second, third, and fourth discourses of the miracles of our Saviour—shows that the sacred subjects treated by him were handled with a great deal of irreverence, and in many passages language was used by him that was blasphemous in every sense of the term. It is apparently with [423] reference to this element that in a passage in the report in 1 Barnardiston, p. 163, the Court, in dealing with the second point made on behalf of Mr. Woolston, observed "That as the Christian religion was part of the law, whatever derided that, derided the law." The true view of the law of blasphemy appears to me to be that expressed by Lord Denman in *Reg. v. Hetherington*, 5 Jur. 529, 4 How. St. Tr. N. S. 563, which is substantially in accordance with that taken by Lord Coleridge in *Reg. v. Ramsay*, 15 Cox C. C. 231, 238, and followed by Phillimore, J., in *Rex v. Boulter*, 72 J. P. 188.

We have been referred by Lord Dunedin to the law of Scotland on this subject as stated in Hume's *Criminal Law* (vol. 1, p. 568), and it appears to be the case that in Scotland scurrility or indecency is an essential element of the crime of blasphemy at common law. Certain Scotch statutes which made it a crime to contravene certain doctrines have been repealed. The consequences of the view put forward on behalf of the appellants would be somewhat startling, and in the absence of any actual decision to the contrary I think we must hold that the law of England on this point is the same as that of Scotland, and that the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained.

The appellants, however, contended that, whether criminal or not, the objects for which the society was formed were such that the law would give no help for the recovery of funds to be applied in their promotion. The principle on which this part of the appellants' case rested was very clearly stated by Bramwell, B. in *Cowan v. Milbourn*, L. R. 2 Exch. 230, 233, 236. In the course of the argument Bramwell, B., said: "An act may be illegal in the sense that it will not be recognized by the law as capable of being the foundation of any legal right, or that it may even deprive what it accompanies of that capacity, although it is followed by no penalty," and in the course of his judgment he expressed himself to the same effect. The principle is very familiar, and has been applied in innumerable cases. The question whether the present case falls within it demands a careful examination of the authorities.

In arriving at the conclusion that the object of the respondent [424] society was not

unlawful in the sense that the Court will not aid the plaintiffs to get the legacy, the Court of Appeal found it necessary to overrule two cases. The first of these cases is *Briggs v. Hartley*, 19 L. J. Ch. 416, 417. In this case a legacy had been left for the best original essay on "The subject of Natural Theology, treating it as a Science, and demonstrating the truth, harmony, and infallibility of the evidence on which it is founded, and the perfect accordance of such evidence with reason; also demonstrating the adequacy and sufficiency of natural theology when so treated and taught as a science to constitute a true, perfect, and philosophical system of universal religion (analogous to other universal systems of science, such as astronomy, &c.) founded on immutable facts and the works of creation, and beautifully adapted to man's reason and nature, and tending, as other sciences do, but in a higher degree, to improve and elevate his nature and to render him a wise, happy, and exalted being." Shadwell, V.-C., gave judgment in these terms: "I cannot conceive that the bequest in the testator's will is at all consistent with Christianity; and, therefore, it must fail."

This is a direct decision by a judge of great eminence upon the point, and in my opinion the Court of Appeal had no sufficient ground for overruling it. The second of these cases is *Cowan v. Milbourn*, L.R. 2 Exch. 230, 234, 235, 236. In that case the plaintiff had hired of the defendant some rooms at Liverpool for the purpose of having lectures delivered there. Placards were issued giving as some of the subjects of the lectures "The Character and Teachings of Christ; the former Defective, the latter Misleading," and "The Bible shown to be no more Inspired than any other Book; with a Refutation of Modern Theories thereon." The use of the rooms was refused by the defendant, and he justified his refusal by the character of the lectures proposed to be delivered. In an action in the Court of Passage, Liverpool, for breach of contract to let, the learned judge ruled that the lectures announced were blasphemous and illegal, and a verdict was entered for the defendant, with leave to the plaintiff to move to enter a verdict for him on each of these counts. Motion was made accordingly in the Court of Exchequer before Kelly, C.B., Martin, B., and Bramwell, B. The Court refused to grant a rule, the Chief Baron expressing himself as follows: "It would be a violation of [425] duty to allow the question raised to remain in any doubt. That question is, whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His

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teaching, that the first is defective and the second misleading, is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to the use of his rooms."

Martin, B. concurred. Bramwell, B., said: "I am of the same opinion, and I will state my grounds. I think that the plaintiff was about to use the rooms for an unlawful purpose, because he was about to use them for the purpose of, 'by teaching or advised speaking,' 'denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority.' That he intended to use the rooms for the purposes declared by the statute to be unlawful is perfectly clear, for he proposed to show that the character of Christ was defective, and His teaching misleading, and that the Bible was no more inspired than any other book. That being so, his purpose was unlawful; and if the defendant had known his purpose at the time of the refusal, he clearly would not have been bound to let the plaintiff occupy them, for, if he would, he would then have been compelled to do a thing in pursuance of an illegal purpose." Then a little further on: "Now it appears that the plaintiff here was going to use the rooms for an unlawful purpose; he therefore could not enforce the contract for that purpose, and therefore the defendant was not bound, though he did not know the fact. It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the [426] law for prostitution, a contract having prostitution for its object would be valid in a Court of law. The rule must be refused, and I do not regret the result, and on this ground, that this placard must have given great pain to many of those who read it."

The authority of these two decisions has never, so far as I am aware, been questioned in any later case, and no satisfactory reason is given in the Court of Appeal for disregarding them. The Master of the Rolls says [1915] 2 Ch. 463, 464: "It seems to me that the undoubted relaxation of the views as to

common law blasphemy must extend to matters outside the criminal law." He goes on to say that in his view the decision in *Briggs v. Hartley*, 19 L. J. Ch. 416, ought not to be followed, and with regard to *Cowan v. Milbourn*, L. R. 2 Exch. 230, he says: "So far as I am aware this case, which was decided in 1867, has never been followed, and, notwithstanding my profound respect for the learned judges who decided it, I am bound to say that I think it ought not to be followed. If *Cowan v. Milbourn*, L. R. 2 Exch. 230, is still good law, the plaintiffs cannot claim the legacy, but as I do not consider it is good law I think *Joyce, J.*, was right in the view which he took."

Pickford, L.J., says [1915] 2 Ch. 466, 467: "A much more difficult question is whether this object, though not illegal in the sense of being punishable, is illegal in the sense that the law will not recognize it as being the foundation of legal right and will do nothing to aid it. The denial of religion is not in terms the object of the company as set out in (a), but I think that it is involved in it, and that it is not possible to promote the principle that human conduct should be based upon natural knowledge and that human welfare is the proper end of all thought and action without at any rate inferentially denying the Divine government of the world and the principles of religion. I think there is no doubt that in former times such an object would have been held to be contrary to public policy, but the question is whether it is right to hold so now. I think that the doctrine of public policy cannot be considered as being always the same and that many things would be, and have been, held contrary to public policy which are not so held now." The learned Lord Justice goes on to refer to the cases of *Briggs v. Hartley*, 19 L. J. Ch. 416, and *Cowan v. Milbourn* L. R. 2 Exch. 230, and says: "Whatever may have been the [427] doctrine as to public policy prevailing in 1850, when the former case was decided, I do not think that it ought now to be followed. If the latter decision means that no consideration will support a contract which involves any questioning of the truth of religion, I also think that should not be followed, but the Court may have inferred from the title to which I referred that the lectures attacked religion in a reviling and contumelious manner, and if that were the case, the decision was, I think, right."

Warrington, L. J., does not specifically refer to the case of *Briggs v. Hartley*, 19 L. J. Ch. 416, but with regard to the judgments of *Kelly, C. B.*, and *Bramwell, B.*, in *Cowan v. Milbourn*, L. R. 2 Ex. Ch. 230, he says. [1915] 2 Ch. 473: "Neither of the judges really dealt with the question whether the

lectures, if not infringing a positive ordinance of law, would have rendered the contract incapable of being enforced. It is quite true that Bramwell, B., laid it down that a thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it, but accepting this as correct, as I think it clearly is, it still remains to consider whether the particular thing in question is unlawful in the wider sense or not. In my opinion here is no authority binding us to hold that the promotion in a proper manner of the objects of the company is contrary to public policy, and we ought not to hold it to be so."

It may be that there has been a considerable change of public opinion with regard to the discussion of religion, but the question is whether anything has taken place to justify any Court in holding that the principle of law on this matter may be treated as obsolete. From time to time the standard as to what is decent discussion of religious subjects may vary, and in one age a jury would find that a particular publication was blasphemous in the strict sense of the term which would not be so considered in another. With regard to questions of public policy, such as those arising in connection with restraint of trade, circumstances with regard to facility of communication and of travel may so alter that the principle invalidating such contracts would apply to a particular state of circumstances in one age but not in another. But it is difficult to see how a change in the spirit of the time could justify [428] a change in a principle of law by judicial decision. Such changes in public opinion may lead to legislative interference and substantive alteration of the law, but cannot justify a departure by any Court from legal principle, however they may affect its application in particular cases.

The decisions in *Briggs v. Hartley*, 19 L. J. Ch. 416, and *Cowan v. Milbourn*, L. R. 2 Exch. 230, are in conformity with a considerable body of authority on this subject.

It has been repeatedly laid down by the Courts that Christianity is part of the law of the land, and it is the fact that our civil polity is to a large extent based upon the Christian religion. This is notably so with regard to the law of marriage and the law affecting the family. The statement that Christianity is part of the law of the land has been often given as a reason for punishing criminally contumelious attacks upon Christianity. It is true that expressions have in some cases been used which would seem to imply that any attack upon Christianity, however decently conducted, would be criminal. For the reasons I have already given I do not think that this view can be accepted as having represented the common

law of England at any time. But the fact that Christianity is recognized by the law as the basis to a great extent of our civil polity is quite sufficient reason for holding that the law will not help endeavours to undermine it.

These two cases do not stand alone.

In 1754 the case of *De Costa v. De Paz*, 2 Swanst. 487, note (a) 488-490; Ambl. 228, came before Lord Hardwicke, the question arising upon a will which directed that the investment of 1200*l*, and the revenue arising therefrom should be applied for ever in the maintenance of a *Jesiba*, or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion. A bill was brought to have the money laid out according to the will, and, as stated in the report, "The Lord Chancellor upon the opening asked, if there had ever been a case where such a charity as this had been established, for it being against the Christian religion, which is part of the law of the land, he thought he could not decree it." After argument Lord Hardwicke said that the first question was "whether the [429] legacy in question is good, and such as this Court can or ought to establish." He pointed out that the case would be different where the legacy was for the support of poor persons of the Jewish religion, and then proceeds as follows: "But this is a bequest for the propagation of the Jewish religion; and though it is said, that this is a part of our religion, yet the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord Hale and Lord Raymond; and it undoubtedly is so; for the constitution and policy of this nation is founded thereon. As to the Act of Toleration no new right is given by that, but only an exemption from the penal laws. The Toleration Act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the dissenters under certain regulations and tests. This renders those religions legal, which is not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the Legislature."

Accordingly Lord Hardwicke declared he was of opinion that the legacy was not good in law, and ought not to be decreed or established by the Court.

In 1819, in the case of *Matter of Bedford Charity*, 2 Swanst. 470, 522, 527, Lord Eldon referred to the case of *De Costa v. De Paz*, 2 Swanst. 487, note (a), 488-490; Ambl. 228, as establishing that no one can found, by charitable donation, an institution for the purpose of teaching the Jewish religion, and made the following observations: "I apprehend that it is the duty of every judge presiding in an English Court of justice, when

he is told that there is no difference between worshipping the Supreme Being in chapel, church, or synagogue to recollect that Christianity is part of the law of England."

It will be observed that the case of *De Costa v. De Paz*, 2 Swanst. 487, note (a), 488-490; Ambl. 228, is a decision given by Lord Hardwicke in 1754, and approved by Lord Eldon in 1819, to the effect that a legacy for the promotion of the Jewish religion was not enforceable, as being for the promotion of a faith contrary to Christianity. Secularism, as explained in the respondents' memorandum, is much more contrary to Christianity than is the Jewish religion. The Jews have been relieved [430] by the Jewish Relief Act, 1846 (9 & 10 Vict. c. 59), s. 2, but there is no statute in similar terms with regard to those holding the views expressed by the memorandum of the respondent society.

In *Lawrence v. Smith*, Jac. 471, a bill was filed to restrain the piracy of some lectures delivered at the College of Surgeons. An *ex parte* injunction was granted, and a motion was made by the defendant to dissolve the injunction on the ground that the work could not be the subject of copyright, and passages were referred to which it was contended were hostile to natural and revealed religion and denied the immortality of the soul. The Lord Chancellor said, in giving judgment, Jac. 473: "Looking at the general tenour of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided, he may apply again."

In a note on p. 474 it is stated that in *Murray v. Benbow*, Feb. 1822, Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendant from publishing a printed edition of Lord Byron's poem "Cain," and that the Lord Chancellor, after reading the work, refused the motion on grounds similar to those stated in *Lawrence v. Smith*, Jac. 471. A note of Lord Eldon's judgment on that application is given in the preface to "Cain" in the large octavo edition of Byron's works, published in 1846 by John Murray, p. 317.

In *Thompson v. Thompson*, 1 Coll. Ch. Cas. 381, 392, 397, a question having arisen as to a bequest for literary purposes with reference to the doctrines maintained in the testator's writings, the Vice-Chancellor (Sir J. L. Knight Bruce) said: "Understanding it to be admitted, that the testator's writings, published and unpublished, contain nothing irreligious, illegal, or immoral, I have no

doubt that this is a legal disposition, according to the law of England;" and he held the bequest good, "supposing neither atheism, sedition, nor any other crime or immorality to be inculcated [431] by the works." Here Sir J. L. Knight Bruce recognized the doctrine that a bequest for irreligious purposes could not be enforced.

In 1850 the case of *Briggs v. Hartley*, 19 L. J. Ch. 416, was decided.

In the case of *Pare v. Clegg*, 29 Beav. 589, it was contended that the claim of the plaintiff as creditor of a society called the National Community Society (which afterwards took the name of the Rational Society) must fail on the ground that the society was founded for an immoral and illegal purpose. The Master of the Rolls, Lord Romilly, in delivering judgment dealt with this contention as follows, 29 Beav. 601: "The charges against it" (the society) "are, that it was founded, first, for the purpose of propagating natural religion, to the injury of revealed religion; secondly, in order to put an end to all moral restraint on the actions of mankind; and, thirdly, with a view to destroy the institution of private property generally. I have perused the rules of the society for the purpose of considering the force of this objection, and although I am of opinion that the society is based upon irrational principles, and seeks to realise a visionary and unattainable object, it is not, I think, to be considered as founded for the purpose of propagating irreligious and immoral doctrines in the ordinary and proper sense of those words. It is not such a society as that a person dealing with it could not acquire the right to enforce a contract entered into with him by the society." This implies that if the result of the examination of the rules had been to show that the society was formed for irreligious purposes the decision might have been the other way.

These authorities, beginning with *De Costa v. De Paz*, 2 Swanst. 487, note (a); Ambl. 228, in 1754 and ending with *Pare v. Clegg*, 29 Beav. 589, in 1861, appear to me to establish that the Courts will not help in the promotion of objects contrary to the Christian religion, apart altogether from any criminal liability, and to show that *Briggs v. Hartley*, 19 L. J. Ch. 416, and *Cowen v. Milbourn*, L. R. 2 Exch. 230, were well decided, and that, if the law of England is to be altered upon the point, the change must be effected, not by judicial decision, but by the act of the Legislature.

It is foreign to the subject of the present inquiry to consider whether the welfare of the individual and the greatness of the nation [432] would be best promoted by proceeding on the lines of the Secular Society, involving the ignoring of the supernatural as influencing human conduct, and holding out the pro-

motion of happiness in this world as the chief end of man, or upon the lines indicated in the striking passage with which Lord Bacon concludes his *Essay on Atheism* and the still more striking quotation from Cicero which he there makes. Such considerations bear upon public policy and may have had some influence in moulding the English law upon the subject. But we have to deal not with a rule of public policy which might fluctuate with the opinions of the age, but with a definite rule of law to the effect that any purpose hostile to Christianity is illegal. The opinion of the age may influence the application of this rule but cannot affect the rule itself. It can never be the duty of a Court of law to begin by inquiring what is the spirit of the age and in supposed conformity with it to decide what the law is. Very nice and difficult questions may arise as to whether in any particular case the purpose is hostile to the Christian religion. No such difficulty arises in the present case, as by the memorandum of association the axe is laid to the root of the tree of all religion.

The legacy was given and would be taken for the purposes of the society, as stated in the memorandum, and if these purposes are illegal their illegality is not mended by the certificate of incorporation. In my opinion they are illegal in the sense that the law will not aid in their promotion and this appeal ought to be allowed.

LORD DUNEDIN.—My Lords, before I had committed my views in this case to writing I had the advantage of seeing not only the judgment just delivered by the Lord Chancellor, but also those about to be delivered by my noble and learned friends Lord Parker and Lord Buckmaster. In these there is contained so much that not only has my adhesion, but is expressed better than I could hope to do, that I shall refer to them for several of the propositions on which my judgment rests, and shall only state succinctly the reasons which have led me, though not without hesitation, to the conclusion that this appeal should be dismissed.

My Lords, I have said that I have formed my opinion not without hesitation; but that hesitation is due to one fact only. Had there been no authorities to deal with, and I were to approach the matter [433] from the point of view of legal principle alone, I do not think I should have felt much difficulty. What has troubled me is that I think it is impossible to decide the case as I think it should be decided without going counter to what has been said by judges of great authority in past generations. It is always, I feel, no light matter to overrule such pronouncements.

I shall first deal with two points which must be resolved before the case can be

further considered, but on which, for the reason already mentioned, I shall adopt the opinion of others as my own. I agree with what I understand is the unanimous opinion of your Lordships, that as to what is necessary to constitute the crime of blasphemy at common law the dicta of Erskine J., Lord Denman, C. J., and Lord Coleridge, C. J., in the cases of *Shore v. Wilson*, 9 Cl. & F. 355, 524, *Reg. v. Hetherington*, 4 How. St. Tr. (N.S.) 563, and *Reg. v. Ramsay*, 15 Cox, C. C. 231, respectively are correct, and I adopt the reasoning of the Lord Chancellor and Lord Buckmaster. Further, I agree with the Lord Chancellor that, on a fair construction, paragraph 3 (A) of the memorandum of association of the respondent company expresses the dominating purpose of the company; and that the other matters are mentioned not as independent, but only as subsidiary aims. I agree with him in thinking that teaching in accordance with 3 (A) is inconsistent with and to that extent subversive of the Christian religion—by which expression, without attempting definition, I mean all such forms of religion as have for a common basis belief in the Godhead of the Lord Jesus Christ.

It is said for the appellants that the Court will not lend its assistance for the furtherance of an illegal object, and that money given to the society must needs be illegally applied, because it certainly can only be used for objects in terms of the memorandum, and such objects are illegal, because the Christian religion is part of the law of the land. Now if money was laid out in either procuring publications or lectures in terms of the objects of the memorandum such publications or lectures need not be couched in scurrilous language and so need not be such as would constitute the crime of blasphemy at common law. Nor need they be criminal under the Blasphemy Act; for here I agree with Lord Buckmaster that the Act is so [434] framed as to make its penalties only apply when there has been what may be termed apostasy. It would not, I think, be safe to found any argument on the fact—but it is a fact sufficiently curious to be mentioned—that the Scottish Parliament two years before the Blasphemy Act passed an Act in similar terms, but omitting the words “having been educated in or at any time having made profession of the Christian religion, &c.” In the repealing Act, 50 Geo. 3, c. 160, this and another older Scottish Act are repealed in toto, while the Blasphemy Act was allowed to stand. How innocuous it was on a true construction may be surmised from the fact that there seem to have been no prosecutions under it.

Criminal liability being negatived, no one has suggested any statute in terms of which it—by which I mean the supposed use of the money—is directly prohibited. There is no

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question of offence against what may be termed the natural moral sense. Neither has it been held, I think, as being against public policy, as that phrase is applied in the cases that have been decided on that head. Now if this is so, I confess I cannot bring myself to believe that there is still a *terra media* of things illegal, which are not criminal, not directly prohibited, not *contra bonos mores*, and not against public policy. Yet that, I think, is the result of holding that anything inconsistent with Christianity as part of the law of England cannot in any way be assisted by the action of the Courts.

The Lord Chancellor has reviewed the authorities which he holds to be contrary to this opinion. Undoubtedly there are dicta; but so far as concerns actual judgments they might, I think, all be supported on grounds not inconsistent with this opinion, except *Briggs v. Hartley*, 19 L. J. Ch. 416, and *Cowan v. Milbourn*, L. R. 2 Exch. 230. On the other hand, the opinions of the consulted judges in *Shore v. Wilson*, 9 Cl. & F. 355, 499-578 (including those of Parke, B., and Tindal, C. J.) are, in my view, clearly inconsistent with the decision in *Briggs v. Hartley*, 19 L. J. Ch. 416, and in favour of the view I am holding. For it is, I think, impossible to hold that the terms of 53 Geo. 3, c. 160, effected anything more than relief from statutory penalties and disqualifications, and equally impossible to say that Unitarian doctrine is, [435] in the words used by Shadwell, V.-C. in *Briggs' Case*, 19 L. J. Ch. 416, "consistent with Christianity." I do not say more about the cases, because they are to be reviewed with great minuteness by Lord Buckmaster, in whose views I entirely concur.

It is not, however, on this point alone that I desire to rest my judgment. So far I have dealt with the matter as if the question were one of contract or of trust. Now that there is no trust here is, I think, clear beyond doubt. The trust to be constituted must either be found in some expression of the donor—here the testator—relative to the gift, or in the fact that the donee—here the society—is a trustee, and that the gift is only given to him in that capacity. But the testator has clogged his gift with no conditions. He has made an absolute gift to a legal entity which is entitled to receive money. The certificate of incorporation in terms of the section quoted of the Companies Act, 1909, prevents any one alleging that the company does not exist. Then the law of *Ashbury R. Carriage, etc. Co. v. Riche* (1875) L. R. 7 H. L. 653, is based upon the consideration of what is and what is not *intra vires* of a statutory corporation, but I have never heard it suggested that it made a company a trustee for the purposes of its

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memorandum. I do not say more, for here I wish respectfully to concur with what is said on this subject by Lord Parker. Trust being out of the reckoning, there can be no doubt that there is here no question of contract. What remains? Nothing but an ordinary action for a legacy at the instance of a legal person that has a right to sue. It is here that I feel disposed to quarrel with the phrase "the assistance of the Courts." I do not see that the company is seeking the assistance of the Courts to carry out the objects of the memorandum. It is seeking their assistance only to compel the executor to do his duty, so that it may receive what is legally due to it. If the legacy were due to an individual, the executor would not be heard to discuss the probable uses to which the legatee would put the money. I do not think he can do so in the case of the society. For after all—and treating the memorandum, in spite of the opinion I have expressed already, as indicating purposes entirely illegal such as in contract would not serve as foundation for an action—there is no reason why the society should not employ the money in paying [436] its office rent. For these reasons and those to be more fully stated by my noble and learned friends who are to follow me I am of opinion that this appeal should be dismissed, and I move your Lordships accordingly.

LORD PARKER OF WADDINGTON.—My Lords, in considering the questions which arise for decision on this appeal, it is, I think, well to bear in mind certain general and perhaps somewhat elementary principles. At common law the conditions essential to the validity of a gift are reasonably clear. The subject-matter must be certain; the donor must have the necessary disposing power over, and must employ the means recognized by common law as sufficient for the transfer of, the subject-matter; and, finally, the donee must be capable of acquiring the subject-matter. If these conditions be fulfilled, the property in the subject-matter of the gift passes to the donee, and he becomes the absolute owner thereof and can deal with the same as he thinks fit. The common law takes no notice whatever of the donor's motive in making the gift or of the purposes for which he intends the property to be applied by the donee, or of any condition or direction purporting to affect its free disposition in the hands of the donee. It is immaterial that the gift is intended to be applied for a purpose actually illegal—as, for example, in trade with the King's enemies—or in a manner contrary to the policy of the law—as, for example, in paying the fines of persons convicted of poaching. In either case, the essential conditions being fulfilled, the gift is complete,

the property has passed, and there is an end of the matter. A gift at common law is never executory in the sense that it requires the intervention of the Courts to enforce it.

With regard to the conditions essential to the validity of a gift, equity follows the common law. On the one hand, if the subject-matter be property transferable at common law, equity will not as a rule aid a gift which does not fulfil the essential conditions. On the other hand, when the property is transferable in equity only, equity also requires that the subject-matter must be certain, that the donor must have the necessary disposing power, and must employ the means which equity recognizes as sufficient for a transfer [437] of the subject-matter, and that the donee must be capable of acquiring the subject-matter. If a donee sues in equity to recover the subject-matter he sues by virtue of an equitable estate already vested in him, and not to enforce the gift. Under certain circumstances, however, the donee does not in equity, even if all the requisite conditions be fulfilled, obtain an absolute interest. The gift may have been obtained by duress or undue influence, in which case it will be set aside in equity, and if the donee has obtained any legal property he will be compelled to restore it to the donor or those claiming under him. Again, the circumstances of the gift or the directions given or objects expressed by the donor may be such as to impose on the donee the character of a trustee. In such a case equity will enforce the trust so far as may be, and, if for any reason the trust fails, will imply a resulting trust in favour of the donor or those claiming under him. But, except so far as they may be relevant on the points above mentioned, equity does not any more than the common law pay any attention to the donor's motives in making the gift or to the purposes for which he intends the property to be applied by the donee, or to any condition or direction affecting its free disposition in the hands of the donee. The question whether a trust be legal or illegal or be in accordance with or contrary to the policy of the law only arises when it has been determined that a trust has been created, and is then only part of the larger question whether the trust is enforceable. For, as will presently appear, trusts may be unenforceable and therefore void, not only because they are illegal or contrary to the policy of the law, but for other reasons.

It may be well to illustrate what I have said by one or two examples. Thus, if a testator gives 500*l.* to A., saying that he knows A. will expend it in procuring masses to be said for testator's soul, the question arises whether A. is a trustee for the purpose indicated. If he be not a trustee, he will

in equity take the legacy beneficially; the fact that the trust, if there be a trust, would be unlawful being quite immaterial. If, however, it be held that A. is a trustee, then, as the trust is unlawful, equity will not allow the trustee to retain the legacy. Again, in the case of a simple legacy of 500*l.* to A., where conversations had taken place between A. and the testator as to the purposes for which the legacy should [438] be applied, the question would arise whether these conversations rendered it unconscionable for A. to take the legacy for his own use. If so, equity would treat him as a trustee. If not, it would allow him to retain the legacy, although the purpose for which the legacy was intended by the testator was unlawful or otherwise unenforceable. Again, it is well settled that a gift to A. to help him in his business is an absolute gift to A., and it is therefore immaterial whether A.'s business is that of a corn merchant or a receiver of stolen goods. If, however, A. were a trustee the character of the business would be material in considering whether the trust was one which equity would carry into execution.

My Lords, in the present case you will find that the testator has given his residuary estate through the medium of trustees for sale and conversion to the Secular Society, Limited, and the question is as to the validity of this gift. There is no doubt as to the certainty of the subject-matter, or as to the testator's disposing power, or as to the validity of his will. So far as the conditions essential to the validity of the gift are concerned, the only doubt is as to the capacity of the donee.

The Secular Society, Limited, was incorporated as a company limited by guarantee under the Companies Act, 1862 to 1893, and a company so incorporated is by s. 17 of the Act of 1862 capable of exercising all the functions of an incorporated company. *Prima facie*, therefore, the society is a corporate body created by virtue of a statute of the realm, with statutory power to acquire property by gift, whether *inter vivos* or by will. The appellants endeavour to displace this *prima facie* effect of the Companies Acts in the following manner. If, they say, you look at the objects for which the society was incorporated, as expressed in its memorandum of association, you will find that they are either actually illegal or, at any rate, in conflict with the policy of the law. This being so, the society was not an association capable of incorporation under the Acts. It was and is an illegal association, and as such incapable of acquiring property by gift. I do not think this argument is open to the appellants, even if their major premise be correct. By the 1st section of the Companies Act, 1900, the society's certificate of registra-

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tion is made conclusive evidence that the society was an association authorized to be registered—that [439] is, an association of not less than seven persons associated together for a lawful purpose. The section does not mean that all or any of the objects specified in the memorandum, if otherwise illegal, would be rendered legal by the certificate. On the contrary, if the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for which the money had been applied were expressly authorized by the memorandum. In like manner a contract entered into by the company for an unlawful object, whether authorized by the memorandum or otherwise, could not be enforced either in law or in equity. The section does, however, preclude all His Majesty's lieges from going behind the certificate or from alleging that the society is not a corporate body with the status and capacity conferred by the Acts. Even if all the objects specified in the memorandum were illegal, it does not follow that the company cannot on that account apply its funds or enter into a contract for a lawful purpose. Every company has power to wind up voluntarily, and moneys paid or contracts entered into with that object are in every respect lawfully paid or entered into. Further, the disposition provided by the company's memorandum for its surplus assets in case of a winding up may be lawful though all the objects as a going concern are unlawful. If there be no lawful manner of applying such surplus assets they would on the dissolution of the company belong to the Crown as bona vacantia: *Cunnack v. Edwards* [1896] 2 Ch. 679.

My Lords, some stress was laid on the public danger, or at any rate the anomaly, of the Courts recognizing the corporate existence of a company all of whose objects, as specified in its memorandum of association, are transparently illegal. Such a case is not likely to occur, for the registrar fulfils a quasi-judicial function, and his duty is to determine whether an association applying for registration is authorized to be registered under the Acts. Only by misconduct or great carelessness on the part of the registrar could a company with objects wholly illegal obtain registration. If such a case did occur it would be open to the Court to stay its hand until an opportunity had been given for taking the appropriate steps for the cancellation of the certificate of registration. It should be observed that neither s. 1 [440] of the Companies Act, 1900, nor the corresponding section of the Companies (Consolidation) Act, 1908, is so expressed as to bind the Crown, and the Attorney-General, on behalf of the Crown, could institute proceedings by way of certiorari to cancel a

registration which the registrar in affected discharge of his quasi-judicial duties had improperly or erroneously allowed. But, as will appear later, I do not think that the present is a case requiring such action on the part of your Lordships' House.

My Lords, it follows from what I have already said that the capacity of the Secular Society, Limited, to acquire property by gift must be taken as established, and, all the conditions essential to the validity of the gift being thus fulfilled, the donee is entitled to receive and dispose of the subject-matter thereof, unless either (1) the gift was obtained by duress or undue influence, or (2) there is something which in a Court of Equity imposes on the donee the character of a trustee. Admittedly there is no question of duress or undue influence, and in my opinion it is impossible to hold that the donee was intended to take or in fact takes the subject-matter as trustee or in any other character than that of absolute owner. It should be observed that the testator says nothing as to how he desires his residuary estate to be applied in the hands of the society, nor is there any evidence that he made any communication to any one on behalf of the society with regard to such application. The only possible argument in favour of the testator's intention to create a trust rests upon this: The society is a body corporate to which the principle of your Lordships' decision in *Ashbury R. Carriage, etc. Co. v. Riche*, L. R. 7 H. L. 653, is applicable. Its funds can only be applied for purposes contemplated by the memorandum and articles as originally framed or altered under its statutory powers. A gift to it must, it may be said, be considered as a gift for those purposes, and therefore the society is a trustee for those purposes of the subject-matter of the gift. This argument is, in my opinion, quite fallacious. The fact that a donor has certain objects in view in making a gift does not, whether he gives them expression or otherwise, make the donee a trustee for those objects. If I give property to a limited company to be applied at its discretion for any of the purposes authorized by its memorandum and articles, the company [441] takes the gift as absolutely as would a natural person to whom I gave a gift to be applied by him at his discretion for any lawful purpose. The case of *Atty.-Gen. v. Haberdashers' Co.* (1834) 1 Myl. & K. 420, is an express authority on this point. A gift of a fund on trust to pay the income thereof in perpetuity to a society, whether corporate or otherwise, might possibly, if the objects of the society were charitable, be established as a charitable gift, exempt from objection on the ground that it created a perpetuity. But it is one thing to establish a gift (which would otherwise fail) on the ground that it is charitable, and

quite another thing to avoid a gift which would otherwise be good on the ground that it creates an unenforceable trust. If a gift to a corporation expressed to be made for its corporate purposes is nevertheless an absolute gift to the corporation, it would be quite illogical to hold that any implication as to the donor's objects in making a gift to the corporation could create a trust. The argument, in fact, involves the proposition that no limited company can take a gift otherwise than as trustee. I am of opinion, therefore, that the society, being capable of acquiring property by gift, takes what has been given to it in the present case, and takes it as absolute beneficial owner and not as trustee.

My Lords, the above considerations appear to me to be alone sufficient to dispose of this appeal. Nevertheless, I will proceed to consider the matter on the footing that the society takes in the character of trustee. On that footing it seems to me that the trust is clearly void, and that the appellants ought to succeed, whatever opinion your Lordships hold on the questions which were argued before the House. A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the Courts in this country recognize as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty. A simple instance of this is a gift for charitable or benevolent purposes. Such a gift is void, for benevolent purposes are, as is well settled, not necessarily charitable: *Morice v. Durham* (1805) 10 Ves. Jr. 522; *James v. [442] Allen* (1817) 3 Meriv. 17; *In re Jarman* (1878) 8 Ch. D. 584. Now if your Lordships will refer for a moment to the society's memorandum of association you will find that none of its objects, except, possibly, the first, are charitable. The abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the association be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the

law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift. The same considerations apply when there is a trust for the publication of a book. The Court will examine the book, and if its objects be charitable in the legal sense it will give effect to the trust as a good charity: *Thornton v. Howe*, 31 Beav. 14; but if its object be political it will refuse to enforce the trust: *De Themmines v. De Bonneval* (1828) 5 Russ. 288. If, therefore, there be a trust in the present case it is clearly invalid. The fact, if it be the fact, that one or other of the objects specified in the society's memorandum is charitable would make no difference. There would be no means of discriminating what portion of the gift was intended for a charitable and what portion for a political purpose, and the uncertainty in this respect would be fatal.

My Lords, the only way of meeting this difficulty would be to argue in favour of a general charitable intention on the part of the testator. The rule of equity in this respect is well known, and, however admirable in the interest of the public, has, I think, gone further than any other rule or canon of construction in defeating the real intention of testators. Perhaps the most striking instance [443] of the application of the rule is the case of *Le Costa v. De Paz*, 2 Swanst. 487, note (a), *Ambl.* 225, to which I shall have to return presently. There the trust was for the purpose of establishing an assembly for reading the Jewish law and instructing the people in the Jewish religion. The Jewish Relief Act had not yet been passed, and therefore the gift could not be applied as directed by the testator. Nevertheless Lord Hardwicke held that, the gift being for a religious purpose, the testator had manifested a general charitable intent, and accordingly the fund was applied for paying a preacher to instruct children in the Christian instead of the Jewish religion.

Any argument in favour of the testator's general charitable intention in the present case would have to proceed on the footing that the society's first and paramount object was charitable, and that its subsequent objects, though not charitable in themselves, were entirely subsidiary to the first object. It would be an argument depending for its validity on the true construction of the memorandum, and precisely analogous to that urged by the appellants in support of their contention that because the society's first object was illegal all its other objects were also illegal, or, as they put it, tinged with illegality. I will consider the two arguments together.

The only object specified in the company's memorandum of association which can of itself be said to be either charitable or illegal

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is the first. All the other specified objects are in themselves clearly non-charitable, and admittedly legal. The suggestion must be that the charitable or illegal character of the first object so clearly manifests a charitable or illegal intention on the part of the testator that all the subsequent objects (being non-charitable) must, on the hypothesis that the first is charitable, be ignored altogether, or being legal must, on the hypothesis that the first is illegal, be themselves treated as illegal. Such suggestion, when analysed, appears to rest entirely on the assumption that the object first specified in the memorandum must be the paramount object, and that all the other specified objects must be subsidiary or subordinate. Such an assumption introduces a new, and in my opinion a very dangerous, canon of construction. Moreover, in the present case it appears to be inconsistent with the terms of the memorandum itself. The first object is to promote the principle therein referred to, not in such manner [444] as thereafter mentioned, but in such ways as may from time to time be determined. This can only point to the subsequent objects being distinct or independent objects. Moreover, one of those objects, that lettered (L), is "to assist by votes of money or otherwise other societies or associated persons or individuals who are specially promoting," not the first object, but any of the objects thereinbefore mentioned.

How can it be argued that the society is precluded from giving assistance to societies or individuals who, while repudiating the society's first object, advocate the secularization of education or the disestablishment of the Church on political or even on religious grounds? It is impossible to limit the societies or individuals to whom assistance may be granted to such as uphold the principle referred to in the society's first object. It is equally impossible to treat an act expressly authorized by the memorandum as ultra vires the company because of the motive by which the agents of the company may be inspired. The whole frame of the memorandum points to the company having distinct and separate objects, and not to the first object being paramount and the others subsidiary. Any argument in favour of a general illegal intention must therefore fail. Just as the objects of the society which the testator had in view in making the gift cannot be said to be illegal merely because the first object specified in the memorandum is illegal, so also if the society takes as trustee it cannot be said that the testator had a general charitable intention sufficient to support the trust merely because the first object specified in the memorandum is charitable. It follows that the trust, if a trust has been created, is wholly invalid, whether the first

object is on the one hand charitable or on the other hand illegal.

My Lords, I will not proceed to consider whether a trust for the first object specified in the memorandum would be a valid trust. The society's first object is "to promote . . . the principle that human conduct should be based upon natural knowledge and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action." A trust to promote or advocate this principle would certainly not be a trust for the benefit of individuals. But could it be established as a charitable trust? It is certainly not within the preamble of [445] the statute 43 Eliz. c. 4. This is not conclusive, though the Courts have taken such preamble as their guide in determining what is or is not charitable. It is not a religious trust, for it relegates religion to a region in which it is to have no influence on human conduct. The principle may have its attractions for certain types of mind, but on analysis it appears to be extremely vague and ambiguous. The first branch does not prescribe the end to which human conduct is to be directed. It merely says that whatever aim a man has in view he is to base his conduct on natural knowledge rather than on supernatural belief. This may merely mean that if, for example, we desire to defeat our enemies we should avail ourselves of all known scientific means, and not rest idle in the belief that there is a special providence looking after our interests. The meaning intended must necessarily be obscure until the terms "natural knowledge" and "supernatural belief" are more narrowly defined. Passing to the second branch of the principle, it is, I think, equally obscure. It lays down dogmatically what ought to be the end of all human thought and action, "so think and act as to secure human welfare in this world." No hint is given as to what constitutes human welfare, a point on which there is the widest difference of opinion, or as to why any one should act on the precept unless it be assumed that altruism is merely enlightened egoism. It would in my opinion be quite impossible to hold that a trust to promote a principle so vague and indefinite was a good charitable trust. Even if the principle to be promoted were as definite as Kant's categorical imperative, I doubt whether a trust for its promotion would be charitable.

My Lords, it remains to consider the question (which formed the chief topic of argument at your Lordships' Bar) whether the promotion of the principle specified as the society's first object is either illegal or against the policy of the law. A trust for the promotion of the principle being unenforceable on other grounds, this question

could only arise on a criminal prosecution for blasphemy or in an action to enforce a contract entered into for the purpose of promoting the principle. In discussing it I shall assume that the principle involves a denial of or an attack upon some of the fundamental doctrines of the Christian religion.

My Lords, on the subject of blasphemy I have had the advantage [446] of reading, and I entirely agree with, the conclusions arrived at by my noble and learned friends the Lord Chancellor and Lord Buckmaster. In my opinion to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace. I cannot find that the common law has ever concerned itself with opinion as such, or with expression of opinion, so far as such expression is compatible with the maintenance of public order. Indeed there is express authority that heresy as such is outside the cognizance of a criminal Court unless the heretic by setting up conventicles or otherwise endangers the peace: see *Hawkins' Pleas of the Crown*, vol. 1, p. 354. The contrary view appears to be based on various dicta (I do not think they are more than dicta) to the effect that Christianity is part of the law of the land, the suggested inference being that to attack or deny any of its fundamental doctrines must therefore be unlawful. The inference of course depends on some implied major premise. If the implied major premise be that it is an offence to speak with contumely or even to express disapproval of existing law, it is clearly erroneous. If, on the other hand, the implied major premise is that it is an offence to induce people to disobey the law, the premise may be accepted, but to avoid a non sequitur it would be necessary to modify the minor premise by asserting that it is part of the law of the land that all must believe in the fundamental doctrines of Christianity, and this again is inadmissible. Christianity is clearly not part of the law of the land in the sense that every offence against Christianity is cognizable in the Courts.

A good deal of stress was laid in this connection upon the Blasphemy Act (9 & 10 Will. 3, c. 32), and its provisions undoubtedly give rise to certain difficulties. I think, however, for reasons which will appear later, that this Act should be construed as imposing, in the case of persons educated in or who have at any time professed the Christian religion, certain additional penalties for the common law offence rather than as creating a new statutory offence. The fact that there has, so far as can be discovered, never been a prosecution for an offence under the Act

points to this view having been generally accepted.

My Lords, on the question whether the promotion of the principle [447] in question is against public policy as opposed to being illegal in the criminal sense the appellants relied principally on two authorities—namely, *Cowan v. Milbourn*, L. R. 2 Exch. 230, and *Briggs v. Hartley*, 19 L. J. Ch. 416. In the former case the Court, consisting of Kelly, C.B., Martin, B., and Bramwell, B., refused to enforce a contract for the hire of rooms, the purpose of the hirer being to use the rooms for certain lectures, one of which, as advertised, was to be on “The Character and Teachings of Christ; the former Defective, the latter Misleading,” and another on “The Bible shown to be no more Inspired than any other Book.” Kelly, C.B., was of opinion that the first of these lectures could not be delivered without blasphemy. He referred especially to the fact that Christianity was part of the law of the land. Martin, B., agreed. Bramwell, B., quoted the Blasphemy Act, and said that the rooms were clearly intended to be used for a purpose declared by the statute to be unlawful. It appears, therefore, that all three judges considered that the purpose was unlawful in the strict sense, though Bramwell, B., referred to the distinction between things actually unlawful in the sense of being punishable and things unlawful in the sense of being contrary to the policy of the law. This, however, appears to have been unnecessary for the decision. The Court refused to enforce the contract. In the case of *Briggs v. Hartley*, 19 L. J. Ch. 416, the testator had created a trust to provide a prize for the best essay on natural theology, treated as a science, and sufficient when so treated to constitute a true, perfect, and philosophical system of universal religion. Shadwell, V.-C., held the trust void as inconsistent with Christianity. In my opinion the first of these cases might possibly be supported on the footing that the lectures intended to be given would involve vilification, ridicule, or irreverence likely to lead to a breach of the peace. In so far as it decided that any denial of or attack upon the fundamental doctrines of Christianity was in itself blasphemous either at common law or under the statute, I think it was wrong. The second case, however, appears to be a direct authority on the point at issue, for the trust was clearly a good charity unless it could be held contrary to the policy of the law.

My Lords, I desire to call the attention of the House to certain general considerations and to certain authorities which have led [448] me to the conclusion that *Briggs v. Hartley*, 19 L. J. Ch. 416 was wrongly decided and that there is nothing contrary to

the policy of the law in an attack on or a denial of the truth of Christianity or any of its fundamental doctrines, provided such attack or denial is unaccompanied by such an element of vilification, ridicule, or irreverence as is necessary for the common law offence of blasphemy. In the first place I desire to say something as to the history of religious trusts.

Trusts for the purposes of religion have always been recognized in equity as good charitable trusts, but so far as I am aware there is no express authority dealing with the question what constitutes religion for the purpose of this rule. Prior to the Reformation that form of Christianity now called Roman Catholic was undoubtedly within the rule, but the same cannot be said with equal certainty of the other forms of Christianity or of the Jewish religion, which has little in common with Christianity except its monotheism and its belief in the inspiration of the Old Testament. After the Reformation Anglican Christianity was undoubtedly within the rule, but this cannot be said with equal certainty of Roman Catholicism or of any form of Protestant dissent or of the religion of the Jews. The question is complicated by the fact that the Reformation was followed by a number of penal statutes enforcing conformity with the Established Church and imposing penalties on the exercise of any other form of religion, whether Christian or otherwise. As long as these statutes remained in force no trust for the purposes of any other religion than the Christian religion, or of any form of Christianity other than the Anglican, were enforceable, because it was clearly against public policy to promote a religion or form of religion the exercise of which was penalized by statute. The fact that no such trust was enforceable does not show that it was not a trust for the purposes of religion within the meaning of the rule.

The Revolution of 1688 was followed by the Toleration Act of that year, which exempted Protestant dissenters from the penalties imposed by the earlier Acts, but provided that nothing therein contained should afford any protection to Roman Catholics or persons denying the Trinity. From the date of this Act all trusts for the religious purposes of any nonconformist body entitled to the [449] benefit of its provisions have been held good charitable trusts, and inasmuch as the provisions of the Act do not deal with the validity of trusts, but merely give exemption from penalties, I think we are safe in assuming that, in the equitable rule as to trusts for the purposes of religion being charitable, religion includes all forms of religion which accept, as the exempted nonconformists may be said to have done, the fundamental doctrines of the Christian faith.

But subsequent decisions enable us to go a step further. The Unitarian Relief Act, 1813 (as I may call it) 53 Geo. 3, c. 160, repeals so much of the Toleration Act, 1688, as enacts that nothing therein contained should extend to give any ease or benefit to persons denying the Trinity, and also so much of the Blasphemy Act as relates to persons denying the Trinity. As from the passing of this Act trusts for the religious purposes of Unitarians have always been held good charitable trusts. The repeal of the Blasphemy Act, which did not itself affect the common law, could not alter the common law. These decisions proceed, therefore, on the footing that a mere denial of the Trinity is not criminal. The Unitarian Relief Act containing no provisions as to trusts, they also proceed on the footing that, but for the statutory penalties to which, prior to the Act, persons who denied the Trinity has been subject, a trust for a religion which rejects the doctrine of the Trinity would have been a good charitable trust. A denial of or attack on the doctrine of the Trinity can never, therefore, have been either actually illegal or contrary to the policy of the law.

Further, whatever may have been the case with the Unitarians of 1813, it is quite certain that in more recent years many Unitarians have not only denied the Trinity but have disputed the "Divine authority" of the Old and New Testament in the sense in which that expression is ordinarily used by persons professing the Christian faith. If there is any doctrine vital to Protestant Christianity it would appear to be that of the Divine authority of the Scriptures, and yet in the case of trusts for the religion of Unitarians no distinction has been drawn between those who do and who do not hold this doctrine. It would seem to follow that a trust for the purpose of any kind of monotheistic theism would be a good charitable trust [450] and that it is not illegal or contrary to public policy to deny the authority of the Old or New Testament.

The Roman Catholic Relief Act, 1832, and the Jewish Relief Act, 1846, expressly validate trusts for the purposes of the Roman Catholic and Jewish religions. No inference can, therefore, be drawn from any decision since they were placed on the Statute-book. But the case of *De Costa v. De Paz*, 2 Swanst. 487, note (a), Ambl. 228, to which I have already referred, is important in this connection. It was decided before the Jewish Relief Act, and Lord Hardwicke held that a trust for the purpose of the Jewish religion was bad on the ground that it was against Christianity and Christianity was the law of the land. It would have been enough to say it could not be enforced on the ground that the practice of the Jewish religion was

subject to statutory penalties. On further consideration, however, Lord Hardwicke upheld the gift on the ground that it was for a charitable purpose and that the testator's general charitable intention ought not to be defeated because the fund could not be applied in the way the testator desired. He left it to the Crown to direct a *cy près* application. As I have already said, the Crown applied it for the purposes of the Christian religion. This case seems to show that the Jewish religion is within the equitable rule and that, apart from the statutory penalties, there was never anything inconsistent with public policy in enforcing a trust for the benefit of the Jewish religion. *De Costa v. De Paz*, 2 Swanst. 487, note (a), Ambl. 228, was followed in *Isaac v. Gompertz* (1786) cited in 7 Ves. Jr. 61. Lord Thurlow there held that a trust for the maintenance of a Jewish synagogue was charitable, and directed an application to the Crown with a view to its *cy près* application.

My Lords, apart from the question of religious trusts there is one authority directly in point. In *Pare v. Clegg*, 29 Beav. 589, 596, the plaintiff sued the trustees of a friendly society known as the Rational Society for moneys lent to the society. The trustees objected that the society had illegal objects and that the money could not be recovered on that account. The objects of the society included the promotion of the following propositions:—

"(1) That all facts yet known to man indicate that there is an external or internal cause of all existences by the fact of their [451] existence: that this all-pervading cause of motion and change in the universe is the power which the nations of the world have called God, Jehovah, Lord, &c.; but that the facts are yet unknown to man which define what that power is.

"(2) That all ceremonial worship by man of this cause, whose qualities are yet so little known, proceeds from ignorance of his own nature, and can be of no real utility in practice; and that it is impossible to train men to become rational in their feelings, thoughts or actions until all such forms shall cease."

These propositions are clearly anti-Christian. If they point to religion at all, it is a kind of negative deism, if I may use that expression, and not a theistic religion. Nevertheless it was held by Romilly, M.R., that they contained nothing "irreligious or immoral," and that, therefore, the defence failed. It follows that he cannot have thought that there was anything against public policy in advocating deism or (a fortiori) any form of monotheism.

This conclusion is further borne out by *Thompson v. Thompson*, 1 Coll. Ch. Cas. 381. There the trust was to pay a stipend to some

literary man who had not been successful in his career and who would assist in extending the knowledge of the doctrines to which the testator had devoted his attention and pen. This was held to be a charitable gift, provided the testator's writings, published or unpublished, contained nothing "irreligious, illegal or immoral."

My Lords, in my opinion the authorities I have mentioned are sufficient to establish that the first object of the society's memorandum is not open to objection as contrary to the policy of the law. It is not illegal, for it does not involve blasphemy. It is not irreligious, for it is at any rate consistent with that negative deism which was held not to be irreligious in *Pare v. Clegg*, 29 Beav. 589. It is not immoral or seditious. It is, no doubt, anti-Christian, but, to adopt the words of Coleridge, J., in *Shore v. Wilson*, 9 Cl. & F. 355, 539, "There is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical [462] rule, is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching, or believing, however erroneous, are maintained."

My Lords, I am glad to be able to come to this conclusion. It would be a serious matter for your Lordships' House, unless clearly compelled by authority, to lay down a principle which would not only lead to the anomalies pointed out by Lord Buckmaster, but would preclude the Courts of this country from giving effect to trusts for the purposes of religions which, however sacred they may be to millions of His Majesty's subjects, either deny the truth of Christianity, or, at any rate, do not accept some of its fundamental doctrines.

On all these grounds I think the appeal fails.

LORD SUMNER.—My Lords, the question is whether an anti-Christian society is incapable of claiming a legacy, duly bequeathed to it, merely because it is anti-Christian. The certificate proves that the incorporation is that of the statutory number of persons in accordance with the formalities of the Act, that "all the requisitions of this Act in respect of registration have been complied with" (*Companies Act, 1862, s. 18*), and that the respondent society is a complete person in law. It does not prove that all the memorandum powers are lawfully exercisable.

What then are the society's character and powers? For them we must look at the

memorandum, and then the question will be, Does the law permit their exercise?

Paragraph 3 (A) gives its principle. The first part is stated both as a positive proposition, namely, that human conduct should be based upon natural knowledge, and as a negative proposition, namely, that it should not be based on supernatural belief. The second part is expressed only positively, namely, that human welfare in this world is the proper end of all thought and action, but equally the negative of this proposition is implied. Since "human welfare is the proper end of all thought and action," any object save the welfare of mankind in this world (for example, the glory of God) cannot be a proper end for any thought or action at all. The powers taken in the subsequent paragraphs are ancillary [453] to the first and some are so expressed. It is true that object (K) is "to publish books," and object (L) "to assist by votes of money other societies or associated persons or individuals who are specially promoting any of the above objects," but are we to say that this company has among its memorandum powers the publication of Bibles and Prayer Books, the subvention of Bible societies, and the doing of all lawful things conducive to the attainment of such objects, such as building a mission-hall for reading the Bibles and offering the prayers? If the memorandum is to be so construed it is decisive of the case, for I agree that this gift is not an imperfect gift nor impressed with any trust in the donee's hands, and a donee who sometimes acts legally and sometimes illegally cannot be deprived of his legacy for fear he might follow the evil and eschew the good. It is not a question of hoping for the best, as was argued; the law must presume that what is legal will be done, if anything legal can be done under the memorandum. Thus one just man may save the city. To my mind, if the memorandum be construed as it is by my noble and learned friend, who has immediately preceded me, any consideration of blasphemy or Christianity or their legal position is irrelevant, for the appeal fails without it, and before we come to it. I think we should look at the substance and that all the paragraphs should be construed as if they concluded with the words "for the purposes and on the principle stated in paragraph (A)." Surely a society incorporated on such a principle cannot be supposed, as a matter of construction, to exercise ancillary powers on other principles or for independent purposes. Of course, it must be assumed that the powers taken are to be used, if possible, for lawful ends: for example, to subsidize a blaspheming lecturer would be an ultra vires act, and those who so disbursed the company's money would be personally liable to refund

it, apart from aiding and abetting; but as I take the memorandum to be that of a society deliberately and entirely anti-Christian, in which opinion I believe the shareholders themselves would agree, I am constrained to deal with the question, What if all the company's objects are illegal per se? For I should be loth to dispose of this case on the narrow ground that, even if all its other objects are illegal, the company in law can always wind up and so dispose of its funds.

[454] If the respondents are an anti-Christian society, is the maxim that Christianity is part of the law of England true, and, if so, in what sense? If Christianity is of the substance of our law, and if a Court of law must, nevertheless, adjudge possession of its property to a company whose every action seeks to subvert Christianity and bring that law to naught, then by such judgment it stultifies the law. So it was argued, and if the premise is right, I think the conclusion follows.

It is not enough to say with Lord Coleridge, C.J., in *Ramsay's Case*, 48 L. T. N. S. 733, 735, 15 Cox C. C. 231, 235, that this maxim has long been abolished, or with my noble and learned friend the Master of the Rolls in the Court below that "the older view," based on this maxim, "must now be regarded as obsolete." If that maxim expresses a positive rule of law, once established, though long ago, time cannot abolish it nor disfavour make it obsolete. The decisions which refer to such a maxim are numerous and old, and although none of them is a decision of this House, if they are in agreement and if such is their effect, I apprehend they would not now be overruled, however little Reason might incline your Lordships to concur in them. In what sense, then, was it ever a rule of law that Christianity is part of the law?

The legal material is fourfold: (1) statute law; (2) the criminal law of blasphemy; (3) general civil cases; (4) cases relating to charitable trusts. From statute law little is to be gleaned. During the sixteenth century many Acts were passed to repress objectionable doctrines, but plainly statutes were not needed if the common law possessed an armoury for the defence of Christianity as part and parcel of itself. Indeed, who but the King in Parliament could then say whether the Christianity, which for the time being formed part of the common law, was the Christianity of Rome or of Geneva or of Wittenberg? Certainly the Courts could not.

After the Revolution of 1688 there were passed the Toleration Act to give "some ease to scrupulous consciences in exercise of religion," which, upon conditions, relieved certain dissenters (Papists and those who denied the Trinity excepted) from the operation of various existing statutes, and the

Blasphemy Act, [455] which recites that "many persons have of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion . . . and may prove destructive to the peace and welfare of this kingdom." That the Blasphemy Act simply added new penalties for the common law offence of blasphemy, when committed under certain conditions, was held by Lord Hardwicke in *De Costa v. De Paz*, 2 Swanst. 487, note (a), Ambl. 228, and by the Court of King's Bench in *Rex v. Carlile*, 3 B. & Ald. 161, 5 E. C. L. 252, and Lord Eldon in *Atty.-Gen. v. Pearson* (1817) 3 Meriv. 353, 398, 399, said that the Toleration Act left the common law as it was and only exempted certain persons from the operation of certain statutes. Such, indeed, is the clear language of the statutes, nor can the fact that persons are singled out for special punishments who deny the Godhead of the Three persons of the Trinity, the truth of the Christian religion, and the Divine authority of the Holy Scriptures, or who maintain that there be more gods than one, be accepted as showing that the common law offence of blasphemy consists in such denials and assertions and in nothing else. Later Acts have relieved various religious confessions from the burthen of the Blasphemy Act and other statutes, but, except in so far as they deal with charitable trusts for the purposes of such confessions, on which I do not now dwell, they seem to carry the present matter no further.

The common law as to blasphemous libels was first laid down after the Restoration, and here the statement that Christianity is part of the law is first found as one of the grounds of judgment. Earlier opinions of the same kind are curiously general in character. In *Bohun v. Broughton*, Y. B. 34 Hen. 6, fo. 40, on a *quare impedit*, it is said "a tielx leis que ils de Saint Eglise ont en ancien Scripture, covient a nous a doner credence; car ceo common ley sur quel tous man[iere]s leis sont fondes." Again in the "Doctor and Student" (dialogue 1, chs. 5, 6, and 7) three successive chapters state the grounds of the law of England—the first, the law of reason; the second, the law of God; and the third, the usage and custom of the realm. When *Lilburne* was on his trial in 1649 (1649) 4 How. St. Tr. 1269, 1307, he complained that he was not [456] allowed counsel and appealed to the judges "to do as they would be done by." "You say well," replied Lord Keble. "The law of God is the law of England." But all the same, *Lilburne* had to do the best he could for himself. A passage from Lord Coke may also be quoted. Brooke, J., had once observed casually (Y. B. 12 Hen. 8, fo. 4) that a pagan could not have or main-

tain any action, and Lord Coke in *Calvin's Case* (1608) 7 Rep. 17a, founding himself on this and on St. Paul's Second Epistle to the Corinthians (ch. 6, v. 15), stated that infidels are perpetui inimici, and "a perpetual enemy cannot maintain any action or get anything within the realm." Of this Willes, C.J., in *Omichund v. Barker* (1745) Willes, 538, 542, observes: "Even the devils themselves, whose subjects he (Lord Coke) says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits." Evidently in this interval the spirit of the law had passed from the Middle Ages to modern times. So far it seems to me that the law of the Church, the Holy Scriptures, and the law of God are merely prayed in aid of the general system or to give respectability to propositions for which no authority in point could be found.

At the beginning of the seventeenth century a considerable change of procedure took place in reference to religion. Legate was burnt at Smithfield in 1612 upon a writ de haeretico comburendo, and another heretic, named Wightman, at Litchfield about the same time, but they were the last persons to go to the stake in this country pro salute animae. No doubt this process was moribund. Before the Restoration the Court of Star Chamber and the Court of High Commission had been suppressed, and at length, by the statute, 29 Car. 2, c. 9, the writ de haeretico comburendo itself was abolished with all process and proceedings thereupon and all punishment of death in pursuance of any ecclesiastical censures. It is to be noted that the Act, in saving the jurisdiction of the Ecclesiastical Courts over "atheism, blasphemy, heresy, or schism," distinguishes blasphemy from the profession of false doctrine, whether atheistical or heretical. The time of Charles II. was one of notorious laxity both in faith and morals, and for a time it seemed as if the old safe-guards [457] were in abeyance or had been swept away. Immorality and irreligion were cognizable in the Ecclesiastical Courts, but spiritual censures had lost their sting and those civil Courts were extinct, which had specially dealt with such matters viewed as offences against civil order.

The Court of King's Bench stepped in to fill the gap. In 1663 Sir Charles Sedley was indicted for indecency and blasphemy. (1663) 1 Sid. 168, 17 How. St. Tr. 155. The indecency was so gross that little stress was laid on the blasphemy, which was probably both tipsy and incoherent. The Court told the prisoner that they would have him know that, although there was no longer any Star Chamber, they acted as *custos morum* for all the

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King's subjects, and it was high time to punish such profane actions, contrary alike to modesty and to Christianity.

Then follows Taylor's Case, 1 Vent. 293, in 1675, when the indictment was for words only, though ribald and profane enough. This is the earliest trial for blasphemy. Adwood's Case (1617) 2 Rolle 78, in 1617 is not an instance. It is like Traske's Case (1618) Hob. 236, where the matter in hand was the making of conventicles as tending to sedition. The indictment in Taylor's Case, 1 Vent. 293, is given in Tremaine's Placita, p. 226, and shows that the charge was not confined to the fact that Taylor's language was contrary to true religion, but that it was considered dangerous to civil order, for it concludes: "Ad grave scandalum professionis verae Christianae religionis in destructionem Christianae gubernationis et societatis . . . ac contra pacem dicti domini regis."

Now Taylor's Case, 1 Vent. 293, is the foundation-stone of this branch of the law, and for a century or so there is no sign of carrying the law beyond it. The case repays scrutiny. The objection that the offence was an ecclesiastical one lay on the very face of the words charged, and in directing the jury Hale, C.J., found it necessary to show why it was also a civil offence. He said that such kind of wicked, blasphemous words, though of ecclesiastical cognizance, were not only an offence to God and religion, but a crime against the laws, State, and Government, and "therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved." 1 Vent. 293, 3 Keb. 607, 621. It is true that he added that Christianity was [458] parcel of the laws of England, "and therefore to reproach the Christian religion is to speak in subversion of the law," but this does not really enlarge the previous statement. Speaking in subversion of the law, without more, in the sense of saying that particular laws are bad and should be mended, has never been a criminal offence, and agitating against them has often led on to fortune. Rex v. Woolston, Fitzg. 64, 2 Stra. 834, in 1728, supplies the completion of the doctrine. Upon a motion in arrest of judgment the Court followed Taylor's Case, 1 Vent. 293, as settled law. The argument was that Woolston's crime, if any, was of ecclesiastical cognizance (he was a clergyman who joked about the miracles), and that "mere difference of opinion is tolerated by law." Lord Raymond's answer was. "I would have it taken notice of, that we do not meddle with any differences in opinion, and that we interpose only where the very root of Christianity itself is struck at. . . . To say, an attempt to subvert

the established religion is not punishable by those laws upon which it is established, is an absurdity." True it is that the last words somewhat invert Lord Hale's reasoning, for they seem to treat an attempt to subvert the established form of Christianity (not any other) as an offence, because it attacks the creature of the law, not because that form is the basis of the law itself and the bond of civilized society. At any rate the case leaves untouched mere differences of opinion, not tending to subvert the laws and organization of the realm.

Curl's Case (1727) 2 Stra. 788, 1 Barn. K. B. 29, heard about the same time, was a case for publishing an obscene libel, but is of some incidental importance. The Courts were chary of enlarging their jurisdiction in this regard, and in Queen Anne's time judgment had been arrested in such a case for supposed want of precedent, and the offence was treated as one for ecclesiastical cognizance only. On a motion for arrest of the judgment on Curl it was argued that the libel, being only contra bonos mores, was for the spiritual Courts. The motion was refused, the Chief Justice saying: "If it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offence." He said, too, "religion is part of the common law," but Probyn, J., clears this up, adding, "It is punishable at common law [459] as an offence against the peace in tending to weaken the bonds of civil society."

At the end of the eighteenth and beginning of the nineteenth centuries various publishers of Paine's "Age of Reason" were prosecuted. The words indicted were chosen for their scoffing character, and indeed are often really blasphemous, but the idea throughout is that the book was the badge of revolution and tended to jeopardize the State. Thus in the trial of Williams, 26 How. St. Tr. 653, 715, Ashhurst, J., passing sentence on him in the Court of King's Bench, stated the ground of this offence thus: "All offences of this kind are not only offences to God, but crimes against the law of the land, and are punishable as such, inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England."

If later cases seem to dwell more on religion and less on considerations of State, I think, when examined, they prove to be of small authority. In Rex v. Waddington, 1 B. & C. 26, 8 E. C. L. 12, there seems to have been little argument, and no decisions were cited. Rex v. Davison (1821) 4 B. & Ald. 329, 6 E. C. L. 505, decides in effect that contempt of God in Court may be also contempt of Court. In 1838 Alderson, B.,

told a York jury (*Gathercole's Case* (1838) 2 Lew. C. C. 237, 254) that "a person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country." The defendant, in fact, had not made any general attack on Christianity, but, being a Protestant clergyman, had foully aspersed a Roman Catholic nunnery. Whether this strange dictum was material or not, and whether it is right or not (and Baron Alderson's is a great name), it only shows that the gist of the offence of blasphemy is a supposed tendency in fact to shake the fabric of society generally. Its tendency to provoke an immediate [460] breach of the peace is not the essential, but only an occasional, feature. After all, to insult a Jew's religion is not less likely to provoke a fight than to insult an Episcopalian's; and, on the other hand, the publication of a dull volume of blasphemies may well provoke nothing worse than throwing it into the fire.

Reg. v. Hetherington, 5 Jur. 529, 530; 4 How. St. Tr. (N. S.) 563, was a motion in arrest of judgment. Even here, alongside of the propositions that the Old Testament contains the law of God, and that "it is certain that the Christian religion is part of the law of the land" (per Patteson, J.), we find Lord Denmann, C. J., saying: "As to the argument, that the relaxation of oaths is a reason for departing from the law laid down in the old cases, we could not accede to it without saying that there is no mode by which religion holds society together but the administration of oaths; but that is not so, for religion . . . contains the most powerful sanction for good conduct." *Reg. v. Moxon*, 4 How. St. Tr. (N. S.) 693, is of small authority. Later prosecutions add nothing until Lord Coleridge's direction to the jury in *Reg. v. Ramsay*, 15 Cox C. C. 231; Cab. & El. 126. For thirty years this direction has been followed, nor was it argued by the appellants that the publication of anti-Christian opinions, without ribaldry or profanity, would now support a conviction for blasphemy. It is no part of your Lordships' task on the present occasion to decide whether Lord Coleridge's ruling was or was not the last word on the crime of blasphemy, but the history of the cases and the conclusion at present reached go to show that what the law censures or resists is not the mere

expression of anti-Christian opinion, whatever be the doctrines assailed or the arguments employed.

It is common ground that there is no instance recorded of a conviction for a blasphemous libel, from which the fact, or, at any rate, the supposition of the fact, of contumely and ribaldry has been absent, but this was suggested to be of no real significance for these reasons. Such prosecutions, it was said, often seem to be prosecutions, and are therefore unpopular, and so only the gross cases have been proceeded against. This explains the immunity of the numerous agnostic or atheistic writings so much relied on by Secularists. All it really shows is that no one cares to prosecute such things till [461] they become indecent, not that, decently put, they are not against the law. Personally I doubt all this. Orthodox zeal has never been lacking in this country. The Society for Carrying into Effect His Majesty's Proclamations against Vice and Immorality, which prosecuted Williams in 1797, has had many counterparts both before and since, and as anti-Christian writings are all the more insidious and effective for being couched in decorous terms, I think the fact that their authors are not prosecuted, while ribald blasphemers are, really shows that lawyers in general hold such writings to be lawful because decent, not that they are tolerable for their decency though unlawful in themselves. In fact, most men have thought that such writings are better punished with indifference than with imprisonment.

I may now turn to decisions in civil cases other than cases of charitable trusts. They are at least inconclusive. In *Murray v. Benbow*, 4 St. Tr. (N. S.) 1409, 1410, Byron's "Cain" was in question. Lord Eldon read it, and, as it happened, was able to compare it with "Paradise Lost." "You have alluded," he says, "to Milton's immortal work. It did happen in the course of last Long Vacation, amongst the sollicitae jucunda oblivia vitae, I read that work from beginning to end. . . . Taking it altogether, it is clear that the object and effect were not to bring into disrepute, but to promote the reverence of our religion." So judging "Cain" he doubted, and, as an injunction was matter of discretion and not of right, he refused an injunction till the plaintiff's right had been established at law. According to Smiles's *John Murray* (i. 428) the necessary action was brought, a jury upheld the copyright, and on a subsequent application the injunction was granted. About the same time, however, in 1822, in *Lawrence v. Smith*, Jac. 471, an injunction had been obtained *ex parte* to restrain the issue of a pirated edition of the plaintiff's "Lectures on Physiology." As

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the lectures seemed to him to question the immorality of the soul, Lord Eldon dissolved it as a matter of discretion and in the absence of any judgment deciding the right at law, and observed that "the law does not give protection to those who contradict the Scriptures," a dictum which, in its full width, [462] imperils copyright in most books on geology. In the present case the respondents do not appeal for protection to the Court's discretion, but vindicate a right of property, as clearly established as if there were a verdict. Again in *Pare v. Clegg*, 29 Beav. 589, Lord Romilly, M.R., gave judgment against the defendant, remarking that the society which he represented, though based on irrational principles, was not formed "for the purpose of propagating irreligious and immoral doctrines," and so was liable. This is not authority for saying generally that a society formed for the purpose of propagating irreligious doctrines could not be made to pay its debts. At most they must be such irreligious doctrines as the law forbids, and that leaves open the whole question what it is that the law forbids. Whether or not it is an authority directly in favour of the respondents I am not prepared to say. *Cowan v. Milbourn*, L. R. 2 Exch. 230, has long stood unchallenged. The judges meant to decide no new law, but to follow and apply the passages cited from *Starkie on Libel*. I cannot follow the observation of Lord Coleridge, C.J., in *Reg. v. Ramsay*, 15 Cox C. C. 231; *Cab. & El.* 126, that the judgments, or at any rate that of *Bramwell, B.*, turn on the effect of the statute of William III. The rooms had been engaged for two purposes. One was for a tea party and ball in memory of Tom Paine, and the other was the delivery of the lectures in question. As to the first, the recorder left the case to the jury, who gave a farthing damages for the frustration of this dismal, but no doubt harmless, festivity. As to the other, some fear of a breach of the peace may have existed, for intervention by the chief constable is mentioned in the *Law Reports*, but not in the *Law Journal*, *Law Times*, or *Weekly Reporter*. The plea, 16 L. T. N. S. 290, alleged a purpose "to use the said rooms for certain irreligious, blasphemous, and illegal lectures," but they had not been delivered, and no indictable words could have been assigned. The recorder refused to leave the question of purpose to the jury with regard to the lectures. The argument in moving for the rule was that the case should have gone to the jury, for the placards *per se* did not prove an intention to insult or mislead, and temperate discussion of such subjects is lawful. Clearly the recorder had ruled that under such titles no [463] lecture could be delivered that would not be unlawful. It is

upon such a presentation of the case and, I suppose, on such a ruling at the trial that *Kelly, C.B.*, said "Such a lecture cannot be delivered . . . without blasphemy and impiety," and from this his colleagues do not dissent. I do not think that the Court were finding in the placards and the chief constable a *quia timet* justification for the defendant's breach of contract. Their ground was that the hiring was and could only be for an illegal object, and therefore the contract could not be enforced. The distinction is well settled between things which are illegal and punishable and things which, though not punishable, are illegal so as not to support a contract for good consideration. Prostitution is one of the common examples. *Bramwell, B.*, evidently thought that Secularism was another. But this reasoning postulates that, whatever lectures were actually delivered, they could not but be unlawful. Lectures, lawful because decently expressed, could, however, have been delivered under those titles, and therefore the hiring was not conclusively shown to have been for an unlawful purpose and void. The case should have gone to the jury. The alternative view of the case must be that the whole Court held that any general denial or dispute of Christian faith is unlawful, which had not been held at law before. From this it would follow that a person, whose business it was to publish and sell anti-Christian books, need neither pay his printer's bill nor the poor rates for his shop, a proposition which is refuted by stating it, and from which at least two members of the Court in *Cowan v. Milbourn*, L. R. 2 Exch. 230, would have recoiled. I think the decision was wrong.

As to *De Costa v. De Paz*, 2 Swanst. 487, note (a), 490, n.; *Ambl.* 228, Lord Hardwicke is reported as saying that there is a great difference between laying penalties on persons for the exercise of their religion and establishing them by acts of the Court. So here I think there is a great difference between laying civil disabilities on a man for the profession of his irreligion or on a company for the exercise of its memorandum powers, however contrary to Christianity, and establishing them by the act of the Court. The appellants' claim is that the Court should deny the respondent company's right to receive this money on the ground that it cannot make any lawful use of it, not that it [464] should establish the money in the company's hands as a charitable trust for un-Christian objects. It is true that Lord Hardwicke goes on to say that "the intent of this bequest must be taken to be in contradiction to the Christian religion, which is a part of the law of the land . . . for the constitution and policy of this realm is founded thereon," and there are a good

many other cases of the same kind, especially *Briggs v. Hartley*, 19 L. J. Ch. 416, in which similar language is used; but charitable trusts form a particular and peculiar branch of the law, and I do not think that the reasoning, and still less the remarks, contained in those cases bear usefully on general principles. However right it may be to refuse the aid of the law in establishing a trust for Secularist purposes, I cannot see why a Secularist is not to receive a gift of money because he is a Secularist and says so. I will not further pursue the cases cited on charitable trusts, nor could I presume to add to what has fallen from my noble and learned friend Lord Parker of Waddington.

My Lords, with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England" is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: "No man can be expected to be faithful to the authority of man, who revolts against the Government of God." One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best, C. J., once said in *Bird v. Holbrook* (1828) 4 Bing. 628, 641, 13 E. C. L. 91, 95 (a case of injury by setting a spring-gun): "There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England;" but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. "Thou shalt not steal" is part of our law. "Thou shalt not commit adultery" is part of our law, but another part. "Thou shalt love thy neighbour as thyself" is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, [465] with equal justice and equally good government, in heathen communities, and its sanctions, even in Courts of conscience, are material and not spiritual.

Frequently as the proposition in question appears in one form or another, it is always as something taken for granted and handed down from the past rather than as a deliberate and reasoned proposition. It constantly has been used in charging juries as to unmistakably scurrilous words, where there was neither opportunity nor occasion for defining the limits of legitimate religious and irreligious opinion. I question if the foundations of the criminal law of blasphemous

libel were ever fully investigated in any Court before *Reg. v. Ramsay*, 15 Cox C. C. 231; *Cab. & El.* 126. Even then Lord Coleridge passed over numerous decisions. To be sure his omissions were faithfully dealt with soon afterwards by Stephen, J., one of his own puisnes, in a popular periodical, and this paper your Lordships allowed Mr. Talbot to read as part of his argument, to which, nevertheless, it added nothing either in learning or in cogency. Such observations, too, have often been employed by judges of first instance in cases relating to charitable trusts, where there was equally little need for any analysis of the proposition or for discussion, either historical or juridical, of its implications. It is fairly clear, too, that men of the utmost eminence have thought, and said advisedly, that mere denials of sundry essentials of the Christian faith are indictable as such. Hawkins, in his *Pleas of the Crown*, bk. i., ch. 26, p. 358, says that "all blasphemies against God; as denying His being . . ." as well as "all profane scoffing at the Holy Scripture" are punishable offences, and adds as the reason for punishing the latter that offences of this nature "tend to subvert all religion or morality, which are the foundation of government." Blackstone, bk. iv., p. 59, describes a class of "offences more immediately against God and religion" consisting in "blasphemy against the Almighty, by denying his being or providence" or "contumelious reproaches of our Saviour Christ," and refers to this head "all profane scoffing at the holy scripture or exposing it to contempt and ridicule." Probably few great judges have been willing to go further in questions of religious liberty than Lord Mansfield in his eloquent address [466] to this House in *Evans v. Chamberlain* of London, 2 Burn's Ecc. Law, p. 218; 16 Parly. History, pp. 315, 317. Yet there he says: "The eternal principles of natural religion are part of the common law: the essential principles of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them may be prosecuted at common law." Again, the very careful Commissioners on the Criminal Law, of whom Serjeant Starkie was one and Sir William Wightman another, observe in their Sixth Report, p. 85: "Although the law distinctly forbids all denial of the being and providence of God, or the truth of the Christian religion . . . it is only where irreligion assumes the form of blasphemy, in its true and primitive meaning, and has constituted an insult both to God and man, that the interference of the criminal law has taken place." Nevertheless it seems to need no citation of authorities (the opinions of the majority of the Judges in your Lordships' House in *Shore v. Wilson*, 9 Cl. & F. 355,

[1917] A. C. 406.

having been fully discussed) to show that a temperate and respectful denial, even of the existence of God, is not an offence against our law, however great an offence it may be against the Almighty Himself, and, except for *Cowan v. Milbourn*, L. R. 2 Exch. 230, it has never been decided outside of the region of charitable trusts that such a denial affects civil rights. I cannot bring myself to think that it does so. What, after all, is really the gist of the offence of blasphemy, or of its nature as a cause of civil disability? Ribaldry has been treated as the gist, which must be a temporal matter; as between creature and Creator, how can the bad taste or the provocative character of such a denial come into question? The denial itself, not the mode of it, must be what merits the Divine anger: but that is an offence against God. Our Courts of law, in the exercise of their own jurisdiction, do not, and never did that I can find, punish irreligious words as offences against God. As to them they held that *deorum injuriæ dis curæ*. They dealt with such words for their manner, their violence, or ribaldry, or, more fully stated, for their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society, and to be a cause of civil strife. The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable [467] or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly

imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience. If these considerations are right, and the attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State and not on the doctrines or metaphysics of those who profess them, it is not necessary to consider whether or why any given body was relieved by the law at one time or frowned on at another, or to analyse creeds and tenets, Christian and other, in which I can profess no competence. Accordingly I am of opinion that acts merely done in furtherance of paragraph 3 (A) and other paragraphs of the respondents' memorandum are not now contrary to the law, and that the appeal should be dismissed.

LORD BUCKMASTER.—My Lords, the terms of the will of the testator and the circumstances leading up to this appeal do not demand [468] close attention, for according to the appellants' argument the whole question to be decided depends upon the meaning of the 3rd article of the memorandum of association of the respondent company, and upon the determination of whether this article, properly construed, renders the real object of the respondent company either criminal or illegal as contrary to the common law. The point of construction must be decided by considering the fair meaning of the language used and without resort to external means. Neither the documents preliminary to the incorporation of a company registered with a memorandum of association, nor the action of directors after a company has been formed, can properly be received in evidence for the purpose of determining what the objects of the company may be.

Clause 3, sub-head (A) of the memorandum defines the main object of the company in these words: "To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action."

Upon this follow a series of objects which in themselves it is not suggested are obnoxious to the law, while the last sub-head of the clause is in general terms and gives power "to do all such other lawful things as are conducive or incidental to all or any of the above objects." Without this last provision the true construction of the memorandum would involve the view that if the defined objects could be attained, either by lawful or by unlawful means, it was only

those that were lawful that were permitted. But the latter provision makes the meaning quite plain.

This conclusion, however, does not affect the appellants' case, which depends upon the assertion that there are no lawful ways by which the objects of the society can be carried out. It is said that the true meaning of the memorandum is to encourage the propagation of doctrines directly contrary to the Christian faith—doctrines that are inimical to the central principle of Christianity and incapable of reconciliation with any essential portion of its creeds. Warrington, L.J., indeed, thought that to promote such objects would be to promote atheism, and as this may be a material matter it is necessary to state the reasons why I am unable to accept this view.

[469] Natural law may, as it seems to me, be properly regarded as part of the Divine purpose, revealed through the instrument of reason; and if natural knowledge be accepted, as on this assumption it must, as equivalent to the truth, then to take that as the basis of human conduct, as the first part of the clause directs, does not, to my mind, necessarily mean that a belief in God is thereby excluded.

The latter part of the clause, which says that human welfare in this world is "the proper end of all thought and action," is more difficult. That human welfare is a proper end of thought and action few would dispute—it is the end on which the noblest minds have concentrated their highest effort; even if it be regarded as the sole object, I can conceive it being steadfastly pursued by people who possessed a firm belief in a supreme invisible Power using the instrument of man's agency to accomplish the Divine will. That this clause of the memorandum defines an object contrary to the generally accepted conception of the Christian faith is, I think, assented to by all who have heard this case, and from this view I am not prepared to dissent. It is not necessary, and if unnecessary it is certainly not desirable, to attempt a definition of what the law would regard as the essential features of that faith. It is sufficient to say that the respondent company has as its main object the propagation of doctrines hostile to the Christian religion, and the question to be determined is whether it is in consequence an illegal association—incapable of receiving or holding property.

This objection is stated by Mr. Talbot (to whom I am much indebted for his research and for the matter and manner of his argument) by saying that such doctrine offends, in the first case, against the common law, which prohibits blasphemy. He regards the essence of legal blasphemy as the publication

of matter denying or hostile to the Christian faith, and he rejects the interpretation put upon it by Erskine, J., in *Shore v. Wilson*, 9 Cl. & F. 355, 524, by Lord Denman, C. J., in *Reg. v. Hetherington*, 4 St. Tr. (N. S.) 563, 590, and by Lord Coleridge, C. J., in *Reg. v. Ramsay*, 15 Cox C. C. 231, each of whom states the law so as to limit the offence to the act of denial associated with ribald, contumelious, or scurrilous language [470] or conduct. I am unable to accept the appellants' contention as correct. To do so would involve the conclusion that all adverse critical examination of the doctrines of Christianity—even though it was conducted with the utmost reverence—was a blasphemous publication which rendered the writer liable to criminal proceedings. It would, indeed, be hard to find a worse service that could be done to the Christian faith than to prevent people from explaining and inviting an answer to the reasoned convictions that led them to question its truth.

The common law which forbids blasphemy is to be gathered from usage and custom, and it is a striking fact that with one possible exception—the case of *Rex v. Woolston*, Fitzg. 64, 2 Stra. 834—every reported case upon the matter, beginning with *Rex v. Taylor*, 1 Vent. 293, and continuing down to *Reg. v. Ramsay*, 15 Cox C. C. 231, and *Rex v. Boulter*, 72 J. P. 188, is a case where the offence alleged was associated with, and I think constituted by, violent, offensive, or indecent words.

That it was considered necessary to report the earlier cases as precedents affords, to my mind, a strong presumption that it was the character of the attack which constituted the crime, for if the law was well recognized as forbidding any adverse criticism, the cases where such criticism was coarse and disgraceful would be too plain to merit preservation. In my opinion, therefore, the common law of England does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated, and whether in each case this is a crime is a question for the jury, who should be directed in the words of Erskine, J., in *Shore v. Wilson*, 9 Cl. & F. 524, 525, quoted by the Master of the Rolls in his judgment on the present case.

It is then said that, even if this be conceded, the object of the society is illegal, not in the sense that acts done to further its objects would be criminal, but that they are of such a nature as to be incapable of establishing a legal right to receive money for their furtherance. I find it difficult to appreciate this distinction, but I understand the contention to be that Christianity is part of the common law of England, and it must,

therefore, be illegal, [471] even if it were not criminal, for any body of people to promote doctrines that are hostile to its creed. If this argument be carried to its full extent, it will really show that Unitarians, Positivists, Comtists, and other similar religious and ethical bodies, unless relieved by statute, are illegal associations, for the Christianity known to the common law is certainly not Unitarian Christianity, nor is it reconcilable with the doctrines of Comte or Hegel. Again, it would result that editors and publishers would be able to deny payment to contributors and authors whom they had expressly employed to write philosophical and scientific articles or books if it could be decided that the work was anti-Christian, while no one could be compelled to pay for any such books when purchased. Indeed, the doctrine, as it seems to me, would apply to a great deal of classical and scientific literature, and the conditions which would condemn these works might vary from year to year as different views from time to time prevailed.

It is quite right to point out that, if the law be as the appellants contend, these considerations afford an argument for its alteration, but do not prove that it does not exist. If, on the other hand, the law is not clear, it is certainly in accordance with the best precedents so to express it that it may stand in agreement with the judgment of reasonable men.

Apart from the criminal cases already mentioned certain authorities are referred to, which, if correctly decided, do appear to afford support for the appellants' argument. The case of *De Costa v. De Paz*, 2 Swanst. 487, note (a); *Ambl.* 228, a decision of Lord Hardwicke's, is one of these authorities; and *Matter of Bedford Charity*, 2 Swanst. 470, is a decision of Lord Eldon's, containing statements to the same effect; and so also is the case of *Briggs v. Hartley*, 19 L. J. Ch. 416. The first of these was a gift for the purpose of providing a fund to be applied for ever for the reading of the Jewish law and for advancing and propagating the Jewish faith. It was certainly open to argument that this was not a charitable bequest and was consequently void as a perpetuity. But it was not upon this ground that the decision was based; it was held that it was a charity (see the report in *Ambler*), but that the mode of disposition was such that it could [472] not take effect. It is true that in the report in 2 Swanston the reason why the gift to the specific object of the charity was held inoperative was because it was contrary to the Christian religion, but in *Ambler* it is stated that the objects were contrary to the "established" religion, and as at that date the statutory disabilities under which the adherents

of the Jewish faith suffered had not been removed this might have been sufficient for the purpose of the case; indeed, on any other view it is hard to understand why if the whole object was illegal it was supported as a charity at all. I do not, however, propose further to pursue this question, as I have had the advantage of reading Lord Parker's opinion, and with it I am in entire agreement. The second case was merely a question as to whether Jews might enjoy the benefits of a particular charity, and it was held they might not. The last was a legacy for the best essay on Natural Theology treated as a science, and sufficient when so treated and taught to constitute a true, perfect, and philosophical system of universal religion; and it was held bad for no further reason than that it was not consistent with Christianity, but the law was in no way examined or criticized.

In the two earlier cases it was stated that Christianity is part of the law of the land, and the authorities quoted in support of the proposition are the cases of *Rex v. Taylor*, 1 Vent. 293, and *Rex v. Woolston*, Fitzg. 64; 2 Stra. 834; but the pronouncements of Lord Hale and Lord Raymond in these cases must be taken in reference to the subject-matter of the case, which, in one instance certainly, and in the other possibly, was a prosecution for scurrilous blasphemy.

If the reasons for the decision in *De Costa v. De Paz*, 2 Swanst. 487, note (a); *Ambl.* 228, were those urged by the appellants I should not regard them as correct. If a gift to endow any body that propagates doctrines hostile to the generally accepted view of the Christian religion was at any time contrary to the common law, it is, in my opinion, contrary at the present time, and gifts to Unitarians and similar religious bodies for the support and endowment of their religious faith are now void. It is urged in answer to this that the position with regard to Unitarians, as also with regard to Jews, is altered by two statutes—the one 53 Geo. 3, c. 160, and the other 9 & 10 Vict. [473] c. 59. I am unable to accept this view. The statutory position appears to me to be plain. By the Act of 1 Will. & Mar. c. 18 (generally known as the Toleration Act) it is provided that no penalties shall apply to any person dissenting from the Church of England that shall take the oaths that are specified in 1 Will. & Mar. c. 1 and in 30 Car. 2, stat. 2, and (as to persons in orders) accept the Articles of Religion, excepting Articles 34, 35, and 36, and certain words of the 20th Article. But Papists and those denying the doctrines of the Blessed Trinity as declared in the said Article of Religion are omitted from the protection of this statute. The penalties from which this statute grants re-

lied are statutory penalties and disabilities, and it left the common law exactly what it was.

The Act known as the Blasphemy Act (9 & 10 Will. 3, c. 32) is really an Act directed against apostates from the Christian faith, and that Act again provides certain penalties, cumulative and severe on second conviction, for any person who, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall by writing or advised speaking deny any one of the Persons of the Holy Trinity to be God, or who shall assert that there are more gods than one, or shall deny the Christian religion to be true. This is a disabling statute still unrepealed, imposing penalties so severe that it is said no prosecution has ever been instituted under its provisions. Its terms, therefore, demand the narrowest and most jealous scrutiny. The fact that it has only incidentally been brought under judicial notice may explain the loose and, as I think, erroneous references made to its effect, as for example by Lord Lyndhurst in *Shore v. Wilson*, 9 Cl. & F. 355, 397, where he says that "those persons who by preaching denied the doctrine of the Trinity . . . are subject to the penalties of the Act," and again by Bramwell, B., in *Cowan v. Milbourn*, L. R. 2 Exch. 230. This is not accurate; only those persons who had been educated in, or had at any time made profession of, the Christian religion within the realm could incur the statutory penalties.

The Act 53 Geo. 3, c. 160, repeals so much of the Toleration Act as provides that the exemption of the statute shall not extend so as to give its advantage or benefit to persons denying the doctrine [474] of the Blessed Trinity, and for the purpose of making this exemption effectual it repeals, as far as was necessary, 9 & 10 Will. 3, c. 32. The statute of 9 & 10 Vict. c. 59 (the Religious Disabilities Act, 1846) provides that persons professing the Jewish religion shall, in respect of their schools, places of religious worship, educational and charitable purposes, and property held by them, be subject to the same laws as His Majesty's Protestant subjects who dissent from the Church of England. This means that they are freed from all disabilities imposed by statute and open to all existing at common law. This is the view expressly stated by Lord Eldon in *Atty.-Gen. v. Pearson*, 3 Meriv. 353, 405, and is in agreement with the decisions in *Rex v. Carlile*, 3 B. & Ald. 161, 6 E. C. L. 249, and *Rex v. Waddington*, 1 B. & C. 26, 8 E. C. L. 12.

So far as holding property is concerned Jews are to be regarded as being in the same position as His Majesty's Protestant subjects who dissent from the Church of England.

This must be taken to mean that they can hold property; for the common law—whatever its scope—did not specially safeguard what we now know as the Established Church, but the Christian faith. And there was never anything, apart from statutory disabilities, to prevent Protestant dissenters from holding property: *Atty.-Gen. v. Pearson*, 3 Meriv. 353, 409, 410. Of course, while any particular belief was made the subject of penalty by statute, a gift to further the purpose of that belief would be contrary to the statute law; but when once the statutory disability was removed, unless some disability could be found outside, there could be nothing to hinder the gift of money for the purpose of any such association.

It is this that explains the case of *West v. Shuttleworth*, 2 Myl. & K. 684, which was a decision on the statute in relief of Roman Catholics similar to that in relief of Jews (2 & 3 Will. 4, c. 115). Now the Roman Catholic religion—whatever views may be taken of the Reformation—was certainly never contrary to the common law; and therefore, when once the statutory prohibitions were taken away, the receipt of money for the general purpose of their faith was not forbidden. In the case of *Shrewsbury v. Hornby*, 5 Hare 406, a gift in support of Unitarian doctrine was held [475] good, and it is suggested that this was because 53 Geo. 3, c. 160, repealed the common law so far as it affected Protestant ministers. I am unable to find that the statute effects this purpose. If by implication any part of the common law is repealed there would appear to be no particular reason why it should be repealed so as to allow a special class of Protestant dissenters—but not other people—to deny the doctrine of the Holy Trinity. It would, indeed, be strange if the publication of a book, or the delivery of a lecture, would be legal or illegal according to the religious opinion of the person who wrote it, and not according to its contents. If any repeal at all had been effected by these Acts it would, in my opinion, have been the repeal of the whole doctrine had it ever existed; but the true view, in my judgment, is that it did not exist. The common law throughout remains unaffected; and I cannot find any case except *Briggs v. Hartley*, 19 L. J. Ch. 416, where as a necessary step in the decision it is enunciated in terms as wide as are necessary to support the appellants' case. For example, in *Thompson v. Thompson*, 1 Coll. Ch. Cas. 381, 397, it was held that a gift will be supported for the encouragement of the general doctrines advocated in a testator's writings if neither atheism, sedition, nor any crime or immorality is to be inculcated. Again, in *Harrison v. Evans*, 2 Burn's Ecc. Law 207, 218, Lord Mansfield defined the common law

in these terms: "There never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law." It is unnecessary to determine whether and under what circumstances the promulgation of atheism is illegal, for by "atheism" in this connection I understand a disbelief in one eternal and invisible God, and I have already stated my views that the respondents' objects do not properly include the advocacy of such a doctrine. Blasphemy is constituted by violent and gross language, and the phrase "reviling the Christian religion" shows that without vilification there is no offence.

[476] I am glad to think that this opinion is supported by the carefully considered and weighty utterances of many learned judges. The case of *Shore v. Wilson*, 9 Cl. & F. 355, in its actual result, depended upon a question of construction of deeds of trust and upon special facts and, so regarded, the decision could have but little application to other disputes; but when the case was before this House the opinions of the judges were taken on certain questions, and the sixth question was this: "Whether such (i. e. Unitarian) ministers, preachers, widows and persons are in the present state of the law incapable of partaking of such charities or any and which of them."

Erskine, J. (p. 525), Coleridge, J. (p. 539), Maule, J. (p. 509), Williams, J. (p. 545), Gurney, B. (p. 554), Parke, B. (p. 565), and Tindal, C.J. (p. 578) all agreed in thinking that they were not. It is true that Coleridge, J., based his opinion upon the ground that Unitarians were Christians, but Maule, J., stated that there was no authority to show that teaching Unitarian doctrine was contrary to the common law, and Erskine, J., stated that it was open to any man "without subjecting himself to any penal consequences soberly and reverently to examine and question the truth of those doctrines which have been assumed as essential to the Christian faith."

There is indeed to be found in certain of these opinions indications of the view expressed in *Rex v. Woolston*, 2 Stra. 834, that it is not illegal to deny any doctrine of the Christian faith, but that it is to deny them all collectively. I cannot accept this view of the law. The Christianity offences against which are illegal at common law is the Christianity known to the common law, and Unitarian Christianity is opposed to the central doctrine of this faith.

There remains the case of *Cowan v. Milbourn*, L. R. 2 Exch. 230, in which the distinction urged by the appellants is clearly stated by Bramwell, B.; but it is equally clear that he misconceived the meaning of the Blasphemy Act, for he based his judgment on the statement that the hirer "proposed to use the rooms for purposes declared by the statute to be unlawful," but, as I have already shown, the statute had no such comprehensive scope.

I am unable to ascertain what is the real reason upon which the distinction is supported. It appears to me that offences against [477] Christianity, so far as they are recognized by law, are either statutory offences, leading to statutory penalties, or they are criminal offences at common law, punishable by the criminal Courts, and I am unable to see how such offences, if not so punishable, exist at all, or how in this connection an act can be illegal without being the subject of prosecution, for even if it be accepted that Christianity is part of the common law it does not follow that it is illegal to question its wisdom or its truth. The analogy of the cases with regard to restraint of trade and immorality of consideration does not appear to me to be sound. Restraint of trade, though contrary to the common law of England, never was a criminal offence; and, again, acts of immorality, though not criminal, cannot be made a consideration sufficient to support a contract, nor can a contract entered into to further such acts be enforced in the Courts. The latter of these classes of case are those which offend against good morals—the former are those contrary to public policy. The alleged offence in this case is neither one nor the other. The common law of England, in the words of Lord Mansfield, "knows no prosecution for mere opinion," and if the holding of opinion be not contrary to the common law, I cannot see why its expression should be unlawful, provided such expression be kept within proper limits of order, reverence and decency. If this be so, a society to propagate such opinions, if properly conducted, is not an illegal society.

I have only to add that, apart altogether from these considerations, I think that the respondents are well founded in arguing that since the company is a legal entity, and as some at least of its objects are on the face of them lawful, there is no ground upon which it is possible to prevent them from receiving money which has been the subject of a bequest in their favour.

I cannot accede to the argument that the later purposes in the memorandum, which, taken alone, must be regarded as proper and lawful objects, become unlawful because they are associated with the first purpose of the memorandum. If an unequivocal act be law-

ful in itself the motive with which it is performed is immaterial; and, if it be said that all the later purposes are the instruments by which the first purpose may be effected, this, as it seems to me, may be an argument for showing that the first purpose is lawful, but it cannot establish that the later purposes are not.

[478] Even if all the objects of the company were illegal, it would not follow that while the certificate of incorporation remained unrevoked the company would be unable to receive money. It is a mistake to treat the company as a trustee, for it has no beneficiaries, and there is no difference between the capacity in which it receives a gift and that in which it obtains payment of a debt. In either case the money can only be used for the purposes of the company, and in neither case is the money held on trust. If, by oversight, or mistake a company were incorporated for wholly illegal objects, the right course to follow, where its capacity to receive money was questioned in legal proceedings, would be to direct an adjournment till proper steps had been taken to revoke the incorporation. This matter has been so fully dealt with by Lord Parker, with whose views I entirely agree, that I do not desire to elaborate it further. For these reasons I am of opinion that this appeal should be dismissed.

The question of costs was considered on May 17.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

NOTE.

The reported case, affirming the decision of the Court of Appeal in the case of *In re Bowman* [1915] 2 Ch. 447, Ann. Cas. 1917B 1017, holds to be valid a testamentary gift to a society organized "to promote . . . the principle that human conduct should be based upon natural knowledge and not upon supernatural belief and that human welfare in this world is the proper end of all thought and action." The decision in the reported case, like that of the court of appeal, is based on the view that an anti-Christian propaganda, if maintained without scurrility or profanity, is not blasphemous. The cases passing on the validity of a testamentary disposition subversive of the religion are reviewed in the note to *In re Bowman supra*, as reported in Ann. Cas. 1917B 1017.

DENNIS

v.

WATERFORD PACKING COMPANY.

Maine Supreme Judicial Court—March 3, 1915.

113 Me. 159; 93 Atl. 53.

Appeal and Error — Bill of Exceptions — Reference to Record for Facts.

A bill of exceptions, stating that plaintiff seasonably objected to the admission of certain testimony and when it was admitted noted his exceptions, that he offered certain testimony which the presiding justice excluded, and duly excepted, and that he requested the presiding justice to give certain instructions which were refused, and duly excepted, with no other statement of what the admitted or excluded evidence was and nothing to show the relevancy, materiality, or competency thereof or the appropriateness of the instructions, did not present separately each issue of law in the clear, distinct, summary manner required by Rev. St. c. 79, § 55, which provides that a party aggrieved by any of the opinions, directions, or judgments of the presiding justice may present written exceptions in a summary manner, which if found true shall be allowed and signed by the justice, though the record of the evidence was made a part of the bill of exceptions, since, while this is not improper, the reference to the evidence or the incorporation of the evidence as a part of the bill cannot take the place of a succinct and summary statement of the specific grounds of exception in the body of the bill itself.

Evidence — Self-serving Letters — Admissibility.

A packer of corn wrote a broker of corn-packing products offering "10,000 cases fancy," at \$1 per dozen cases. The broker procured a purchaser subject to approval of a sample case, but upon receipt of the sample case the purchaser wired the broker that it was not of fancy quality and could not be used. The broker wrote the packer stating the substance of the telegram. It is held that, in an action by the broker for commissions, the letter and telegram were improperly excluded, since letters and telegrams by one party to a suit to the other sent in the general course of business and not specifically to manufacture evidence, and which by the character of their contents are naturally calculated to elicit replies and denials, are admissible in evidence, though self-serving and not answered, not as themselves affording proof that the statements therein are true, but on the ground that silence when such statements are made may itself be an admission.

[See note at end of this case.]

Brokers — Right to Commission — Goods Rejected for Defects.

A packer of corn wrote a broker of corn-packing products offering "10,000 cases

fancy," at \$1 per dozen cases. The broker procured a purchaser subject to approval of a sample case, but upon receipt of the sample case the purchaser refused to accept the corn as not being of fancy quality. The evidence showed that "fancy" corn was of a higher grade than standard corn and consisted of the very best part of a good pack, packed from tender creamy corn with good consistency, and was sweet, tender, of extra flavor, not hard nor wet, and taken when the corn was "right in the milk," and that the corn in question was not fancy corn as regarded in the trade. It is held that the broker, having produced a customer ready and willing to buy on the packer's terms and able to buy, had earned his commissions.

[See Ann. Cas. 1915B 169.]

Exceptions from Superior Court, Cumberland county.

Action by Henry Dennis, plaintiff, against Waterford Packing Company, defendant. Judgment for defendant. Plaintiff alleges exceptions. The facts are stated in the opinion. EXCEPTIONS SUSTAINED.

Hinckley & Hinckley for plaintiff.

Eben Winthrop Freeman for defendant.

[160] SAVAGE, C. J.—Action by a broker to recover commissions. The verdict was for the defendant, and the case comes before this court on the plaintiff's exceptions and motion for a new trial.

The defendant moves that the exceptions be dismissed on the ground that they are not sufficiently definite, specific and summary. The bill of exceptions states that,

"During the trial, the plaintiff seasonably objected to the admission of certain testimony, and when the same was admitted noted his exceptions.

During the trial the plaintiff offered certain testimony which the presiding Justice excluded, and the defendant (plaintiff?) duly excepted.

At the close of the evidence the plaintiff duly requested the presiding Justice to give certain instructions to the jury, which the presiding Justice refused to give, and the defendant (plaintiff?) duly excepted."

There is in the bill no other or particular statement of what the evidence was which was thus admitted or excluded. Nor is there anything in the bill to show that the evidence admitted was irrelevant, immaterial or incompetent; nor that the evidence excluded was relevant, material and competent; nor is there anything to show that the requested instructions were appropriate. There is nothing to show that the rulings and refusals to rule were erroneous or prejudicial. This statement brings this bill of exceptions precisely within [161] the teeth of *McKown v. Powers*, 86 Me. 291, 29 Atl. 1079. It does

not present separately each issue of law in that clear, distinct, summary manner required by the statute. R. S. Chap. 79, Sec. 55. *Salter v. Greenwood*, 112 Me. 548, 92 Atl. 786.

It is needless to cite the long line of cases in this State which hold that the excepting party must on the face of the bill show that he has been aggrieved, and this rule requires that the bill should state the evidence concerning the admission or exclusion of which complaint is made, and enough of the contentions or issues in the case to show that it was relevant or irrelevant, material or immaterial, competent or incompetent, as the case may be. In the case of *McKown v. Powers*, which was but a restatement of the existing rule, the court declared in substance that it would not feel bound to consider exceptions so irregularly presented, and that it would not do so, unless in exceptional cases. This warning was repeated in *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380, in which the court used this language: "An imperative rule has been established and repeatedly reaffirmed in order to secure greater regularity and certainty in the administration of justice, and no material relaxation of the rule will be countenanced, unless for special and peculiar reasons in furtherance of justice." The doctrine of *McKown v. Powers* has been many times reaffirmed since that case was decided, the latest instance being in the very recent case of *Salter v. Greenwood*, 112 Me. 548, 92 Atl. 786.

It is true in this case, as it was in *McKown v. Powers*, that the record of the evidence is made a part of the bill of exceptions, but that does not help the matter. It is not a "summary" bill, as contemplated by statute. It is not an infrequent practice in framing a bill of exceptions to refer to the evidence and make it a part of the bill. This is not improper. The evidence may help to illuminate the exceptions. But neither the statute, nor approved practice, contemplates that a reference in the bill to the body of the evidence, or the incorporation of the evidence as a part of the bill, is to take the place of succinct and summary statement of the specific grounds of exception in the body of the bill itself. In view of the statute and the rule, we do not think it is the duty of the court to hunt through a mass of undigested, and sometimes indigestible, testimony, to find the points of exception, and determine their value.

The motion of the defendant might well be granted, if that would end the case. But as an examination of the record under the motion [162] for a new trial has led us to the conclusion that the case must be sent back for a new trial, we deem it to be for the interest of both parties to consider now one or two questions concerning which exceptions were

taken. And this necessitates a brief statement at this point of the issue between the parties.

The defendant corporation is a packer of corn. The plaintiff is a broker of corn packing products. On October 12, 1912, the defendant wrote to the plaintiff as follows:—"Having finished packing corn we are now in the market with about Ten Thousand Cases Fancy, which we offer at \$1.00 net per dozen cases, F. O. B. Harrison, Maine, with the customary label allowance." Thereupon the plaintiff offered the corn to Austin-Nichols Co. of New York, upon the terms named in the letter. October 14, Austin-Nichols Company accepted the offer subject to approval of case of "fancy" representing average quality. The plaintiff notified the defendant of the acceptance, and requested it to send sample case to Austin-Nichols Company for their approval. A sample case was accordingly sent. October 19, Austin-Nichols Company wired the plaintiff, "Sample case Waterford corn received. Not fancy quality. Cannot use." The telegram was offered in evidence, and excluded on the ground that it was merely hearsay evidence, as to the quality of the corn. The plaintiff testified that upon receipt of the telegram he wrote a letter to the defendant in which he communicated the information received in the telegram, or, as we understand it, the substance of the telegram. Then he offered to show the contents of that letter. The evidence of the contents of the letter was excluded on the ground that they were self-serving statements.

We have recently held that letters and telegrams sent in the general course of business, by one party to a suit to the other, and not specifically to manufacture evidence, which by the character of their contents are naturally calculated to elicit replies and denials, are admissible in evidence, although they are self-serving, and are not answered. *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952, *Keeling-Easter Co. v. Dunning*, 113 Me. 34, 92 Atl. 929. The ground of admissibility is not that the writings themselves afford proof that the statements in them are true, but that silence when such statements are made may itself be an admission. We think the evidence offered and excluded falls within this rule, and that it should have been admitted. These observations [163] will apply also to other instances of exclusion of oral statements made by the plaintiff to the representative officers of the defendant. The exceptions must be sustained.

The motion can be disposed of briefly. If the plaintiff produced a customer ready and willing to buy on the defendant's terms, and able to pay, he earned his commissions. That the plaintiff produced a customer ready and able to buy "fancy" corn and that it was "fancy" corn which the defendant in its letter to the plaintiff proposed to sell, the testi-

mony leaves no real doubt. It is undisputed. Neither can there be any real doubt that the customer refused to accept the corn on the claimed ground that it was not "fancy" corn.

This leaves only two questions for consideration, 1, was the customer willing to buy the corn if it was "fancy corn?" and 2, was it fancy corn? We find nothing in the testimony which tends to show that the customer was not willing to buy, if the corn proved to be as represented, "fancy" corn. Even after it wired the plaintiff that the sample sent was not "fancy quality," it sent its agent and buyer from New York to Waterford to inspect the corn, and to see if in fact the bulk of it was "fancy." And he after examination refused to accept it for the reason that it was not "fancy." Every consideration of the evidence tends to the conclusion that the customer was willing to buy "fancy" corn. There is no warrant for a contrary conclusion.

Lastly, was the corn "fancy" corn? The evidence is undisputed that there are known to the trade two principal grades of packed corn; one is called "Standard" and the other "Fancy." "Fancy" corn is the higher grade. It is not the best part of the pack in any particular year. It is the very best part of a good pack. It is corn that is packed from tender, creamy corn, and with good consistency. It is sweet, tender, of extra flavor, not hard nor wet, and got when the corn is "right in the milk," as it is called. There is direct evidence in the case that the corn in question was not "fancy" corn, as that corn is regarded in trade. And a most significant piece of evidence on this issue is the low price at which the defendant was afterwards willing to sell the bulk of it, compared with the then going price for "fancy" corn. Aside from some evidence, which is disputed, that the plaintiff said after examination that the corn was all right, the defendant offered no evidence whatever that the corn was in fact "fancy." The highest praise given to the corn by the defendant's [164] witnesses, in our judgment, falls very considerably short of showing that it was "fancy." And counsel in the brief submitted makes no claim that the corn was "fancy."

Upon the record now before us, we think it is unmistakable that the verdict is wrong. Justice requires that it be set aside.

Exceptions sustained.

Motion for a new trial sustained.

NOTE.

Admissibility in Evidence of Self-serving Letter or Telegram Sent in General Course of Business.

To what extent and under what conditions a self-serving unanswered letter or telegram

passing between persons in the general course of business is admissible in favor of the person sending it, has been the subject of much discussion by the courts and the decisions are not harmonious. The general trend of the decisions is to the effect that such a letter or telegram is admissible but only as an admission implied from the silence of the recipient. *Gore v. Hawsey*, 3 F. & F. (Eng.) 509; *Lucy v. Mouflet*, 5 H. & N. (Eng.) 229; *Morris v. Norton*, 75 Fed. 912, 43 U. S. App. 739, 21 C. C. A. 553; *Peninsular Naval Stores Co. v. Parrish*, 13 Ga. App. 779, 80 S. E. 28; *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.* 156 Ind. 665, 59 N. E. 995; *Murray v. East End Imp. Co.* 60 S. W. 648, 22 Ky. L. Rep. 1477; *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952; *Keeling-Easter Co. v. Dunning*, 113 Me. 34, 92 Atl. 929; *Fearing v. Kimball*, 4 Allen (Mass.) 125, 81 Am. Dec. 690; *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20, 10 Detroit Leg. N. 846; *Sonnesyn v. Hawbaker*, 127 Minn. 15, 148 N. W. 476; *Downs v. Racine-Sattley Co.* 175 Mo. App. 382, 162 S. W. 331; *Fenno v. Weston*, 31 Vt. 345; *Murphey v. Gates*, 81 Wis. 370, 51 N. W. 573. And see the reported case.

In *Murphey v. Gates*, 81 Wis. 370, 51 N. W. 573, it was held that several letters written by the plaintiff to the defendant demanding a balance due for services rendered pursuant to a contract, together with evidence of the failure of the defendant to deny the truth of the statements, were admissible in favor of the plaintiff. In that case it was said that the failure of the defendant to respond to the letters, or to deny in any form the statements therein, was a tacit admission of them, and to that end the letters of the plaintiff were admissible.

A letter making a demand for an amount claimed, and stating the ground for the demand, is admissible in evidence. *Sonnesyn v. Hawbaker*, 127 Minn. 15, 148 N. W. 476, wherein it was said: "Where a demand is made upon a party under such circumstances that he would naturally deny if he did not assent, the demand and failure to reply may be received as evidence in the nature of an admission tending to prove the justice of the demand."

So a failure to answer letters, wherein the writer placed a certain construction on a contract, is a circumstance from which a jury may infer that the recipient's understanding of the contract was the same as the writer's, and such letters are properly admissible. *Murray v. East End Imp. Co.* 60 S. W. 648, 22 Ky. L. Rep. 1477. See to the same effect under a statute, *Peninsular Naval Stores Co. v. Parrish*, 13 Ga. App. 779, 80 S. E. 28.

In an action for goods sold and delivered, letters and telegrams sent to the plaintiff by the defendant informing the plaintiff that the

merchandise was not up to sample and that he would not accept it are admissible in evidence. *Keeling-Easter Co. v. Dunning*, 113 Me. 34, 92 Atl. 929, wherein the court in stating the reason for the rule said: "Had the complaints made in these letters been made orally in conversation, but not answered, we think no one would question their admissibility. Nor would there be any question if the letters had been answered. The real ground of admissibility in a case like this is not that the writings themselves afford any proof that the statements contained in them are true, but that silence, when statements are made which are calculated to draw forth a reply, may itself be an admission—may raise some inference that the statements are true. It may have more weight, or less. That question is for the jury. If it can have any weight in that direction, the writings are admissible. As Mr. Wigmore says, 'each case must stand on its own facts,' and, tested by the rule we have stated, we think the telegrams and letters were properly admitted."

In an action for deceit in the sale of an automobile a letter by the buyer to the effect that the seller misrepresented his car has been held to be admissible. *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952, wherein the court said: "Such a letter is clearly admissible. Though in a sense self-serving, it is admissible because, if the charge contained in it is untrue, it is calculated to evoke a reply. If no reply is made, that fact, unexplained, may afford an inference that the charge is true."

In an action for the breach of a contract for services, a telegram sent to the defendant by the plaintiff asserting the contract has been held to be admissible in view of the fact that the defendant in his answer to the telegram did not deny the assertion. *Downs v. Racine-Sattley Co.* 175 Mo. App. 382, 162 S. W. 331, wherein it was said: "We fail to perceive any good ground for rejecting this correspondence as self-serving. Certainly if defendant's answer had expressly admitted the existence of the contract the correspondence would have possessed evidentiary value and we think the implied admission was pertinent evidence bearing on the subject of the character of the existing relationship between the parties." Compare *Hammond v. Benson*, 112 Mo. 190, 20 S. W. 474.

It has been said that a failure to answer a self-serving written communication is seldom to be regarded as an admission by the person addressed, but that exceptional circumstances may justify the court in submitting it to the jury with a proper caution. *Morris v. Norton*, 75 Fed. 912, 43 U. S. App. 739, 21 C. C. A. 553, wherein the court said: "The rule is well settled that conversations between parties to a controversy, in which one makes a

proprietary or corporate function in the premises, and was therefore liable; and that, even if it be conceded that the function was governmental, the school district is made liable for negligence in the premises by the provision of the statute, Rem. & Bal. Code, §§ 950, 951 (P. C. 81 §§ 1667, 1669), as construed by this court in *Redfield v. Kittitas County School Dist. No. 3*, 48 Wash. 85, 92 Pac. 770.

Two questions are thus presented: (1) was the school district acting in a governmental capacity and hence not liable in an action at common law? (2) If so, is it liable under the statute?

I. Unlike cities and towns, school districts, though corporate entities and classed as municipal corporations, are essentially only *quasi* municipal corporations. *State v. Grimes*, 7 Wash. 270, 34 Pac. 836. They are mere arms of the state for the administration of its school system. Practically all of their functions are therefore governmental.

"They are governmental agencies, and it is, to say the least, doubtful if they are in any respect anything else, or have any rights that can be called private." *Atty-Gen. v. Lowrey*, 131 Mich. 639, 643, 92 N. W. 289.

See also *Whitehead v. Detroit Board of Education*, 139 Mich. 490, 102 N. W. 1028; *Freeland v. Stillman*, 40 Kan. 197, 30 Pac. 235; *Beach v. Leahy*, 11 Kan. 23; 1 *Dillon, Municipal Corporations* (5th ed.), p. 67, § 37.

This is certainly true as to providing and maintaining school grounds, school buildings and appliances, and all those things which it is permitted the school boards to acquire and [171] administer through the expenditure of public school funds. Such is the net result reached by Chief Justice Gray, after a most exhaustive and discriminating review of the authorities, both English and American, in the leading case of *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. Although in Massachusetts at that time the duty to provide school houses and equipment was imposed by general law upon all towns and cities of the commonwealth, such towns and cities were, in substance, held to be *pro tanto* nothing more than *quasi* corporations exercising a portion of the sovereign power of the state, not for their own benefit, but as agents of the public. In that case it was therefore held that a child attending a public school, who was injured by reason of the unsafe condition of a staircase in the schoolhouse, could not maintain an action against the city for damages, there being no liability at common law and no statute declaring a liability. Judge Dillon states the rule as follows:

"When a municipal corporation is charged by charter or statute with the duty of erect-

ing and maintaining public schools for the education of the children of the municipality, the weight of authority is to the effect that in the exercise of the power so conferred it performs a public or governmental duty and not a special corporate or administrative duty as distinguished from a State or public duty, and it is not impliedly liable for the wrongful acts and negligence of its officers or agents in maintaining and repairing school buildings. In the case of school districts, boards of education and other *quasi* corporations created for the limited purposes of directing and controlling school matters, exemption from liability, in some jurisdictions at least, is placed upon the two-fold ground (first) that those bodies are only *quasi* corporations and (second) that they perform only a public and governmental duty and do not act in a private or corporate capacity in erecting and maintaining school buildings." 4 *Dillon, Municipal Corporations* (5th ed.), p. 2888, § 1658.

See also *Kinnare v. Chicago*, 171 Ill. 332, 49 N. E. 536; *Bigelow v. Randolph*, 14 Gray (Mass.) 541; *Howard v. Worcester*, 153 Mass. 426, 27 N. E. 11, 25 Am. [172] St. Rep. 651, 12 L.R.A. 160; *Ernst v. West Covington*, 116 Ky. 850, 76 S. W. 1089, 3 Ann. Cas. 882, 105 Am. St. Rep. 241, 63 L.R.A. 652; *Clark v. Nicholasville*, 27 Ky. L. Rep. 974, 87 S. W. 300; *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420; *Freel v. Crawfordsville*, 142 Ind. 27, 41 N. E. 312, 27 L.R.A. 301; *Lane v. Woodbury Dist. Tp.* 58 Ia. 462, 12 N. W. 478; *State v. Frederick County School Com'rs*, 94 Md. 334, 51 Atl. 289; *Diehm v. Cincinnati*, 25 Ohio St. 305; *Ford v. Kendall Borough School Dist.* 121 Pa. St. 543, 15 Atl. 812, 1 L.R.A. 607.

The rule of nonliability at common law applies even in case of duties not imposed *volens volens*, but also as to those voluntarily assumed by permission of the state, the ground of immunity being, not that the duty is compulsory, but that it is public. *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35. The same rule of immunity at common law applies in relation to defects in school grounds used as playgrounds for the recreation of the school children as obtains in case of school buildings. *Finch v. Toledo Board of Education*, 30 Ohio St. 37, 27 Am. Rep. 414; *State v. Frederick County School Com'rs*, and *Bigelow v. Randolph*, *supra*.

We are asked, "How can it be said that the physical development of children is a function of government?" The answer seems obvious—just for the same reason that it can be said that the mental development of children is a function of government. Both are intended to raise the standard of citizenship. The state is certainly as much

interested in the physical standard of its citizens as in their mental standard. Condemnation of land for play grounds in connection with the public schools is a public use. *State v. Superior Ct.* 69 Wash. 189, 124 Pac. 484; *Sorenson v. Perkins*, 72 Wash. 16, 129 Pac. 577.

To hold that the school district in providing the school house was performing a governmental function, and in providing these exercise ladders was performing a private or [173] proprietary function, would be to mark a distinction without basis either in reason or authority. In providing and maintaining these ladders, the district was acting in a governmental capacity. It is clear, therefore, it would not be liable at common law for the injury here in question.

II. Is the district liable under the statute? The statute, reference being had to Rem. & Bal. Code by section numbers, is as follows:

"§ 950. An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases:—1. Upon a contract made with such public corporation; 2. Upon a liability prescribed by law in favor of such public corporation; 3. To recover a penalty for forfeiture given to such public corporation; 4. To recover damages for an injury to the corporate rights or property of such public corporation.

"§ 951. An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation."

It will be noted that this statute applies to counties and incorporated towns as distinctly and specifically as it does to school districts. It was first passed in 1869, and is found in practically the same terms in the code of 1881. It is a replica of the former statute of Oregon, which is quoted in the opinion in *McCalla v. Multnomah County*, 3 Ore. 424. In that case, it was made the basis of liability of the county for a personal injury resulting from negligence in failing to keep a bridge in repair. This statute was also applied in *Sheridan v. Salem*, 14 Ore. 328, 12 Pac. 925, as making the city liable for personal injuries resulting from a defective crosswalk. In each of these

cases it was recognized that, at common law [174] and but for this statute, there would have been no liability. At first our own territorial supreme court, apparently overlooking the statute and following the rule of the common law, held that a county was not liable for personal injuries caused by a defective sidewalk under its control. *Clark v. Lincoln County*, 1 Wash. 518, 20 Pac. 576. This fact was later pointed out by the state supreme court and, though recognizing the rule of the common law, the court held a county liable under the terms of the statute for personal injuries resulting from a defective bridge under county control, expressly following the decisions of the Oregon court in the *McCalla* and *Sheridan* cases. *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936; *Hoexter v. Judson*, 21 Wash. 646, 59 Pac. 498.

Still later the question arose touching the liability of a school district for injury to a pupil resulting from a bucket of hot water used in connection with the heating apparatus in a school building. This court, speaking through the late Judge Dunbar, after again recognizing the common law rule of immunity in the exercise of governmental functions, held the school district liable, basing the decision squarely upon the statute and using the following language:

"It is contended by the respondent that it was not the intention of the legislature to make the act aforesaid apply to governmental duties, and that the acts complained of were in the performance of strictly governmental duties. The school district is a creature of the statute, and the state is not limited in its authority over the district, and would have power to make it responsible in the performance of governmental duties as well as any other kind of duties. If the acts complained of were perpetuated in the performance of a governmental duty, it would be difficult to conceive what duties the legislature had in mind in enacting the statute. It is more probable that, in contemplation of the common law rule, it was attempting to remove the limitations and restrictions of such rule and make the district responsible generally for an omission of duty. In any event, the law itself has not incorporated the limitations claimed for it by the respondent, [175] and if its theory is correct, it would have been an idle thing for the legislature to have passed the law making the district responsible for acts for which it was already responsible before the enactment of the law, viz., acts which were not governmental. In any event, this statute has been construed by this court in *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, where the action was for an injury to the rights of the plaintiff arising

from the act or omission of the county of Spokane in maintaining a defective bridge. In that case, after admitting practically the general rule contended for by respondent in this case, and quoting from the opinion of Lord Kenyon, in *Russell v. Devon*, 2 T. R. (Eng.) 667, this court says that,

"Our statute expressly meets the suggestions of Lord Kenyon, *supra*, that 'if it be reasonable they should be by law liable to such an action, recourse must be had to the legislature for that purpose.' Not only is provision made for an action against the county upon contract within the scope of its authority, but an injury to the right of the plaintiff arising from some act or omission of the county."

"This reference was to the statute now under discussion, and this court cited the case of *McCalla v. Multnomah County*, 3 Ore. 424, a case decided under a similar statute, *Lyman v. Hampshire County* [140 Mass. 311, 3 N. E. 211], and many other cases." *Redfield v. Kittitas County School Dist. No. 3*, 48 Wash. 85, 92 Pac. 770.

The supreme court of Minnesota has held that, by a statute providing that an action may be brought against school trustees "Upon a contract made with them in their official capacity, or for an injury to the rights of the plaintiff, arising from some act or omission of the officers or of the district," the legislature did not intend to abrogate the rule of nonliability for negligence in the performance of a purely public function. *Bank v. Brainerd School Dist.*, 49 Minn. 106, 51 N. W. 814. The court, however, frankly admits that it is not clear what was intended by the language "for an injury to the rights of the plaintiff," thus failing to meet the clear logic of the *Redfield* case, which shows that this language [176] could only be intended to abrogate the common law rule of nonliability for torts.

The supreme court of Oregon in *Wiest v. Marion County School Dist. No. 24*, 68 Ore. 474, 137 Pac. 749, 49 L.R.A.(N.S.) 1026, criticizes the decision of this court in the *Redfield* case as carrying the statute too far, but strangely overlooks its own decisions in the *McCalla* and *Sheridan* cases placing the same construction on a statute couched in the same terms, namely, that it was intended to abrogate the common law rule of immunity as to counties and towns. It is obvious that, unless we overrule the *Redfield* case, the judgment in the case before us must be affirmed. Counsel, however, point out the plain fact that, unless we overrule the *Redfield* case, we perpetuate the incongruity of a rule that a school district is liable for negligence in the performance of governmental duties, while a municipal corporation proper is not liable in such a

case, but is only liable for negligence in the performance of proprietary or corporate duties. Simple candor compels the recognition of this fact. We have followed the rule of the common law (extended, it is true, as to the care of streets) in cases involving incorporated towns and cities, ignoring the statute, and have applied the statute in its full extent as to school districts and counties.

We have repeatedly held that an incorporated town or city is not liable where injury occurs through negligent performance or omission of performance connected with its purely governmental functions, thus according to the municipality the sovereign immunity of the state. *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347; *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; *Lynch v. North Yakima*, 37 Wash. 667, 80 Pac. 79, 12 L.R.A.(N.S.) 261; *Cunningham v. Seattle*, 40 Wash. 59, 82 Pac. 143, 4 L.R.A.(N.S.) 629; *Cunningham v. Seattle* (rehearing), 42 Wash. 134, 7 Ann. Cas. 805, 84 Pac. 641.

These cases merely follow the rule of the common law as it has been understood ever since its announcement in the case [177] of *Russell v. Devon*, 11 T. R. (Eng.) 667. In none of these cases is the statute, Rem. & Bal. Code, §§ 950, 951 (P. C. 81 §§ 1667, 1669) construed or even referred to. In one of them, *Cunningham v. Seattle*, on rehearing, it is intimated that we have no statute on the subject. See 42 Wash. p. 136.

In the following cases, the common law distinction between governmental and non-governmental functions has been invoked as making cities and towns liable for negligence of their officers or agents, withholding in the latter class of functions the state's immunity. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, 24 L.R.A.(N.S.) 1275; *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L.R.A.(N.S.) 481; *Hayes v. Vancouver*, 61 Wash. 536, 112 Pac. 498; *Hewitt v. Seattle*, 62 Wash. 377, 113 Pac. 1084, 32 L.R.A.(N.S.) 632; *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005, 48 L.R.A.(N.S.) 331. In none of these decisions was the statute mentioned or construed, while in one of them, *Sutton v. Snohomish*, *supra*, it is expressly stated, but without referring to the statute, Rem. & Bal. Code, §§ 950 and 951, that:

"It must be conceded that there is no legislative enactment declaring these cities [municipal corporations of the third class] liable for such negligence as is alleged in the complaint in this action; and it may also be conceded that the appellant city cannot legally be made to respond in dam-

ages for negligence in the discharge of purely governmental duties."

The negligence there involved was the failure of the city to keep a city highway in repair. The city was held liable because that duty did not "call forth the exercise of strictly governmental functions." Subsequently the same liability as to a county, in *Kirtley v. Spokane County*, supra, was distinctly referred to the statute alone.

It is useless to multiply citations or to prolong discussion. Clearly we have two lines of decisions, in one of which the [178] statute is either denied or ignored, and in the other of which it is recognized and held to abrogate the common law rule of immunity. The first line we have constantly followed in dealing with cities and incorporated towns, and the second in dealing with school districts and counties. A majority of the court are averse to overruling either line. To overrule the first would be to unsettle the law of damages as it has been applied to corporations purely municipal almost from the beginning of statehood. To overrule the second would be judicially to repeal the statute, the obvious purpose of which, as it would seem inadvertently, has already been much impaired. The only other course is to uphold both lines of precedent as applied respectively to the two classes of corporations in the adjudicated cases.

"*Stare decisis* is the policy of the courts. Upon this principle rests the authority of judicial decisions as precedents, and the doctrine ought not to be departed from, except for urgent reasons." *State v. Peter*, 21 Wash. 243, 57 Pac. 814.

See also *Manning v. Tacoma R. etc. Co.* 34 Wash. 406, 75 Pac. 994; *State v. Ross*, 43 Wash. 290, 86 Pac. 575.

With the means of collecting the judgment we are not concerned. That question is not before us. On the authority of the statute as construed in the *Redfield* and *Kirtley* cases, the judgment is affirmed.

Morris, C. J., Holcomb, Parker, Main, and Chadwick, JJ., concur.

NOTE.

Liability of Municipal Corporation or School Board for Defective Condition of Public School Premises.

The present note collates the recent cases dealing with the liability of a municipal corporation or of a school board for the defective condition of public school premises. The earlier cases are discussed in the notes to *Ernst v. West Covington*, 3 Ann. Cas. 882; *Wahrman v. New York Board of Education*, 10 Ann. Cas. 406; and *Goddard v. Harpswell*, 30 Am. S. Rep. 398.

The few recent cases that have come before the courts on the liability of a municipal corporation or a school board for maintaining defective school premises support the rule that neither a municipal corporation nor a school board is liable at common law, the duty of maintaining school premises being a governmental one. *Clark v. Nicholasville*, 87 S. W. 300, 27 Ky. L. Rep. 974; *Daniels v. Grand Rapids Board of Education*, 191 Mich. 339, 158 N. W. 23. Compare *McCarton v. New York*, 149 App. Div. 516, 133 N. Y. S. 939. In *Clark v. Nicholasville*, etc. supra, it was held that neither the city nor the board of education could be held liable for injuries to a school girl sustained by reason of defective banisters in a school building.

In *Daniels v. Grand Rapids Board of Education*, 191 Mich. 339, 158 N. W. 23, it appeared that the plaintiff was injured through a defectively constructed balustrade in one of the public schools of a city. It was held that neither the board of education as a municipal corporation, nor the members of the board individually, were liable in damages.

But in *McCarton v. New York*, 149 App. Div. 516, 133 N. Y. S. 939, it appeared that the plaintiff's intestate was killed by the fall of a flagpole on top of a school building. The board of education was held to be liable. The court said: "I am of opinion, however, that the complaint states a good cause of action against the board of education. If it erected or maintained this flagpole, which was unfit for the purpose in that it was rotten and never should have been selected for such use, in a position to endanger the lives of those lawfully in the vicinity of the building, with notice, as alleged and as stated in the opening, that it was in an unsafe condition, it is clearly liable, either upon the theory of having erected or of maintaining a nuisance, depending upon whether the original erection was unsafe, or the flagpole was maintained with actual knowledge that it was in a dangerous condition, or upon the theory of negligence, depending upon its failure to perform its statutory duty to provide for 'prompt and efficient' repairs."

However, in several jurisdictions the common-law rule that a municipal corporation or school board cannot be held liable for the defective conditions of the school premises has been changed by statute. *Ching v. Surrey County Council*, 102 L. T. N. S. (Eng.) 414, 26 Times L. Rep. 355; *Morris v. Carnarvon County Council*, 102 L. T. N. S. (Eng.) 524, [1910] 1 K. B. 840; *Redfield v. Kittitas County School Dist. No. 3*, 48 Wash. 85, 92 Pac. 770. And see the reported case. In *Redfield v. Kittitas County School Dist. No. 3*, supra, it appeared that the plaintiff received injuries from scalding water negli-

gently kept in a bucket in a school room. Under a statute the school district was held to be liable. The court said: "With the inapplicable portions of the two sections omitted, the law would read as follows: An action may be maintained against a school district for any injury to the rights of the plaintiff arising from some act or omission of such district. . . . It is contended by the respondent that it was not the intention of the legislature to make the act aforesaid apply to governmental duties, and that the acts complained of were in the performance of strictly governmental duties. The school district is a creature of the statute, and the state is not limited in its authority over the district, and would have power to make it responsible in the performance of governmental duties as well as any other kind of duties. If the acts complained of were perpetrated in the performance of a governmental duty, it would be difficult to conceive what duties the legislature had in mind in enacting the statute. It is more probable that, in contemplation of the common-law rule, it was attempting to remove the limitations and restrictions of such rule and make the district responsible generally for an omission of duty. In any event, the law itself has not incorporated the limitations claimed for it by the respondent, and if its theory is correct, it would have been an idle thing for the legislature to have passed the law making the district responsible for acts for which it was already responsible before the enactment of the law, viz., acts which were not governmental. . . . Believing that the statute clearly gives the right of action attempted to be enforced in this case, the judgment will be reversed, and the cause remanded with instructions to overrule the demurrer."

In *Ching v. Surrey County Council*, 102 L. T. N. S. (Eng.) 414, 26 Times L. Rep. 355, it appeared that the plaintiff, a young school boy, was injured by reason of having caught his foot in a large hole in the pavement of a school playground. The defendants, by statute, were charged with the duty of maintaining the school premises in proper condition, and they were held to be liable for failure to do so. Farwell, L. J., said: "The Act of Parliament has placed a statutory duty on the education authority of maintaining and keeping efficient these schools. It is said that sect. 7 cannot bear that meaning by reason of the proviso. I do not think it really material to consider whether it does or does not; but sect. 18 of the Act of 1870 has no such proviso, and it states in terms that they shall maintain and keep efficient every school; and by virtue of sect. 5 of the Act of 1902 it is said that the duties imposed by the Act of 1870 are imposed upon the county council. Therefore, so far as that

is concerned, we can reasonably say that the county council have the statutory duty imposed upon them to keep the schools in repair, and that that includes the buildings and the playgrounds."

In *Morris v. Carnarvon County Council*, 102 L. T. N. S. (Eng.) 524, [1910] 1 K. B. 840, it appeared that the plaintiff, a girl six years of age, was injured by a heavy swinging door in a school house. The court said: "The real ground which is relied upon here is that the door was a door put up by the predecessors of the defendants, and that, although it was a dangerous door and was continued by the defendants, they ought not to be held liable in respect of this accident. Now, really that point means this: that there was no duty cast upon the defendants in respect of this dangerous door. It was sought to be said here that if there was a danger which was brought into existence at a time when the defendants' predecessors had the control of the school, there was no obligation or duty on the defendants to discover and remedy it. Before the decision in *Ching v. Surrey County Council* [supra, this page] it might have been argued that the duties which were taken over by the very terms of the statute by the defendants were only duties in respect of scholastic matters—teaching and the like—and not in respect of the physical condition of the school premises, but since the decision in *Ching's* case it is impossible to argue that now. Under these circumstances we only have to consider first whether there was any duty upon these defendants to discover the defects of the door and remedy the same. I think that there was, and that being so, there is nothing else to be discussed in the case. There is the most ample evidence that this door was a dangerous door, and therefore there was clearly an obligation on these defendants to take away a door that was dangerous and to substitute some safer access to the school room, and that duty they did not perform."

FOSTER

v.

FIDELITY SAFE DEPOSIT COMPANY.

Missouri Supreme Court—March 2, 1915.

264 Mo. 39; 174 S. W. 376.

Lost Property — Rights of Finder of Mislaid Property.

Plaintiff, who rented a safe deposit box, while using the customer's private room, dis-

covered an envelope lying on the corner of the desk containing bills to the amount of \$180, and delivered it to the officers of the company, and after diligent effort by them and failure to find the rightful owner, brought suit for its return. It is held that the money, when discovered by plaintiff, was in the possession of the deposit company, which owed a duty towards it, and which, as against plaintiff, was entitled to its possession and custody subject to the rights of the real owner.

[See note at end of this case.]

Rights of Finder of Lost Property.

The finder of lost property is entitled to possession against every one but the true owner.

[See 1 Ann. Cas. 1; 11 Ann. Cas. 700.]

Distinction between Lost and Mislaid Property.

Property to be "lost" must have been unintentionally or involuntarily parted with, and money discovered in the highway or on the ground or the floor will be considered as having been casually and unknowingly dropped, and thus lost; but where it is intentionally put down, as in a drawer or on a table, and the owner forgets where he left it and cannot find it, it is not in a legal sense lost.

[See note at end of this case.]

Rights of Parties as to Mislaid Property.

Where a person goes into another's public place of business to transact business with him and places his money on a table or desk and comes away, forgetting that he has done so, it is left in the possession of the owner, or within the protection of the house or place, and in the legal sense is not lost.

[See note at end of this case.]

Same.

Rev. St. 1909, § 8268 et seq., defining the duty of persons finding lost property, relates only to the duties of a finder of lost property who does not know the true owner, and provides a method for the acquisition of title, and is inapplicable to a safety deposit company obtaining constructive possession of money placed by a customer on a desk provided by the company for the use of its customers, and it is the lawful custodian of the money for the true owner, and must exercise due care to discover him and deliver the property to him.

[See note at end of this case.]

Appeal from Circuit Court, Jackson county: WILLIAMSON, Judge.

Action by A. W. Foster, plaintiff, against Fidelity Safe Deposit Company, defendant. Judgment for plaintiff. Appeal by defendant to Kansas City Court of Appeals. Judgment reversed and case certified to the Supreme Court. The facts are stated in the opinion. **REVERSED.**

Bowersock, Hall & Hook and Robert B. Fizzell for appellant.

Garnett & Garnett for respondent.

[93] BOND, J.—This case comes to this court on the dissent of one of the Judges of the Kansas City Court of Appeals to the decision of the majority of said court, and a request that it be certified here as being in conflict with two of our decisions. The facts and conclusions of law applicable to them are clearly and accurately stated in the following extracts from the decision of Judge Ellison, speaking for the Kansas City Court of Appeals:

"Defendant is a safe deposit company. It maintains individual safes or compartments which it rents to customers for the safe-keeping of money and other valuable articles. Each of these contains a box which may be withdrawn and in which the customer places his money, papers or other valuable articles. It requires two keys to open one of these safes, one carried by the customer and the other by the attendant in charge. Its place of business is on the same floor and in practically the same room occupied by a banking institution known as the Fidelity Trust Company; it being separated therefrom by a steel fence. A customer enters from the street through the bank, thence [94] through a steel gate operated by an attendant, thence into a vault through another gate opened by an attendant. Here he and the attendant open his compartment and he takes out his box and goes to a small private room containing a desk and chair. On the desk are some envelopes, blotters and a pair of scissors. He is admitted into this by an attendant, and when he leaves, the door closes and locks automatically; whereupon the attendant unlocks it and makes the room ready for the next occupant.

"Plaintiff had a compartment rented of defendant, and on the afternoon of April 13, 1906, he took his box therefrom in the usual way, was admitted into one of these private rooms by the attendant, where he examined some papers in his box, and as he was about to leave the room he noticed an envelope lying on the corner of the desk 'that seemed to be a little puffy.' He looked into it and found it contained \$180 in bills. Neither the envelope nor the money had any name or mark of identification. He took his box back to the vault, and supposing the money belonged to some of defendant's customers, handed it over to one of its officers to find the owner.

"Defendant keeps a record of the name of each customer and the day he takes his box from the vault, and it has written to each customer who took out his box on the day plaintiff discovered the money, and it has made diligent search for the rightful owner,

but up to the time of the trial (30th November, 1910) had not found him. After a time plaintiff demanded a return of the money, and defendant refusing to deliver it, this action followed, in which plaintiff had judgment.

"Neither plaintiff nor defendant claims to be the owner of the money. Plaintiff makes no pretence that the money was intentionally abandoned by the owner, and if he should be successful in this action, he must institute certain proceedings prescribed by sections [95] 8268-8273, Revised Statutes 1909, concerning lost property, whereupon, if no owner appears by the end of a year, he would become the owner by force of the law. The question for decision, therefore, is not who owns the money, but which of the parties is entitled to the possession of it; or, better stated, which is the proper custodian. Plaintiff, to sustain himself, must show that he found money which was lost. Property in the possession of another cannot be found, in the sense of the law of lost property, for the reason that it is not lost. Even if discovered in possession of the thief who stole it, the discoverer has not found it, for the reason that being in the thief's possession, it is not lost. If, therefore, the money in controversy was in the possession of defendant when discovered by plaintiff, plaintiff could not have found it, as that word is understood in the law of lost property. . . .

"Now in whose possession was the money when discovered by plaintiff? It could scarcely have been more in defendant's possession, unless it had been in the pocket of one of its officers. It was not only in defendant's place of business, but was in a separate apartment, from which the public was excluded; and, more than that, it was on a desk in a little private compartment kept under the immediate and constant guard and supervision of one of defendant's attendants. A roguish street urchin, if by possibility he had gained access to this place and discovered the envelope on the desk, would have had the same right to it that plaintiff had. Suppose the attendant had observed the boy as he found it; would he have been justified in letting him carry it off? Would it not have been his duty to assert defendant's right of possession and to take it from the boy? Would not the real owner, had he afterwards appeared, have had legal grounds of complaint against defendant, as his bailee, for gross neglect in allowing the money to be carried off in full view? It is no answer to this suggestion nor does it show any distinction [96] between the supposed case and the real one, to say that in the former the owner appeared and in the latter he had not. For, whatever legal right there was to possession of the money, came into existence the

moment plaintiff discovered it. If it was in defendant's possession then, it remained in its possession, and it should hold it for the owner, subject to such rights and duties as arise under the law of bailment or trusteeship. If plaintiff found the money, in the legal sense, then he was entitled to the possession, no matter whether the owner was afterwards ascertained or not. He was entitled to the possession as a step in his ultimate ownership, if no owner appeared after he had gone through with the statutory process as to lost property. If plaintiff was the finder of lost property, in the legal sense, he was under no duty nor obligation to leave it with defendant to ascertain the owner, or to say anything about it. . . .

"So, therefore, we repeat that the rights of each of the parties to this controversy were full grown the moment plaintiff discovered the money. The subsequently developed fact of no owner being found up to the date of this action, does not affect the status of either party as to the right of possession at that time. And the question on the supposed case recurs: Would it have been the duty of the attendant to have asserted a right in defendant to possession as against the urchin's claim of finding it? The answer is plain. If the money was lost, in a legal sense, defendant had no sort of possession of it and owed no duty towards it and had no right to question the honesty of the finder. But if defendant did owe a duty to it, then it was in its custody and plaintiff could have no claim as a finder; for it is not within the bounds of reason or good understanding to say that a thing is lost which is in the possession of another and under that other's protection.

[97] "Authority is abundant and uniform in support of defendant's possession and right of custody. Beginning first with our own State, we have the case of *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, an action for unlawful arrest and assault and battery. Defendant operated a summer place of amusement and refreshment in the open air, all parts of which were free and open to the public except a theatre which was fenced off from other parts. Plaintiff attended the theatre and then took a seat at one of the many tables scattered about the premises, where he found a pocketbook lying on the ground. In attempting to leave the pocketbook at the ticket office, which he found closed, he got into a dispute with some of the defendant's employees, who claimed to be the proper custodians of the pocketbook. and the assault he complained of was made. In the course of the opinion, the Supreme Court stated the law as to lost property in these words (*italics ours*): "Now, the authorities as a general rule hold that money

or other property voluntarily laid down and forgotten is not, in legal contemplation, lost, and that the owner of the shop, bank or other place where it is left is the proper custodian rather than the person who happens to discover it, as well also as to all other persons except the owner.'

"But plaintiff insists that this statement of the law is a mere *dictum*, made without careful consideration of the cases cited in support of it. Passing by any discussion with plaintiff as to whether the proposition is *dictum*, and passing by any question that, *dictum* or not, it is our duty to follow it, an examination of the authorities on the question leaves no doubt that what the court stated in *Hoagland v. Amusement Co.* has been recognized as the law wherever a like question has arisen. It seems to us that counsel treats too lightly the distinction made between conditions in which money or other valuables may be discovered by an alleged [98] finder. Property may be separated from the owner by being abandoned, or lost, or mislaid. In the first instance, it goes back into a state of nature, or, as is most commonly expressed, it returns to the common mass and belongs to the first finder, occupier or taker. In the second instance, to be lost, it must have been unintentionally or involuntarily parted with, in which case it is also an object which may be found and the finder is entitled to the possession against every one but the true owner. But, if it is intentionally put down, it is not lost in a legal sense, though the owner may not remember where he left it, and cannot find it. For 'the loss of goods, in legal and common intentment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner, as to their locality at any given moment.' [*Lawrence v. State*, 1 *Humph. Tenn.* 228.] From these uniformly recognized rules of law on the subject of lost property has naturally sprung the importance of the condition or situation in which property is alleged to have been found. And the law in this instance, as in so many others, founds its rule upon the natural action of men and not upon a possibility. Thus, articles of property may be such and circumstances may be such as to make clear they have been voluntarily abandoned by the owner. But normally, men do not voluntarily abandon their money. Therefore, if money be discovered in the highway, or on the ground, or on the floor, it will not be considered as abandoned, nor will it be considered as placed there voluntarily, for that would be unnatural, but as having been lost—that is, casually and unknowingly dropped. But if it be discovered in a drawer, or on a table, it will be considered as having been placed there purposely by the owner,

and it is not classed by the law as lost property. The circumstance of it being afterwards forgotten does not go back and characterize the original act.

[99] "Therefore if a person goes into another's public place to transact business with him and places his money on a table or desk and comes away forgetting he had done so, he has left it in the possession of the owner, or, as is expressed, he has left it within the protection of the house. This rule has been stated and conceded to be established law, in a number of cases where the situation of the property was such as to make it lost property. We will first refer to these. A case referred to with much frequency is that of *Bridges v. Hawkesworth*, 15 *Jur.* 1079, 7 *Eng. L. & Eq.* 424. There the plaintiff, being in the defendant's public shop, found money on the floor, and it was held he was entitled to the possession as finder. The court saying that 'the notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there.' All the cases (we have not found an exception) which recognize the right of the finder of property in a public house or place of business, recognize the rule that if the money is discovered on a table, or desk, or in a drawer, it is not lost in a legal sense, but is within the possession and protection of the owner of the house.

"Thus in *Hamaker v. Blanchard*, 90 *Pa. St.* 377, a servant found money on the floor of one of the public parlors of a hotel, and it was held that she was entitled to it against every one but the true owner, the court, however, stating: 'But property is not lost, in the sense of the rule, if it was intentionally laid on a table, counter or other place, by the owner who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building.' The same distinction is made in the instance of money having been left in an old safe and thence had slipped or been accidentally [100] shoved in a crevice in the safe and thus become hidden. [*Durfee v. Jones*, 11 *R. I.* 588.] And where money was found in an envelope on the floor of a paper mill, which manufactured paper from old paper, the owner of the mill claiming that he had bought the money with the envelope. [*Bowen v. Sullivan*, 62 *Ind.* 281.]

"But the rule stated by the Supreme Court in the *Hoagland* case does not depend for support alone on mere recognition, as in the foregoing cases. It has been applied uniformly in cases which are like the one at bar.

Thus in *McAvoy v. Medina*, 11 Allen (Mass.) 548, the court said: 'But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe-keeping of the same until the owner should call for it.' And in *Kincaid v. Eaton*, 98 Mass. 139, the court went the length of holding that even where the owner left his pocket-book on a desk in a bank, and, supposing he had lost it, advertised a reward to anyone who found it, he who discovered it on the desk was not entitled to the reward as it had not been lost and was not found. The court said that: 'To discover an article voluntarily laid down by the owner within a banking house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article. The occupants of the banking house, and not the plaintiff, were the proper depositaries of an article so left. The plaintiff has not established a legal [101] right to the reward according to the terms by which it was offered, and therefore cannot retain his verdict.'

'The case of *Loucks v. Gallogly*, 1 Misc. 22, 23 N. Y. S. 126, bears great likeness to the one before us. There the plaintiff discovered fifty dollars in bills on a desk in the National Exchange Bank of Albany, and handed it to the bank teller to hold for the owner, and none made claim. Two years passed and plaintiff sued the teller. The court said that: 'It has been held that in order to constitute legal losing the thing must have been actually lost by the owner, and not merely mislaid; that is, he must not voluntarily and purposely have laid it away in a certain place for a time, with the intention of retaking it, and then have forgotten where he had placed it; but it must have involuntarily and accidentally, as respects the owner, gotten out of his possession.'

'The case of *Deaderick v. Olds*, 86 Tenn. 14, concerned the right of possession of a lost log. It seems that defendant found it stranded upon rocks in a stream, and that he turned it loose into the stream to float down to his boom below; but before it reached there the boom broke and the log floated onto and lodged upon an island belonging to plaintiff. Plaintiff claimed it as a lost log

and as owner of the land upon which it lodged. Defendant claimed it as the original finder and took it from the island; whereupon plaintiff brought replevin. The court, in the course of an opinion by Justice Lurton, now of the United States Supreme Court, said, in cases of alleged lost property, that: 'It is essential, however, in such cases that the property must be *found*; that is, it must, at the time when the finder came upon it, have been in such a situation as to clearly indicate that it was *lost*, and not voluntarily placed by the owner where it was found, by carelessness or forgetfulness. It was evidently laid where it was found, it then becomes the duty of the [102] owner of the premises to keep the property for the owner, as in such cases he is treated as a quasi-bailee, and he may maintain trover therefor against the finder; as if a pocketbook is found upon a desk or counter in a store or bank, the presumption is that the owner placed it there and forgot it.'

'A case to which we have already referred (*Lawrence v. State*, 1 Humph. (Tenn.) 228) is a leading one on this subject. At the common law, lost property could not be the subject of larceny and in that case *Lawrence* insisted the money he was accused of stealing was lost. The circumstances were that he was a barber and found a pocketbook containing \$480 in money, on a table in his shop. The court denied his defense, and among other things, said that: 'To place a pocketbook upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities speak of lost property.'

'The mind refuses consent to the proposition that one may go into another's house, whether business or residence, and take away anything he discovers there which does not belong to the owner. If one visits an acquaintance socially at his home, and comes away leaving some article on a table, he has left it in the possession of such acquaintance, and it seems absurd to say that another visitor would have a right to take the property from the house under the claim that he had found it.'

We approve and adopt the foregoing opinion of the Kansas City Court of Appeals, only adding thereto a word as to the statutes of this State referring to finders of lost property. [R. S. 1909, sec. 8268 et seq.] These provisions of the statute relate to the specific duties of the finder of lost personal property who does not know the true owner and provide a statutory method for the acquisition of title. They are inapplicable to the facts in this case, because the property here was *not* lost. It was merely left in the constructive [103] possession of the defendant—seemingly placed by the owner on the

desk provided by the Safety Deposit Company for the uses of its customers, and by inattention or forgetfulness not replaced in the box from which it had been taken when it was laid on the desk. This is the fair, natural and logical inference afforded by the admitted facts and testimony in this case, and demonstrates that the money left was legally as much in the possession of the defendant thereafter as it was before being removed from the safe deposit box. Hence, the plaintiff only did his duty when he placed it in the actual possession of defendant. The attitude of the defendant is therefore that of a lawful custodian of the money for the benefit of the true owner. This trust it cannot repudiate, and it should exercise due care to discover the real owner and deliver the property to him. We do not understand that appellant claims any other rights in the matter, and what we have said is simply to impress the duty cast on it by law to adopt every means suggested by prudence, intelligence, and good faith to restore this money to its rightful owner.

The judgment of the circuit court is reversed. All concur.

NOTE.

Rights of Parties with Respect to Mislaid Property as Distinguished from Lost Property.

Distinction between Mislaid and Lost Property, 803.

Rights of Parties Generally, 804.

Larceny by Finder, 806.

Distinction between Mislaid and Lost Property.

According to the decisions of both English and American courts property is mislaid when the owner thereof intentionally so places it that he can revert to it and thereafter forgets it; property is lost when the owner accidentally parts with it and does not at any time know where to find it. *Reg. v. West*, 6 Cox C. C. (Eng.) 415; *McAvoy v. Medina*, 11 Allen (Mass.) 548, 87 Am. Dec. 733; *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *Loucks v. Gallogly*, 1 Misc. 22, 23 N. Y. S. 126; *Commercial Bank v. Pleasants*, 6 Whart. (Pa.) 375; *Severn v. Yoran*, 16 Ore. 269, 20 Pac. 100, 8 Am. St. Rep. 293; *Lawrence v. State*, 1 Humph. (Tenn.) 223, 34 Am. Dec. 644. See also the reported case, and the cases cited in the following subdivision of this note.

In *Hamaker v. Blanchard*, 90 Pa. St. 377, 35 Am. Rep. 664, the court said: "But property is not lost, in the sense of the rule,

if it was intentionally laid on a table, counter, or other place, by the owner, who forgot to take it away."

In *Reg. v. West*, 6 Cox C. C. (Eng.) 415, it was said: "The distinction is quite clear between property mislaid, that is, put down and left in a place to which the owner would be likely to return for it, and property lost. Now in this case, the purse could not be treated as lost; the prisoner must have known that in all probability it would occur to the owner where he had left it, and that he would return for it."

In *McAvoy v. Medina*, 11 Allen (Mass.) 548, 87 Am. Dec. 733, the court said: "But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it."

In *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142, it was said: "To discover an article voluntarily laid down by the owner within a banking house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article."

So in *Loucks v. Gallogly*, 1 Misc. 22, 23 N. Y. S. 126, the court said: "But it is held that articles left by strangers or customers in a shop or other place of business, where it is probable they will return and claim them, and where the situation of the articles indicates that they were voluntarily placed where found, and inadvertently left or forgotten, are not considered as lost. . . . The question here is whether the money found by plaintiff was 'lost property,' in the legal sense of the term. It has been held that in order to constitute legal losing the thing must have been actually lost by the owner, and not merely mislaid; that is, he must not voluntarily and purposely have laid it away in a certain place for a time, with the intention of retaking it, and then have forgotten where he had placed it; but it must have involuntarily and accidentally, as respects the owner, gotten out of his possession. . . .

As to the roll of bills in question found by plaintiff on the banking house desk (one at which persons stand to write) what, in the absence of any direct proof, are we to conclude, as an inference of fact, from the situation of the money when discovered by him? Is not the inference stronger and more reasonable than any other that it was consciously and voluntarily placed there by the owner, while temporarily engaged, writing or otherwise, at the desk, and then inadvertently or thoughtlessly left? Does not the fact that the money was discovered on the desk, and not on the floor, indicate that it had been

voluntarily placed there, with the intention of retaking it, rather than that it had unconsciously and accidentally fallen from the person of the owner? If it had been found on the floor, as in the cases referred to, where a customer found a purse on the shop floor, and where the servant in a hotel found a roll of bank notes on the floor of the public parlor, that fact would lead to the conclusion that it had been involuntarily dropped by the owner, and hence lost. . . . The authorities referred to cannot be ignored, and, in view of the reasonableness of the rule that articles thus voluntarily placed in a store, office, shop, or other similar place, and forgotten by the owner, are left, not lost, and that the proprietor of the premises may hold them for the owner, thus the better protecting the owner or loser, we must hold that plaintiff has not established a legal right to the money in question."

In the leading case of *Commercial Bank v. Pleasant*, 6 Whart. (Pa.) 375, the court said: "The word lost, like most other words, has a different signification according to the other words in connection with which it is used, and the subject to which it is applied. It is often used so that it is correctly applied on one state of facts, and not correctly applied in a different state of facts. Most men, who have transacted much business, have at times, looked for a paper, and used the expression that it was lost; if out of the person's possession, and not in the possession of some other to whom he gave it, he will say it is lost; if he afterwards finds it in his own possession or that of some person to whom it was properly given, or in some place where it was properly put, he says it was not lost, it was overlooked or mislaid. An article in the possession of the owner, or of a person to whom he gave it, or in a place where he or that person put it, and where it remains safely, is not lost. So the word recover has its meaning affected by circumstances under which it is used, or the connection in which it is used. Evidently, the reward was offered under the impression that Mr. Cist had dropped the package, or that it had been taken out of his possession without his knowledge, in which case the words lost and recover would be proper. Mr. Cist was the agent of the bank. If he or his wife, when he got home, had found the package in his trunk, enclosed in another package of papers, or enveloped in some article of clothing, Mr. Cist being an honest man, it would never have been lost—only mislaid or overlooked. If, by some mistake, William S. Hatch, instead of giving this package to Mr. Cist, had put it in the safe at Cincinnati, no one would have known where it was, but it would not have been lost, though it would have been mislaid, and no one in the bank have known where it was for some weeks or

months; and neither Mr. Hatch nor any officer of the bank could have become entitled to the reward by seeing it; for it had not been lost, it was not recovered; and, as it had been in the possession and was in the possession of Mr. Hatch, no one would deliver it to him, in the fair import of the terms, 'on the delivery of it to William S. Hatch,' etc."

In *Sovern v. Yoran*, 16 Ore. 269, 20 Pac. 100, 8 Am. St. Rep. 293, it appeared that two boys discovered two packages of money concealed under a floor of a building owned by the defendant. The defendant had purchased this building from the plaintiff, who was administrator of the property of one Johanna Goodchild. The boys delivered the money to the defendant, who, after complying with the requirements of a statute relating to found property, retained half of the sum. It was held that the money was not lost property. The court said: "Money or goods, therefore, when found, although the owner is unknown, which has been hidden in the earth by him for safe-keeping, is not property of which he has involuntarily parted with the possession, or lost property, to which the statute applies; and in such case, if the finder undertakes to treat or deal with it as lost property his acts thereby will not impair the title of the true owner or defeat his right to recover it."

In *Lawrence v. State*, 1 Humph. (Tenn.) 228, it was said: "The loss of goods, in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner, as to their locality at any given moment. If I place my watch or pocketbook under my pillow in a bed chamber, or upon a table or bureau, I may leave them behind me indeed, but if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully and voluntarily in the place you intend and then forget it, it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. To place a pocketbook, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property."

Rights of Parties Generally.

Unlike the finder of lost property (see the notes to *Ferguson v. Ray*, 1 Ann. Cas. 1, and *Kuykendall v. Fisher*, 11 Ann. Cas. 706) the finder of mislaid property acquires no right to its possession. The right of temporary possession until the discovery of the owner is in the owner or occupant of the premises where the property is found. *Heddlie v. Hamilton Bank*, 17 British Columbia 306, 19

West. L. Rep. 897, 5 Dominion L. Rep. 11, 2 West. W. Rep. 560, 21 West. L. Rep. 514; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600; *McAvoy v. Medina*, 11 Allen (Mass.) 548, 87 Am. Dec. 733; *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142; *Loucks v. Gallogly*, 1 Misc. 22, 23 N. Y. S. 126; *Commercial Bank v. Pleasants*, 6 Whart. (Pa.) 375. See also *New York, etc. R. Co. v. Haws*, 56 N. Y. 175; *Hamaker v. Blanchard*, 90 Pa. St. 379, 35 Am. Rep. 664; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528.

In *Hogland v. Forest Park Highland Amusement Co.* 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740, the court said: "Now, the authorities as a general rule hold that money or other property voluntarily laid down and forgotten is not in legal contemplation lost, and that the owner of the shop, bank or other place where it is left is the proper custodian rather than the person who happens to discover it, as well also as to all other persons except the owner. [*State v. McCann*, 19 Mo. 249; *Lawrence v. State*, 1 Humph. (Tenn.) 228; *McAvoy v. Medina*, 11 Allen (Mass.) 549; *Kincaid v. Eaton*, 98 Mass. 139.] The question then was as to who was the proper custodian of the pocketbook in question, the plaintiff or defendant? It is clear, we think, under the evidence, that the pocketbook was not laid down and forgotten, for certainly it would not have been left intentionally upon the ground under the table, but was dropped there, or in some other way came there accidentally, and was within contemplation of law lost, when plaintiff found it."

In *Heddle v. Hamilton Bank*, 19 West. L. Rep. 897, 21 West. W. Rep. 514, it appeared that the plaintiff, a clerk in a bank, discovered a wallet with eight hundred dollars on a desk in the bank. The plaintiff delivered the money to the defendant bank for the purpose of holding it for the owner. The owner never appeared. Thereafter the plaintiff claimed the money as finder thereof. It was held that he was not entitled to it. The court said: "The English courts, as well as the American courts, distinguish between things lost and things mislaid or forgotten: See *Cartwright v. Green*, 8 Ves. Jr. 405, and *Merry v. Green*, 7 M. & W. 623; and, having regard to this distinction, and the evidence and circumstances detailed in the case at bar, I cannot find that the wallet with its contents can be designated lost property so as to give the plaintiff possession thereto, against all the world except the rightful owner. The location where the wallet was discovered evidenced that it was not involuntarily dropped, but placed there intentionally, by some person and under such circumstances, as I understand the law, that the discoverer of the wallet has no right

of possession as against the bank within whose premises it was found."

In *McAvoy v. Medina*, 11 Allen (Mass.) 548, 87 Am. Dec. 733, it appeared that the plaintiff discovered a pocketbook containing money which was left by a third person on a table in the defendant's barber shop. It was held that as between the plaintiff and the defendant the former had no right to the pocketbook. The court said: "But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe-keeping of the same until the owner should call for it."

In *New York, etc. R. Co. v. Haws*, 56 N. Y. 175, it appeared that the defendant found a package of money in one of the plaintiff's cars. He gave this money to the plaintiff's treasurer with instructions to keep the same until the owner appeared. Sometime thereafter the finder brought suit against the plaintiff for the recovery of the money and later the rightful owner appeared and also sued the plaintiff for it. In discussing the rights of the parties the court said: "It having been shown that Mallady accidentally lost the money in question, the title thereto remained in him. Haws, by finding, acquired no title, and, having none, conferred none upon the conductor of the train, to whom he delivered it for the purpose of restoring it to the owner if called for; and the conductor by delivering the same to the treasurer of the plaintiff for the same purpose conferred no title to it. When the plaintiff received the money, therefore, it was the property of Mallady and he had the right to call upon the plaintiff for it; and upon furnishing reasonable proof of his title, enforce its delivery by the plaintiff to him. While the money remained in the hands of the plaintiff it could not defend against a claim therefore made by Mallady, upon the ground that Haws had found it in its car and had delivered it to the conductor, from whom the plaintiff received it. Mallady never having parted with his title and no one having ever acquired any as against him, had the right to demand and recover it from any one in whose possession he found it. After the recovery of the verdict, Mallady demanded the money of the plaintiff. It was still in its

hands. A refusal to restore it to him would have made the plaintiff liable to him for the amount. Payment of the verdict recovered by Haws, and the costs of the action to him, by the plaintiff, would have been no defense against this liability. . . . Haws, under the facts found, never had any title to the money. The only claim he could set up under these facts was that of a mere custodian for Mallady, until he appeared and interposed his claim."

In *Commercial Bank v. Pleasants*, 6 Whart. (Pa.) 375, it appeared that one Cist, an agent of the Commercial Bank of Cincinnati, had in his possession a package containing \$100,000. He placed this package in a fire proof vault in the office of one Macalister. Thereafter Cist made arrangements with a bank in Philadelphia for the deposit of the money. When he started for the bank he thought that he had the money with him but later discovered that he did not have it and thought that he had lost it. He communicated with the officers of the Bank of Cincinnati, who offered a reward of \$10,000 to the finder of the package. Pleasants, who was an employee of Macalister, discovered the package in a corner of the fire proof vault, where it was placed by Cist, and claimed the reward. It was held that he was not entitled to it.

Larceny by Finder.

If a person who discovers mislaid property appropriates the same to his own use he is guilty of larceny. *Reg. v. West, Dears.* (Eng.) 402, 3 C. L. R. 86, 24 L. J. M. C. 4, 18 Jur. 1031, 3 W. R. 21, 6 Cox C. C. 415; *Rex v. Wynne*, 1 Leach C. C. (Eng.) 413; *Reg. v. Pierce*, 6 Cox C. C. (Eng.) 117; *Reg. v. Kerr*, 8 C. & P. 176, 34 E. C. L. 341; *State v. Cummings*, 33 Conn. 260, 89 Am. Dec. 208; *State v. Courtsol*, 89 Conn. 564, 94 Atl. 973, L.R.A.1916A 465; *State v. McCann*, 19 Mo. 249; *People v. McGarren*, 17 Wend. (N. Y.) 460; *State v. Farrow*, 61 N. C. 161, 93 Am. Dec. 585; *Lawrence v. State*, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644.

In *Reg. v. West*, 6 Cox C. C. (Eng.) 415, it appeared that the prosecuting witness, after making a purchase, left his purse on the defendant's stall. The defendant picked it up and appropriated the contents to her own use. It was held that she was guilty of larceny.

In *State v. Cummings*, 33 Conn. 260, it appeared that the defendant, a servant, took a diamond ring from a wash tub into which the owner of the jewel accidentally dropped it and appropriated the same to her own use. It was held that the ring was not lost property and that, therefore, the defendant was guilty of larceny. The court said:

"What then are the facts as claimed to be proved by the state. They are, that the owner of the ring left it by accident in the tub where she had been washing, that knowing where it was she went for it in ten or fifteen minutes, that in the meantime it had been taken by the prisoner out of the tub, that she knew whose it was and denied the taking of it, and concealed it and brought it to New Haven as her own, and offered it for sale. Under these circumstances it is very apparent that, except for the act of the prisoner, there was no loss of the ring, any more than if the owner had left it on her table for a temporary purpose."

In *State v. Courtsol*, 89 Conn. 564, it appeared that the prosecuting witness while riding in a street car left a package of money on the bench on which he sat. After he left the car the defendant, who was also a passenger in the same car, picked up the package and appropriated the money to her own use. It was held that she was guilty of larceny. The court said: "There was no evidence to support counsel's claim that the package was lost. The evidence shows that it was left upon a public conveyance by its owner upon a bench or seat where he had placed it. He remembered where he left it, and speedily sought it, and found that the accused had taken it. It is well settled that property so left is not lost, but is mislaid property. The owner is treated as still constructively in possession of it, although its custody may be in another in whose shop or car it has been left. 2 Wharton on Criminal Law (11th ed.) sec. 1139; 2 Bishop's New Criminal Law, §§ 878, 879; *People v. McGarren*, 17 Wend. (N. Y.) 460, 462; *State v. McCann*, 19 Mo. 249, 254. The accused herself did not claim that she supposed the property had been lost. She took it up, believing it to be her own package containing purchases previously made by her. When she discovered that it was not, she knew that it was a package left upon the car by some person who undoubtedly would call upon the trolley company for it. The court, therefore, properly refused to give an instruction which would give the jury to understand that upon the evidence they might find that the package was lost, and that the accused when she picked it up honestly believed that it was a lost package. As the facts were undisputed, the court was correct in giving the instruction which the accused complained of in her sixth assignment of error, namely: 'This case that you have before you is not a case of lost property, technically speaking, that is, actually lost or abandoned; but is a case, as the books and cases describe it, of property that is mislaid.' The instruction complained of in the seventh reason of appeal was also correct. As already stated, the con-

structive possession of mislaid property remains in the owner. The finder of such property, knowing it to be mislaid or left by mistake, if he takes it with the felonious intent to appropriate it to his own use and thus deprive the owner of it, is guilty of larceny. This would constitute a felonious taking from the possession of another of property belonging to him. This was the substance of the instruction complained of. The language which followed explained the distinction between the finding in such a case and one where the property has been lost."

In *State v. Brick*, 2 Har. (Del.) 530, it appeared that the defendant came into possession of a parcel, which was addressed to a Mr. McClelland, containing a number of bank notes. He appropriated this money to his own use although he knew or could have found out who the owner of the notes was. It was held that he was guilty of larceny. In *People v. McGarren*, 17 Wend. (N. Y.) 460, it appeared that the prosecuting witness went into the defendant's store and left his whip. The defendant discovered the whip and concealed it. It was held that he was not a finder of lost property, and therefore was guilty of larceny in appropriating the whip to his own use. The court said: "It is insisted that the whip was in the possession of the defendant by finding, and could not be the subject of larceny by him. In *The People v. Anderson*, 14 Johns. 294, the defendant was the bona fide finder of a trunk which had been lost from a stage coach in the highway; and it was held that no subsequent act, in concealing or appropriating the trunk to his own use, would make it a case of larceny. The decision proceeded on the ground that the property was lost by the owner, so that it no longer remained, either actually or constructively, in his possession, and that it afterwards came lawfully to the hands of the defendant by finding. But in this case the whip was not lost. It remained where the owner had placed it, until it was taken up and concealed by the defendant. When Northrop left the store his mind was upon another matter, and the whip was forgotten for the moment; but he knew where he had placed it, and it was not lost to him until it was removed and converted by the defendant. . . . The defendant was not, in any proper sense of the terms, the finder of lost property. The fact that Northrop went out of the store and was absent some fifteen minutes before he returned to take the property, did not change the possession. In judgment of law, the possession still remained in him. There was no error in the charge to the jury, and the judgment must be affirmed."

In *State v. Farrow*, 61 N. C. 161, 93 Am. Dec. 585, it appeared that the prosecuting

witness placed a bucket of peas in a cart, which he mistook to be one belonging to his friend. The defendant took the bucket, covered the peas with lettuce and beets, and endeavored to appropriate the bucket with its contents to his own use. It was held that he was guilty of larceny.

In *Lawrence v. State*, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644, it appeared that the prosecuting witness left his pocketbook containing four hundred and eighty dollars on a table in a barber shop. After the prosecutor left, the barber picked up the purse and appropriated the money to his own use. It was held that he was guilty of larceny.

For a discussion of larceny by the finder of lost property, see the note to *Brewer v. State*, 20 Ann. Cas. 1378. For a discussion of the appropriation of valuable property found in property purchased as larceny, see the note to *People v. Hoban*, 16 Ann. Cas. 226.

BARRETT ET AL

v.

STATE.

New York Court of Appeals—April 17, 1917.

220 N. Y. 423; 116 N. E. 99.

Animals — Wild Animals — Liability of State for Injury to Property.

The state has a general right to protect wild animals, their preservation being a matter of public interest, and no one can complain of the incidental injuries that may result from such protection.

[See note at end of this case.]

Constitutional Law — Police Power — Prerequisites to Exercise.

The state may exercise the police power whenever the public interests demand it, but, to justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals.

Scope of Police Power.

The police power is not to be limited to guarding merely the physical interests of the citizen, and his moral, intellectual, and spiritual needs may also be considered, as in preserving wild animals.

Animals — Protection of Wild Animals — Validity of Statute.

Laws 1900, c. 20, prohibiting the killing of beaver, and Laws 1904, c. 674, § 1, providing that no person shall molest or disturb

any wild beaver, nor the dams, houses, homes, or abiding places of the same are not unconstitutional; the prohibition of the destruction of dams and houses being an apt means to the desired end of protecting the beaver.

Liability for Injury to Property.

If statutes protecting beaver and prohibiting the destruction of their dams and houses had been unconstitutional, the state would not have been liable to persons whose timber was injured by beaver, since, the statute being void, no one need obey it.

[See note at end of this case.]

Validity of Act Protecting Beaver.

The state may provide for the increase of beaver by removing colonies to a more favorable locality, or by replacing those destroyed by fresh importations, as well as by prohibiting the destruction of animals already in the state.

Liability of Keeper of Wild Animals.

One who keeps wild animals in captivity must see to it at his peril that they do no damage to others.

[See note at end of this case.]

Same.

The state is not liable for damage to timber of private individuals committed by beavers purchased and freed in the Adirondacks by the forest, fish, and game commission under Laws 1904, c. 674.

[See note at end of this case.]

Barrett v. State, 173 N. Y. App. Div. 986, reversed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Claim by William G. Barrett et al., against State of New York. Award in favor of claimants by Board of Claims. Award affirmed by Appellate Division of Supreme Court. State appeals. The facts are stated in the opinion. **REVERSED.**

Egburt E. Woodbury and Edmund H. Lewis for appellant.

Charles C. Fenno and Frederick T. Burns for respondents.

[425] **ANDREWS, J.**—At one time beaver were very numerous in this state. So important were they commercially that they were represented upon the seal of the New Netherlands and upon that of the colony as well as upon the seals of New Amsterdam and of New York.

Because of their value they were relentlessly killed, and by the year 1900 they were practically exterminated. But some fifteen animals were left, scattered through the southern portion of Franklin county.

In that year the legislature undertook to afford them complete protection, and there has been no open season for beaver since the enactment of chapter 20 of the Laws of 1900.

In 1904 it was further provided that "No person shall molest or disturb any wild beaver or the dams, houses, homes or abiding places of same." (Laws 1904, ch. 674, section 1.) This is still the law, although in 1912 the forest, fish and game commission was authorized to permit protected animals which had become destructive to public or private property to be taken and disposed of. (Laws 1912, ch. 318.)

By the act of 1904 \$500 was appropriated for the purchase of wild beaver to restock the Adirondacks, and in [426] 1906 \$1,000 more was appropriated for the same purpose. The commission, after purchasing the animals, was authorized to liberate them.

Under this authority twenty-one beaver have been purchased and freed by the commission. Of these four were placed upon Eagle creek, an inlet of the Fourth Lake of the Fulton Chain. There they seem to have remained and increased.

Beaver are naturally destructive to certain kinds of forest trees. During the fall and winter they live upon the bark of the twigs and smaller branches of poplar, birch and alder. To obtain a supply they fell even trees of large size, cut the smaller branches into suitable lengths and pull or float them to their houses. All this it must be assumed was known by the legislature as early as 1900.

The claimants own a valuable tract of woodland upon Fourth Lake bounded in the rear by Eagle creek. The land was held by them for building sites and was suitable for that purpose. Much of its attractiveness depended upon the forest grown upon it. In this forest were a number of poplar trees. In 1912 and during two or three years prior thereto 198 of these poplars were felled by beaver. Others were girdled and destroyed. The Board of Claims has found, upon evidence that fairly justifies the inference, that this destruction was caused by the four beaver liberated on Eagle creek and their descendants, and that the claimants have been damaged in the sum of \$1,900. An award was made to them for that sum and this award has been affirmed by the Appellate Division.

To sustain it the respondents rely upon three propositions. It is said, *first*, that the state may not protect such an animal as the beaver which is known to be destructive; *second*, that the provision of the law of 1904 with regard to the molestation of beaver prohibits the claimants from protecting their property and is, therefore, an unreasonable exercise of the police power; and, *third*, [427] that the state was in actual physical possession of the beaver placed on Eagle creek and that its act in freeing them, knowing their natural propensity to destroy trees,

makes the state liable for the damage done by them.

We cannot agree with either of these propositions.

As to the first, the general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed. As early as 1705 New York passed such an act as to deer. (Colonial Laws, vol. 1, p. 585.) A series of statutes has followed protecting more or less completely game, birds and fish.

"The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds.

. . . The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body." (Phelps v. Racey, 60 N. Y. 10, 14, 19 Am. Rep. 140.)

Wherever protection is accorded harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large and no one can complain of the incidental injuries that may result.

It is sought to draw a distinction between such animals and birds as have ordinarily received protection and beaver on the ground that the latter are unusually [428] destructive and that to preserve them is an unreasonable exercise of the power of the state.

The state may exercise the police power "wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in behalf of the public, it must appear, *first*, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, *second*, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." (Lawton v. Steele, 152 U. S. 133, 136, 14 S. Ct. 499, 38 U. S. (L. ed.) 385.)

The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved, not for its use but for its beauty.

The same thing may be said of the beaver. They are one of the most valuable of the fur-bearing animals of the state. They may be used for food. But apart from these considerations their habits and customs, their curious instincts and intelligence place them in a class by themselves. Observation of the animals at work or play is a source of never-failing interest and instruction. If they are to be preserved experience has taught us that protection is required. If they cause more damage than deer or moose, the degree of the mischief done by them is not so much greater or so different as to require the application of a special rule. If the preservation of the former does not unduly oppress individuals, neither does the latter.

In the determination of what is a reasonable exercise of the powers of the government, the acts of other governments under similar circumstances have some bearing. [429] In Wyoming, Utah, North Dakota, Wisconsin, Maine, Colorado and Vermont beaver are absolutely protected. In Michigan they are protected except between November 1st and May 15th of each year. In South Dakota except between November 15th and April 2d. In Quebec for a number of years there was no open season. Lately there has been an open season for a short time in the autumn.

We, therefore, reach the conclusion that in protecting beaver the legislature did not exceed its powers. Nor did it so do in prohibiting their molestation. It is possible that were the interpretation given by the respondents to this section right a different result might follow. If the claimants, finding beaver destroying their property, might not drive them away, then possibly their rights would be infringed. In Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339, it was said in an elaborate opinion, although this question we do not decide, that a farmer might shoot mink even in the closed season should he find them threatening his geese.

But such an interpretation is too rigid and narrow. The claimants might have fenced their land without violation of the statute. They might have driven the beaver away, were they injuring their property. The prohibition against disturbing dams or houses built on or adjoining watercourses is no greater or different exercise of power from that assumed by the legislature when it prohibits the destruction of the nests and eggs of wild birds even when the latter are found upon private property.

The object is to protect the beaver. That object as we decide is within the power of the state. The destruction of dams and houses will result in driving away the beaver. The prohibition of such acts, being an apt means to the end desired, is not so unreasonable as to be beyond the legislative power.

We hold, therefore, that the acts referred to are constitutional. But had we reached a different conclusion the respondents would not be aided. We know of no [430] principle of law under which the state becomes liable because of the adoption of an unconstitutional statute. Such a statute is no protection to officers assuming to proceed under its authority. The state itself, if it permits such a claim to be enforced against it, may become liable for what they do. But the statute itself is void. No one need obey it. If no affirmative act is done under its supposed authority neither the state nor its officers are liable, because the citizen chooses to obey where he need not have done so.

Somewhat different considerations apply to the act of the state in purchasing and liberating beaver.

The attempt to introduce life into a new environment does not always result happily. The rabbit in Australia—the mongoose in the West Indies have become pests. The English sparrow is no longer welcome. Certain of our most troublesome weeds are foreign flowers.

Yet governments have made such experiments in the belief that the public good would be promoted. Sometimes they have been mistaken. Again the attempt has succeeded. The English pheasant is a valuable addition to our stock of birds. But whether a success or failure the attempt is well within governmental powers.

If this is so with regard to foreign life, still more is it true with regard to animals native to the state, still existing here, when the intent is to increase the stock upon what the Constitution declares shall remain forever wild forest lands. If the state may provide for the increase of beaver by prohibiting their destruction it is difficult to see why it may not attain the same result by removing colonies to a more favorable locality or by replacing those destroyed by fresh importations.

Nor are the cases cited by the respondents controlling. It is true that one who keeps wild animals in captivity must see to it at his peril that they do no damage to others. But it is not true that whenever an individual is liable for a certain act the state is liable for the same act. [431] In liberating these beaver the state was acting as a government. As a trustee for the people and as their representative it was doing what it thought best for the interests of the public. Under such circumstances we can-

not hold that the rule of such cases as those cited is applicable.

We reach the conclusion that no recovery can be had under this claim. It is assumed, both by the respondents and by the appellant, that the Board of Claims had jurisdiction to determine the questions involved. That we do not discuss.

The judgment of the Appellate Division and the determination of the Board of Claims must be reversed and the claim dismissed, with costs in Appellate Division and in this court.

Hiscock, Ch. J., Chase, Hogan, Pound, McLaughlin and Crane, JJ., concur.

Judgment reversed, etc.

NOTE.

The reported case is apparently a unique decision, involving the liability of a state for depredations on private property by certain beaver purchased by the state and liberated in its forest reserve. It is held that the rule making the owner of wild animals liable for damage done by them has no application to the state, and that no liability arises from the fact that the state protects from molestation wild animals which are prone to injure property. The court also holds that a statute protecting animals of that kind is valid, the relative advantage and disadvantage to the public being purely a legislative question. The liability for injuries done by wild animals is discussed in the notes to *Molloy v. Starin*, 14 Ann. Cas. 57; *Connor v. Princess Theatre*, Ann. Cas. 1914A 762; and *Crowley v. Groonell*, 87 Am. St. Rep. 690. As to the right of property in a wild animal, see the note to *Graves v. Dunlap*, Ann. Cas. 1917B 944. The law of bees is treated in the note to *Brown v. Eckes*, Ann. Cas. 1917B 981. See also the note to *Parsons v. Manser*, 97 Am. St. Rep. 283.

BARKER ET AL.

v.

STATE FISH COMMISSION.

Washington Supreme Court—November 10, 1915.

88 Wash. 78; 152 Pac. 537.

Fish and Game — Regulation of Method of Taking Fish — Prohibiting Certain Nets.

Laws 1915, p. 80, § 36, providing that it shall be unlawful to operate in any of the waters of Puget Sound any purse seine, drag

seine, or other like seine or net of a greater length than 500 feet with meshes less than 2½ inches stretch measure, and after January, 1916, 3 inches stretch measure, and that it shall also be unlawful to operate any gill net of a greater length than 500 feet with meshes less than 5 inches stretch measure, does not, because it permits the use of purse and drag seines of over 500 feet in length with a smaller mesh than the mesh required with respect to gill nets of the same length, deny to gill net fishermen the equal protection of the laws, in violation of Const. U. S. Amend. 14, or grant to purse and drag seine fishermen privileges and immunities which it withholds from gill net fishermen, in violation of Const. Wash. art. 1, § 12, as it discriminates only as to appliances used, and permits every person to use each class of appliances under exactly the same conditions and restrictions, and it does not affect the validity of the act that its operation will entirely destroy the vocation of the gill net fishermen, assuming such to be its effect.

[See note at end of this case.]

Same.

The classification of territory in game and fish laws preventing hunting or fishing in a portion of the state and permitting it elsewhere in the state is not a discrimination between or a classification of persons in violation of the state or Federal Constitution.

[See note at end of this case.]

Constitutional Law — Evidence as to Constitutionality of Statute.

The courts cannot hear evidence touching the constitutionality of a statute, but must determine its validity from the matters appearing on its face and matters of which the court can take judicial notice, though there may be some seeming exceptions to this rule.

[See 6 R. C. L. tit. *Constitutional Law*, p. 112.]

Fish and Game — Regulation of Manner of Taking Fish — Prohibiting Certain Nets.

That Laws 1915, p. 80, § 36, is unwise or unjust, in that the three-inch mesh thereby permitted to be used in purse and drag nets is much more destructive to fish than the five-inch mesh permitted to be used in gill nets, is a matter with which the court has nothing to do, as it does not, for this reason, discriminate between persons or grant privileges or immunities to any class and withhold them from another, nor deny to any person the equal protection of the laws.

[See note at end of this case.]

Appeal from Superior Court, Thurston county: MITCHELL, Judge.

Action by John F. Barker et al., plaintiffs, against State Fish Commission, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. AFFIRMED.

Vince H. Faben for appellants.

Attorney General and Edward W. Allen for respondent.

[73] PARKER, J.—This action was commenced in the superior court for Thurston county by John F. Barker and others, in behalf of themselves and all others similarly situated, against Ernest Lister, Governor, Edward Meath, Treasurer, and L. H. Darwin, State Fish Commissioner, constituting the State Fish Commission, seeking to enjoin them from commencing any action or proceeding looking to the arrest or prosecution of the plaintiffs, or others similarly situated, for violations of the provisions of the fisheries code enacted by [74] the legislature of 1915. The plaintiffs' complaint was demurred to on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the superior court, and the plaintiffs electing to stand on their complaint and not plead further, judgment of dismissal was entered against them, from which they have appealed.

The claimed rights of appellants to the relief prayed for is by their counsel rested upon the ground of the unconstitutionality of the fisheries code of 1915. It is contended that the restrictions and regulations of this law, if enforced, would deny to appellants privileges and immunities which it grants to others, in violation of article 1, § 12 of the state constitution, and would also deny to them the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States.

The allegations of the complaint, so far as necessary to here notice them, are as follows:

"That these plaintiffs and all others similarly situated and for whom this action is brought are fishermen and derive their income from their daily prosecution of their occupation as fishermen in the waters of Puget Sound and other tide and fresh waters of the state of Washington; that they have invested in boats, seines, nets, anchors, and other equipment and paraphernalia used in their said business upwards of the sum of seventy-five thousand dollars, and each and all of the said plaintiffs are directly and financially interested in the welfare and preservation of said business and industry; that the value of the personal property and equipment possessed and used by the average gill net fishermen in the conduct of his fishing operations is at least the sum of twelve hundred dollars.

"That gill net fishing is conducted and carried on in all tide and non-tide waters of the state of Washington, and is conducted for all practical purposes by means of a net about three hundred and fifty fathoms in length and one hundred meshes of three inch stretch measure in depth; that it is necessary in order that said net may be used efficiently that it shall lie open, without tension, the meshes being spread open, [75] and

the net spreading in the water transverse to the current or tide in such manner that it automatically entraps the fish in the meshes of the net by means of the gills of the fish: that a purse net or seine is about eighteen hundred feet in length and varies in depth from eighteen to twenty-six fathoms, and is operated in such manner by about eight men or more and with engine power, in addition, so as to entrap the fish by pulling in the purse lines, thereby taking in from six hundred to eight hundred marketable fish and sometimes eighteen or twenty thousand fish in one haul.

"That the necessary investment of a gill net fisherman is usually confined to one individual and is operated by one or two men and if said business is unreasonably and oppressively restricted or prohibited it would entirely confiscate the property of the fisherman invested in his tackle and apparel and accoutrements, to his individual damage in the sum of twelve hundred dollars or more; that it is necessary that they follow their calling and vocation each day in the year, and it is only possible to successfully operate the same during the hours after sunset and before daylight; that in order to operate a gill net feasibly or for any practical purpose it would require a working line at least four hundred fathoms in length, whereas under the provisions of said act of March 6, 1915, the gill net fisherman is only permitted to use a working line limited to five hundred feet in length, which is insufficient and impossible of any practical use or utility in the waters of Puget Sound.

"That under the provisions of said act above mentioned, and by reason of the limitation of the dimension of the working tackle, the provisions thereof are discriminatory in favor of the purse net as against the gill net and to the injury and extermination of the gill net fishermen, and for the protection and benefit of the purse net fishermen, and that the same is arbitrary and unfounded upon any consideration of public health or public safety or upon any necessity, inherent or otherwise, but simply as aforesaid, for the discrimination against the gill net fishermen."

Other allegations follow these, invoking the protection of the state and Federal constitutional guaranties above noticed.

[76] The discriminating provisions of the law which are particularly called to our attention and claimed by counsel for appellants to withhold from them the equal protection of the laws in violation of the constitutional guaranties invoked, are found in section 36 of the law, reading as follows:

"It shall be unlawful to use any pound net, trap, fish wheel or other fixed appliance for catching salmon or other food fish with meshes under three inches, stretch measure.

It shall be unlawful to operate in any of the waters of Puget Sound any purse seine, drag seine or other like seine or net of a greater length than five hundred feet with meshes less than two and one-half inches stretch measure, during the year 1915, and after January first, 1916, with meshes less than three inches stretch measure. It shall also be unlawful to operate in any of the said waters any gill net of a greater length than five hundred feet with meshes less than five inches stretch measure." Laws of 1915, p. 80, § 36.

The argument of counsel for appellants is, in substance, that, since purse and drag seines of over five hundred feet in length with meshes of "three inches stretch measure" may be used, while gill nets of over five hundred feet in length shall have meshes of "five inches stretch measure," there is thereby prescribed a discrimination in favor of those engaged in purse and drag seine fishing and against those engaged in gill net fishing. and that, therefore, purse and drag seine fishermen are granted privileges and immunities which are withheld from appellants, who are gill net fishermen.

It seems plain to us that this is not a discrimination between, or a classification of, persons; but only a discrimination as to appliances which may be used; and that as to each class of such appliances, every person may use them under exactly the same conditions and restrictions. There is no suggestion in the law that gill nets may not be used as the law prescribes by all persons, or that purse and drag seines may not be used as the law prescribes by all persons. There is plainly no discrimination touching any characteristic or [77] quality attaching to the person of appellants or any other person.

It has become the settled law of this state, in harmony with the rule prevailing in other states, that the classification of territory in game and fish laws preventing hunting or fishing in a portion of the state and permitting it elsewhere in the state is not a discrimination between, or a classification of, persons in violation of the state or Federal constitutional guaranties here invoked. *Hayes v. Territory*, 2 Wash. Ter. 286, 5 Pac. 927; *State v. Tice*, 69 Wash. 483, 125 Pac. 168, 41 L.R.A.(N.S.) 469; *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938. Among the numerous decisions of other states so holding we note: *Portland Fish Co. v. Benson*, 56 Ore. 147, 108 Pac. 122; *Bittenhaus v. Johnston*, 92 Wis. 588, 66 N. W. 803, 32 L.R.A. 380.

Classification of methods of taking fish, making certain methods lawful and other methods unlawful, has been held not to discriminate between persons in violation of any constitutional right. *State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L.R.A. 52; *State v.*

Mrozinski, 59 Minn. 465, 61 N. W. 560, 27 L.R.A. 76.

Classifications of businesses, even as between businesses constituting places of amusement, in Sunday observance laws, making some lawful and others unlawful on Sundays, has been held not to be a classification of persons within the privileges and immunities or the equal protection guaranties of the state and Federal constitutions. *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *State v. Dolan*, 13 Idaho 693, 92 Pac. 995, 14 L.R.A.(N.S.) 1259; *Carr v. State*, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190.

Discriminations in the peddlers' license law by classifying territory, articles peddled, and means of conveying articles while being peddled, has been held by this court not to be a discrimination between persons in violation of the constitutional guaranties here invoked. *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, 40 L.R.A.(N.S.) 1207.

[78] A law looking to the preservation of health, requiring herds of dairymen selling milk in cities, towns or villages to be registered with the live stock sanitary board, while not applying to persons who may sell milk in the country, was held not to be an unconstitutional discrimination between persons, by the supreme court of Maryland in *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 73 Am. St. Rep. 201, 45 L.R.A. 433.

This court held in *State v. Storey*, 51 Wash. 630, 99 Pac. 878, that the herd law permitting stock to run at large in certain portions of the state and preventing it in other portions of the state under certain conditions is not a discrimination as between persons in violation of any constitutional right.

These decisions rest upon the theory that such discriminations have no reference to any characteristic or quality attaching to the person of those who may be affected by such laws. Manifestly every person is privileged to reap the benefit of this law and escape the consequences of violating its provisions, upon terms which "equally belong to all citizens," without surrendering in the least any of the rights they may possess, apart from the subject-matter the law regulates.

A critical examination of the decisions relied upon by counsel for appellants will, we think, show that they deal with laws which classify persons as such, apart from considerations having any reasonable relation to the subject-matter of the laws involved. We notice those most strongly relied upon, as follows:

In *State v. Montgomery*, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386, there was involved a peddlers' license law which provided for the granting of peddlers' licenses to citizens of the United States and preventing the granting of such licenses to aliens though

living in the state. This was held to be a denial to aliens of the equal protection of the laws as guaranteed by the fourteenth amendment to the constitution of [79] the United States, providing that: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This holding was rested, manifestly, upon the theory that the citizenship of the applicant for a license had no possible lawful relation to the subject-matter of the law in the light of this Federal constitutional guaranty.

In *Gustafson v. State*, 40 Tex. Crim. 67, 45 S. W. 717, 48 S. W. 518, 43 L.R.A. 615, there was involved a law discriminating between taxpayers and nontaxpayers as to the right to take oysters from public waters. This was held to violate the constitutional guaranty of equal rights, in that it was a discrimination between persons because of a difference which had no proper relation to the subject-matter of the law.

In *State v. Hill*, 98 Miss. 142, 53 So. 411, 31 L.R.A.(N.S.) 490, there was involved a law discriminating as to the fishing rights in the waters of a given county between the inhabitants of that county and other inhabitants of the state. This was held to be an unconstitutional discrimination between persons within the jurisdiction of the state. Manifestly, the mere difference in residence could have no proper relation to the subject-matter of the law. In *Harper v. Galloway*, 58 Fla. 255, 19 Ann. Cas. 235, 51 So. 226, 26 L.R.A.(N.S.) 794, and *State v. Higgins*, 51 S. C. 51, 28 S. E. 15, 38 L.R.A. 561, the same conclusions were reached upon the question of discrimination between residents of different portions of the state.

In *State v. Mitchell*, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481, there was involved a law discriminating between those who paid taxes to the amount of \$25 and those who paid a less tax, the former being permitted to peddle without a license, while the latter were required to procure a license and pay a fee therefor. This was held to be an unconstitutional classification of persons based upon a difference which had no reasonable relation to the law.

In all of these decisions relied upon by counsel for appellants there was manifestly attempted to be made by the law [80] makers a classification of persons, which was not limited to a difference in appliances, means or methods used in carrying on the particular occupation or business sought to be regulated. This, we think, renders those decisions and the problems there involved quite different from the questions here presented.

Counsel for appellants makes some contention that, by the allegations of their complaint, they have presented a condition calling for the taking of evidence in the courts upon the question of the real nature of the

discrimination effected by this law. It is argued that the facts here alleged bring this case within an exception to the rule that the constitutionality of a statute must be determined from those matters which appear upon its face and from those matters of which the court may take judicial notice. The suggestion that the court should hear evidence touching the question of the constitutionality of a statute is somewhat startling when the possible far-reaching effect of such a course is, upon reflection, rendered apparent. Manifestly, such is not the rule, as has been clearly pointed out in numerous decisions, among which are: *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 25 Am. St. Rep. 230, 14 L.R.A. 459; *Pittsburgh, etc. R. Co. v. State*, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D 458, and notes. We are not prepared to say that there cannot be found in the books seeming exceptions to this rule. But if there are such exceptions which are real rather than apparent, we are quite convinced they are wholly inapplicable to laws of the nature here involved. However, our conclusion would be the same in this case though we should regard the allegations of appellants' complaint as showing that the vocation of gill net fishing would be entirely destroyed by this law, in view of the fact that the state is thereby legislating concerning its own property and prescribing the methods which may be used in acquiring it by private persons.

Some argument seems to be made rested upon the allegations of the complaint which, if true, tend to show that the [81] three-inch mesh permitted to be used in purse and drag nets is much more destructive to the fish than the five-inch mesh permitted to be used in gill nets. This argument might be appropriate to be addressed to the legislature. It possibly might be of some persuasive force as tending to show that the law is unwise, or even that it is unjust to the people of the state, but with that we have nothing to do. It might be all of that and still not be discriminatory as between persons. It would not for that reason grant privileges or immunities to one class and withhold them from another, which upon the same terms would not equally belong to all persons; nor would it deny to any person the equal protection of the laws.

The judgment is affirmed.

Morris, C. J., Mount, Main, and Holcomb, JJ., concur.

NOTE.

Validity and Construction of Statute Regulating Method of Taking Fish.

Validity:

Generally, 814.

Particular Regulations, 815.

Construction, 816.

Validity.

GENERALLY.

The fish in the waters of a state belong to the people in their sovereign capacity, and are not the subject of private ownership except so far as such ownership is granted by law. See, as to the right of fishing in the owner of a stream or pond, the note to *State v. Mallory*, 3 Ann. Cas. 852. The state may permit or prohibit the catching of fish, and if it allows the catching it may impose such conditions as are deemed to be needful or proper. 11 R. C. L. tit. *Fish and Fisheries*, p. 1041. The power to regulate the method of taking fish has accordingly been recognized from an early date. It was said by Vattel (Bk. 1, § 246): "The sovereign may establish wise laws with respect to hunting and fishing, forbid them in seasons of propagation, prohibit the use of certain nets and of every destructive method, etc."

In the exercise of its plenary power over the taking of fish, the state may regulate the manner of taking fish, and the necessity and propriety of particular regulations is a legislative question. See the reported case and the cases cited in the following subdivision of this note. The general rule was stated in *People v. Collison*, 85 Mich. 105, 48 N. W. 292, as follows: "To fish is a privilege accorded by the state, and the question of individual enjoyment is one of public privilege, and not of private right. 'Unless the catching of fish,' as is said by one writer, 'is conducted with reason, either the fish may be altogether exterminated, or the enjoyment of the right by one may interfere with the equal enjoyment of the right by others.' Hence, for the protection of fish, a valuable article of food and merchandise, the control of which is in the state, and to preserve equality in the right to fish, the state has an undoubted right to regulate the manner in which they shall be caught, and to protect their migrations."

A riparian proprietor has no such right of fishery in the waters adjacent to his property as prevents a regulation of the manner of taking fish. *People v. Bridges*, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684; *Gentile v. State*, 29 Ind. 409; *Com. v. Look*, 108 Mass. 452. And the manner of taking fish in private waters may be regulated. *People v. Collison*, 85 Mich. 105, 48 N. W. 292; *People v. Horling*, 137 Mich. 406, 100 N. W. 691; *State v. Blount*, 85 Mo. 543; *People v. Doxtater*, 75 Hun 472, 27 N. Y. S. 481. And see the note to *Hawaii v. Hoy Chong*, Ann. Cas. 1915A 1155.

The power of a state to regulate the manner of taking fish extends, at least in the absence of federal regulation, to navigable waters. *Manchester v. Massachusetts*, 139 U. S. 240, 11 S. Ct. 559, 35 U. S. (L. ed.) 159; *Fuller v. Spear*, 14 Me. 417; *Dunham v.*

Lamphere, 3 Gray (Mass.) 268; State v. Woodard, 123 N. C. 710, 31 S. E. 219. And see as to the right of fishing in navigable waters generally the note to *Wyatt v. Atty.-Gen.* 21 Ann. Cas. 774. In *Manchester v. Massachusetts*, supra, it was said: "The statute of Massachusetts which the defendant is charged with violating is, in terms, confined to waters 'within the jurisdiction of this commonwealth;' and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other states. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a state may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States."

PARTICULAR REGULATIONS.

The taking of fish by any other method than angling with hook and line may be prohibited. *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 385; *State v. Mrozinski*, 59 Minn. 465, 61 N. W. 560, 27 L.R.A. 76; *People v. Duxtater*, 75 Hun 472, 27 N. Y. S. 481; *Peters v. State*, 96 Tenn. 682, 36 S. W. 399, 33 L.R.A. 114.

In *Lawton v. Steele*, supra, the court said: "As the waters referred to in the act are unquestionably within the jurisdiction of the state of New York, there can be no valid objection to a law regulating the manner in which fishing in those waters shall be carried on. *Hooker v. Cummings*, 20 Johns. (N. Y.) 91. The duty of preserving the fisheries of a state from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food."

In *State v. Mrozinski*, 59 Minn. 465, 61 N. W. 560, 27 L.R.A. 76, it was said: "The only objection urged to the provisions of this section is that they are unreasonably restrictive. The line of argument is substantially as follows: First. The limit of the police power of the state in the premises is the adoption of such measures as are reasonably necessary to prevent the extermination or undue depletion of food fishes. Second. That

it is wholly unnecessary for any such purpose to prohibit the catching of fish, at least of certain kinds not named in the act, except by hook and line; that there are other ways of catching fish that are no more calculated to exterminate fish than by hook and line; that there are some kinds that cannot be taken at all by hook and line; and that an adequate supply of fish for food cannot be caught in that way. Assuming, without deciding, that the police power of the state over the taking or killing of wild animals (which belongs to the state itself, in its sovereign capacity) is subject to the limitation contended for, still we would not hold the provisions of this law invalid. In enacting any police regulation, even one regulating the use of private property or the conduct of a lawful private business, a very large discretion is reposed in the legislature. The courts will never set up their judgment against that of the legislature, and hold a police law invalid, unless it is clearly so, as having no reasonable tendency to accomplish the desired end. The legislature had to deal with the time and manner of taking fish as a practical question. It is a matter of common knowledge that different species of fish, good and bad, those that take the hook readily, and those that do not, inhabit the same waters; that the two usual methods of taking fish are by hook and line, and by nets and seines; and that the latter method usually results in the rapid and undue depletion of most kinds of valuable food fishes. Hence, if the legislature, in its discretion, deems it expedient to prohibit the latter method, no court can say that they had not the power to do so."

The use of nets, traps and the like may be prohibited. *Sherrill v. State*, 84 Ark. 470, 106 S. W. 967; *Gentile v. State*, 29 Ind. 409; *State v. Boone*, 30 Ind. 225; *Stuttman v. State*, 57 Ind. 119; *Fuller v. Spear*, 14 Me. 417; *Dunham v. Lamphere*, 3 Gray (Mass.) 268; *Burnham v. Webster*, 5 Mass. 266; *People v. Collison*, 85 Mich. 105, 48 N. W. 292; *Rea v. Hampton*, 101 N. C. 51, 7 S. E. 649, 9 Am. St. Rep. 21; *State v. Nielsen*, 51 Ore. 588, 16 Ann. Cas. 1113, 95 Pac. 720, 131 Am. St. Rep. 765; *Drew v. Hilliker*, 56 Vt. 641; *Bittenhaus v. Johnston*, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380.

The use of nets for the purpose of catching fish may be declared to be a nuisance. *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 873, 16 Am. St. Rep. 813, 7 L.R.A. 134, affirmed 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 385; *State v. Allen*, 80 Wash. 73, 141 Pac. 292.

The having of fish nets in possession may be prohibited. *State v. Lewis*, 134 Ind. 250, 33 N. E. 1024, 20 L.R.A. 52.

And the forfeiture and destruction of nets may be authorized. See the note to *Ohio v. French*, 1 Ann. Cas. 948.

The use of nets otherwise than from the shore may be prohibited, *Hughes v. State*, 87 Md. 298, 39 Atl. 747; the length of nets may be restricted, *State v. Woodard*, 123 N. C. 710, 31 S. E. 219; and a minimum size of mesh may be prescribed, see the reported case; and see *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982; *People v. Gillingham*, 131 Mich. 105, 90 N. W. 1027.

The spearing of fish may be prohibited, *Stuttaman v. State*, 57 Ind. 119; as may the use of artificial lights, *People v. Collison*, 85 Mich. 105, 48 N. W. 292.

A license may be required for the use of a power boat or sail boat in fishing. *People v. Setunsky*, 161 Mich. 624, 126 N. W. 844, wherein the court said: "It is urged that this act is a regulation of the use of boats and not a regulation of fishing. We cannot accede to this contention. It is only when boats are used in the fishing that a discrimination is made between them, and it was doubtless based on facility of operation, and increased capacity, which bear directly upon the amount of work done and fish likely to be caught. Counsel say that it is possible to take as many fish in a rowboat as in a sailing vessel or steamer. This position is hardly tenable; certainly it is not true in practice as a general rule."

In the exercise of the power to regulate the manner of taking fish, the legislature may make such discriminations or distinctions as it sees fit, so long as all persons similarly situated are subjected to equal regulation. Thus certain methods of taking fish may be prohibited in a part only of the waters of the state. *Sherrill v. State*, 84 Ark. 470, 106 S. W. 967; *Gentile v. State*, 29 Ind. 409; *Doughty v. Conover*, 42 N. J. L. 193; *State v. Tice*, 69 Wash. 403, 125 Pac. 168, 41 L.R.A. (N. S.) 469; *State v. Hals*, 90 Wash. 540, 156 Pac. 395; *Bittenhaus v. Johnston*, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380. And see the reported case. In *Sherrill v. State*, supra, it was said: "The legislature may, in the exercise of police power, put into operation game and fish laws in localities where they are needed or applicable, and such laws apply in such localities to all persons equally. In counties or localities where the law does not extend all persons alike may enjoy the exemption. In other words, all persons are forbidden the use of fish traps in the counties named, and all persons, so far as the prohibitions of this act are concerned, may use them in the exempted counties."

Methods of fishing may be permitted to riparian owners which are prohibited as to all other persons. *Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420; *Donnell v. Joy*, 85 Me. 118, 26 Atl. 1017; *Hughes v. State*, 87 Md. 298, 39 Atl. 747. In the case last cited the

court said: "Nor do we regard the objection made by the appellant, that the act is unconstitutional because it discriminates in favor of the owners and occupiers of the shores of the Saltpetre, as well taken. The prohibition of the act is not confined to any particular class, but it restricts 'any person or persons' from fishing in the waters of the rivers mentioned in the act, with seine or nets, except from the shore in the usual and customary manner. In other words, it prohibits all persons from fishing except in the mode and manner prescribed by the act. There is nothing, in the act itself, which will sustain the contention of the appellant."

The use of nets of a certain kind may be permitted and the use of other nets prohibited. See the reported case.

A regulation of nets may permit the use of existing nets for a certain period while prohibiting the use of similar nets acquired since the enactment of the statute. *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982. In that case the statute under consideration was summarized by the court as follows: "Any net which conforms to the pre-existing law at the time Act No. 151 took effect may be used by its then owner until April 1, 1900. 2. All other nets must conform to the new regulations. 3. All fish of the description and size mentioned in section 2 must be returned to the water, in whatever net taken, except where taken in gill nets of lawful size." Holding the act to be valid the court said: "Under the law, the use of gill nets of smaller mesh than 4½ inches is not open to all, because only those in existence at the time the law took effect can lawfully be used, except as provided by section 1, which permits the use of a smaller mesh for all nets, where used for the purpose of taking any fish except whitefish, lake trout, and black bass, in places where it can be shown that the annual catch does not contain to exceed ten per cent of whitefish or trout; but here all persons are upon an equality, for all who wish may have gill nets in such places,—hence no discrimination, though he who uses the gill net unlawfully (i. e., as prescribed in Act No. 151) may retain small fish, and others may not."

Construction.

By the application of the rule of ejusdem generis a prohibition of "any pound, trap, stake, gill or set net or seine or any device of any kind for taking fish" does not prohibit angling with hook and line. In *re Yell*, 107 Mich. 228, 65 N. W. 97.

But an act prohibiting the use of a seine net, gill net, trammel net, set net, bag weir,

bush drag, or fish trap, "or any other device" is violated by the use of a barrel net or hoop net. *Rhoades v. State*, 96 Ark. 63, 131 S. W. 48.

So a statute prohibiting the use of any "seines or trap nets" has been held to include a gill net. *Hilborn v. Smith*, 148 Mich. 474, 111 N. W. 1082, wherein the court said: "The nets mentioned in the act are 'any species of seines or continuous trap nets,' and it forbids the building of these. It also forbids the placing or driving 'any pound net piles, or stakes, or any other piles or stakes or posts.' A seine as used in the rivers and lakes is a long net, of sufficient width to extend from the surface of the water, usually to the bottom. It is strung on two lines of rope, one, the cork line, being provided with cork or wooden floats at short intervals, to make it float, the other, or lead line, provided with leaden weights to sink it and hold it down, generally upon the bed of the stream or water, thereby spreading the net from surface to bed. It is generally used by drawing it, and surrounding and inclosing the fish. A gill net is much like a seine, except in its method of use. Its meshes are made of a proper size to permit the head of the fish to pass through beyond the gills, which prevents the fish from withdrawing it, and it is thereby trapped and captured. While fishermen might be expected to distinguish between seines and gill nets, and pound or pond nets, calling each by its distinguishing name, if all might not be called by the generic name of seines, certainly the gill net is a species of trap net."

A statute prohibiting the placing of trot lines "so as to prevent the free passage of fish" is not violated by the placing of trot lines which do not constitute an obstruction. *Collins v. Bankers' Acc. Ins. Co.* 96 Ia. 216, 64 N. W. 778, 59 Am. St. Rep. 367. But a statute prohibiting the placing of nets in such manner as to "hinder or obstruct" the passage of fish is violated by the placing of nets in a river leaving a narrow passage at each end of the net. *Summers v. People*, 29 Ill. App. 170.

Where fishing with nets over a certain length is prohibited, the setting together of several nets of less than the prescribed length is a violation of the statute. *State v. Woodward*, 123 N. C. 710, 31 S. E. 219, wherein the court said: "The defendant for some reason, and we must suppose for the purpose of evading the penalty of this act, cut his nets up into sections of twenty yards in length, then tied half a dozen of them together, leaving only six inches between them, and puts them out. This, to our minds, was rather a stupid device to evade the penalty of the statute."

A net across a river fastened at one end to a stake and at the other to a boat, the net

being thus kept in position for ten minutes or more at a time, has been held to be within a prohibition against "placed" or "set" nets. *Watertown v. Draper*, 4 Pick. (Mass.) 165.

Where the use of a seine for certain fish only is prohibited and fish of that kind are caught, it is a question of intention, the statute being violated if it is intended that the prohibited kind of fish shall be taken. *Com. v. Look*, 108 Mass. 452.

A statute permitting the taking of certain kinds of fish by the use of set lines does not impliedly prohibit the taking of other fish in that manner. *People v. Keenan*, 80 Misc. 539, 141 N. Y. S. 781.

Where a statute prohibits the use of nets having a mesh of less than a prescribed size, the legality of the net is to be determined by the size of the mesh as it was manufactured, and is not affected by its shrinkage in use. *People v. Gillingham*, 131 Mich. 105, 90 N. W. 1027.

A statute permitting fishing only by "ordinary process of angling with single bait hook and line or artificial fly" is violated by the use of numerous baited hooks and lines set in holes cut in the ice. *State v. Skolfield*, 63 Me. 266. But where a statute permits fishing only "with rod hook and line or with hand line" both a rod and line and a hand line may be used at the same time. *Com. v. Bercaw*, 30 Pa. Super. Ct. 335.

In *People v. McMasters*, 74 Hun 226, 26 N. Y. S. 221, the statute under consideration prohibited fishing otherwise than by angling with hook and line. While the accused was fishing in a lawful manner his hook became caught in a net containing fish, which he dragged to the shore and kept. It was held that he was guilty of having in his possession fish taken contrary to law. The court said: "There is no pretense but that the taking of fish in a net is contrary to the statute. There is no question, from the defendant's own evidence, but that he had in his possession fish caught in the net, and there is no question but that he knowingly had them. I can see no inference that can be drawn from the testimony other than that he intended to keep the fish. He went one hundred yards to shore with them in his possession, complained to the game constable because he threw them back into the water instead of offering some of them to him, the defendant, to cook. It may seem rather harsh to hold a person liable for having fish in his possession, taken under the circumstances that the defendant claims these were; on the other hand, it is very plain to be seen that a story of the kind here told may be a device to escape the penalty of the law. But, whether harsh or not, it is the law, and the law in question, if it is to be of any benefit, must be strictly construed, and jurors are not at liberty to disregard it because

they think that in any particular case it is harsh, and the penalty heavy for the offense committed; they are not at liberty to disregard the evidence."

As to what constitutes the use of a prohibited device for the catching of fish, see the note to *Moses v. Raywood*, Ann. Cas. 1912A 311.

THERIAULT

v.

CALIFORNIA INSURANCE COMPANY OF SAN FRANCISCO.

Idaho Supreme Court—June 8, 1915.

27 Idaho 476; 149 Pac. 719.

Fire Insurance — Watchman Clause — Construction — Negligence of Watchman.

When the insured employs two competent watchmen and, in good faith, instructs them to watch carefully the property and to guard against fire, both by day and by night, the condition of the "watchman clause" in the policy is fully complied with on the part of the insured and negligence on the part of a watchman does not forfeit the policy.

[See note at end of this case.]

Insurance — Proofs of Loss — Waiver of Defects.

Regardless of the clause in a policy that no officer, agent, or other representative of the insurance company shall have the power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent, authorized to adjust a loss, the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss.

Appeal and Error — Harmless Error.

A judgment should never be reversed by reason of misconduct of counsel at the trial, unless the appellate court is of the opinion such misconduct had prevailing influence upon the jury, to the detriment of appellant.

Appeal from District Court, Shoshone county: Woods, Judge.

Action by E. I. Theriault, plaintiff, against California Insurance Company of San Francisco, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

James A. Wayne for appellant.

John P. Gray for respondent.

[478] *MORGAN, J.*—On July 25, 1913, appellant, in consideration of \$45, issued and

delivered to respondent its certain policy of fire insurance in the sum of \$1,500, whereby it insured for a period of one year a certain building together with mining and power machinery, tools, equipment, household goods and supplies therein contained, being the property of respondent. Another policy in the sum of \$1,500 was written by the Springfield Fire and Marine Insurance Company of Springfield upon the same property, and these policies were so drawn that the loss, if any occurred, would be apportioned between the companies. On the 23d day of August, 1913, the combustible portion of the insured property was destroyed, and the incombustible portion was more or less damaged, by fire.

[479] An action upon the policy in this case was commenced and it was alleged in the complaint that respondent's loss, due to the destruction of the property covered by the two policies, amounted to \$2,737.30. Judgment was prayed for against the appellant in the sum of \$1,368.65 and the trial resulted in a verdict and judgment in favor of respondent and against appellant in the sum of \$1,258.23, from which judgment this appeal has been prosecuted.

The assignment of errors contains twenty-four specifications, which may be grouped under four heads:

1. The action of the court in denying the motion for a nonsuit and in denying the motion for a directed verdict, which motions were made upon the grounds that the provisions of the policy with reference to keeping a watchman upon duty and with reference to rendering written and verified proof of loss within sixty days had not been complied with by respondent.

2. The action of the court in giving certain instructions to the jury relative to waiver of notice and verified proof of loss, upon the ground that respondent, as contended by appellant, relied upon a compliance with the provisions of the policy and not upon a waiver thereof.

3. The action of the court in instructing the jury relative to the watchman clause in the policy, it being contended by the appellant that the court misdirected the jury as to the law applicable thereto.

4. The action of the court in permitting counsel for respondent to make remarks in the presence of the jury which, it is contended by appellant, were prejudicial to its rights and amounted to misconduct upon the part of respondent's counsel.

The respondent is the owner of a mine in the operation of which the insured property was used. A few days before the fire work at the mine and power-house was suspended and respondent went to his home at Avery, Idaho, about eight miles distant from the

property in question. Before going he employed two men, Pressie and Snyder, to act as watchmen, agreed to pay them a dollar a day each for their services [480] in that behalf, and instructed them to keep continual watch and to be very careful in regard to fire. There was a quantity of debris in the tunnel of the mine and respondent also employed Pressie and Snyder to remove it, agreeing to pay them the sum of \$10 for that work.

The insured property was located about 300 feet from the portal of the tunnel and about 1,000 feet from the cabins where the men lived and could not be seen either from the tunnel or the cabins. The fire occurred about noon while the men were at their cabins at dinner.

The policy contains the following clause:

"It is warranted by the insured that whenever any of the following named parts of the plant described in this policy, to wit: powerhouse, is idle or not in operation from any cause whatsoever, competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately about said part of the plant. If any of the above-named parts is idle or not in operation for a period of more than thirty (30) days without the written consent of this company, this policy shall be void."

It is not contended by appellant that the men who were employed as watchmen were incompetent, but it is earnestly urged that their employment to clean out the tunnel was inconsistent with their employment as watchmen; that they could not fulfill their contract to remove the debris from the tunnel and continuously watch the insured property. The testimony does not bear out this contention. The work in the tunnel was not of such a nature as to require the presence of both men (the testimony shows that the material was removed with a wheelbarrow); neither was the job of such magnitude as to require the absence of either of them from the insured property for a great length of time. Snyder testified on cross-examination as follows:

"Q. How many days after Mr. Theriault left did you and Mr. Pressie work together in the tunnel?

"A. Oh, just as it happened; might work there an hour or so, you know, kept fussing around, not hired—we could take [481] our time. We could have taken it out in a day working the four hours."

Numerous decisions have been cited by both appellant and respondent to assist the court in construing what is known as the "watchman clause" in a policy of insurance. While there appears to be considerable conflict of authority upon this point, a careful examina-

tion of the decisions will demonstrate that the conflict is more apparent than real and that the question presented is one of fact rather than of law. In the case of Rankin v. Amazon Ins. Co. 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872, cited by appellant, wherein it was held that the requirements of the "watchman clause" in an insurance policy had not been complied with, the court said:

"It is not a case of mere negligence. If a loss is occasioned by the mere fault or negligence of the watchman, unaffected by fraud or design on the part of the insured, it is within the protection of the policy; but, to entitle the insured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the warranty."

In case of McGannon v. Millers' Nat. Ins. Co. 171 Mo. 143, 94 Am. St. Rep. 778, 71 S. W. 160, it is said:

"Under the contract in question, did the insured warrant that the watchman would never neglect his duty? It is no defense to a suit on a fire policy that the fire resulted from the negligence of the insured. Negligence or carelessness is one of the risks insured against, and negligence of the watchman is, in fact, all that can be made out of this point."

The court, in case of Burlington F. Ins. Co. v. Coffman, 13 Tex. Civ. App. 439, 35 S. W. 406, said:

"Upon very plain principles, the courts, while requiring a strict compliance with a warranty in insurance contracts, will not exact performance beyond its terms. What was required in this instance was that the insured should keep a watchman on duty upon the premises at night. The agreement was complied with when he employed and kept such a servant upon the premises as a night watchman, provided he exercised reasonable care in the selection and retention of the [482] person for that employment. . . . A failure to comply with the provisions would, we think, have existed, if it had been shown that the insured had notice of any unfitness of the watchman, or had not observed ordinary care in employing and keeping him." (See also *Sierra Milling, etc. Co. v. Hartford F. Ins. Co.* 76 Cal. 235, 18 Pac. 267; *McGannon v. Michigan Millers' Mut. F. Ins. Co.* 127 Mich. 636, 89 Am. St. Rep. 501, 87 N. W. 61, 54 L.R.A. 739; *Kansas Mill Owners', etc. Mut. F. Ins. Co. v. Metcalf*, 59 Kan. 383, 53 Pac. 68; *Hanover F. Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810.)

The jury was amply justified in finding from the evidence in this case that respondent, in good faith, employed two competent

watchmen and instructed them to carefully watch the property and guard against fire, both by day and by night, and that their other employment was not of such a nature as to interfere with the full and complete discharge of their duties in that behalf. Having done this the condition of the "watchman clause" in the policy was complied with on respondent's part.

The contention of counsel for appellant that the court erred in instructing the jury relative to waiver of notice and verified proof of loss for the reason that respondent relied upon a compliance rather than upon a waiver of the provisions of the policy with respect thereto, also that the adjuster was not authorized to waive the requirements of the policy relative to notice and proof of loss, does not appear to us to be meritorious.

In paragraph 10 of the complaint it is alleged, after stating that the respondent made out an inventory of the property which was destroyed by fire and delivered it to one Partridge, who was the agent and adjuster and officer of appellant, that after Partridge had examined pictures of the buildings and machinery and had viewed the ruins of the property where the fire occurred, he, the respondent, inquired of Partridge whether there were any other or further documents or papers which he should prepare or any other or [483] further notices which he should give or anything which he should do in addition to what he had already done in connection with making proof of loss, and it is further alleged: "The said Partridge thereupon stated that the plaintiff need not give any other or further notice or proof of loss and that the documents and papers and notices which the plaintiff had already given were ample and sufficient and thereupon expressly waived to this plaintiff the giving of any other or further notice of proof of loss, and that the notice and proof already furnished was all that was necessary and was in itself sufficient. . . ." While there is conflict in the evidence as to what took place between respondent and the adjuster, there is sufficient testimony to fully sustain the allegations of said tenth paragraph of the complaint.

The policy contains the usual provision that no officer, agent or other representative of the insurance company shall have power to waive any of its provisions or conditions, and provides that the insured "within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the

amount of loss therein; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; and changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire. . . ."

Regardless of the clause in a policy that no officer, agent or other representative of the insurance company shall have power to waive any of its provisions or conditions, where other proofs than those required in the policy are accepted by an agent, authorized to adjust a loss, the company will be deemed to have waived the provisions of the policy fixing the manner of making proof of loss.

[484] This court said in the case of Southern Idaho Conference Assoc. v. Hartford F. Ins. Co. 26 Idaho 712, 145 Pac. 502, as follows:

"The record shows that the proof of loss was not made within sixty days after the fire, and the question will be presented on a retrial as to whether the failure to make such proof precludes a recovery in this case. The evidence offered showing or tending to show a waiver by the company of making the proof of loss within the sixty days ought to be received on the trial."

In case of Queen of Arkansas Ins. Co. v. Laster, 108 Ark. 261, 156 S. W. 848, it was said:

"When appellant's adjuster, in response to appellee's inquiry, said that he had 'all the proof he wanted,' this was a waiver of any further proof of loss on the part of appellant, notwithstanding the nonwaiver agreement. It was equivalent to saying to the appellee that appellant was satisfied as to his loss and had all the information pertaining thereto that appellant desired."

In case of Ohio Farmers' Ins. Co. v. Glaze, 55 Ind. App. 147, 101 N. E. 734, it is said:

"A stipulation in a policy that 'no agent has power to waive any condition of this contract unless by written indorsement thereon' refers to conditions essential to make the contract obligatory and binding between the parties in the first instance, and to its continuing force and obligation till loss occurs, but does not refer to stipulations requiring the assured to make proof of loss in a special manner, and such stipulations may be waived by an agent without indorsement. . . ."

"Although an insurance policy on its face prohibits any agent from waiving any of its conditions where other proofs than those required in the policy are accepted by an agent of the company, duly authorized to act with reference to that subject, the company will

be deemed to have waived the proof required by the policy." (See also *Stevens v. Citizens' Ins. Co.* 60 Ia. 658, 29 N. W. 769; *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. 102; *Germania F. Ins.* [485] Co. v. *Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Brook v. Des Moines Ins. Co.* 106 Ia. 30, 75 N. W. 683; *Minneapolis F. etc. Mut. Ins. Co. v. Fultz*, 72 Ark. 365, 80 S. W. 576; *Hanover F. Ins. Co. v. Gustin*, *supra*.)

The action of the trial court in permitting counsel for respondent to make certain remarks in the presence of the jury is assigned as error, and it is contended that these remarks were prejudicial to the rights of appellant and amounted to misconduct upon the part of respondent's counsel. A careful examination of the record has convinced us that the conduct of counsel complained of did not prejudice the cause of appellant in the minds of the jurors. While judgments have been reversed by reason of the misconduct of counsel at the trial, this should never be done unless the appellate court is of the opinion such misconduct had prevailing influence upon the jury to the detriment of appellant.

We find no error in the record and the judgment is therefore affirmed. Costs are awarded to respondent.

Sullivan, C. J., and Budge, J., concur.

NOTE.

Construction of Watchman Clause in Fire Insurance Policy.

What Constitutes Being Idle or Inoperative, 821.

Effect of Negligence of Watchman, 822.

Necessity that Watchman Be on Premises, 823.

Questions of Law and Fact, 823.

What Constitutes Being Idle or Inoperative.

The distinction noted in *Liverpool, etc. Ins. Co. v. Tallamook Lumber Co.* 178 Fed. 161, 21 Ann. Cas. 844, between a temporary and a protracted cessation of operations in construing a clause in a fire insurance policy requiring a watchman in case the insured plant shall become idle or inoperative was recognized in the recent case of *Central Montana Mines Co. v. Royal Ins. Co.* 92 Minn. 223, 99 N. W. 1120, 100 N. W. 3, wherein the policy in suit recited the following warranty: "Warranted by the assured that at all times when the property herein described shall be idle or inoperative, a constant day and night watchman shall be kept on duty,

and provided that if such property be idle or shut down for more than thirty days at any one time notice must be given this company and permission to remain idle for such time must be indorsed hereon, or this policy shall immediately cease and determine." The property insured was a mining plant consisting of several buildings. It was held that the fact that one of the buildings remained closed, did not render the whole plant idle or inoperative so as to constitute a breach of the warranty.

But if a watchman is required in consideration of a consent of the insurer to the property remaining idle a failure to furnish a watchman avoids the policy. *Frick v. Miller's Nat. Ins. Co. (Mo.)* 184 S. W. 1161. The fire policy sued on in that case contained a "watchman with approved watch clock clause" and also contained a provision forbidding the insured premises remaining idle longer than 60 days, which time was extended by the insurer in consideration of the full compliance by the insured with the watchman warranty, which read as follows: "In consideration of a reduction of twenty-five cents (25c.) in the basis rate, at which this policy is written, the assured hereby agrees to maintain a watchman provided with an approved watch clock to watch day and night at all times when the machinery is not running, except when other employees are on duty, and then he is relieved from duty only in the daytime while such other employees are actually on the premises; and it is particularly understood and agreed that the first duty of the watchman is the care and examination of the property in his charge. . . . It is hereby warranted by the assured that the conditions herein named shall be observed, and failing to do so, it is agreed that the credit allowed for the service shall be forfeited for a period of six months, the amount so forfeited to be added to the first assessment made after the breach of conditions is established." In an action for damages caused by fire during the time extended by the insurer, the plaintiff contended that the clause provided a money penalty only for its violation and therefore such penalty was all that could be insisted on by the defendant for its violation. In affirming a judgment for the defendant, the court said: "This is true as this clause originally stood in the policy. If there were nothing else in the case, if as to the matter of operation and vacancy there were no question raised, then undoubtedly plaintiffs would be correct in this contention. But on the 22d day of April, 1912, at the written request of the bank, at a time when the 60 days of vacancy grace lacked but 4 days of expiration, defendant gave an extension of vacancy by an indorsement permitting the mill to remain inopera-

tive and vacant till next harvest, on condition of full compliance with the watchman warranty. If that agreement simply meant nothing, as learned counsel for plaintiffs contend, why take the trouble to make it? The defendant in such view said in effect to the assured that it would permit the mill to continue inoperative indefinitely, at a large increase in the hazard, provided the assured, as a consideration for such extra hazard, would do nothing more than it was already bound to do. It was either a consideration for an otherwise unwarranted vacancy or it was not. No one can read it without concluding that it meant that a watchman must thereafter be provided and maintained. No other meaning can be attached to the use of the words 'full compliance with the watchman warranty.' The policy by other provisions which we have set out was to become void if it continued vacant for more than 60 days. When the mill burnt, it had then been vacant for at least 19 days more, or 75 days in all. Such vacancy was by the express terms of the policy forbidden, and ipso facto rendered the policy void. But a forfeiture was to be saved if plaintiffs maintained a watchman whose presence and attention to his duties were to be proved by a watch clock. Plaintiffs confessedly did not comply with either of the conditions which were agreed on as sufficient to save a forfeiture in the event of a prohibited vacancy. We do not think they showed facts nisi sufficient to allow them to recover and hold that the learned trial court was right in sustaining a demurrer to the evidence."

For an extended discussion of the construction of the terms "ceased to be operated" in a fire insurance policy, see the note to *Waukan Milling Co. v. Citizens' Mut. F. Ins. Co.* 10 Ann. Cas. 795.

Effect of Negligence of Watchman.

It is held in the reported case that where the insured employs a competent watchman to watch his premises, the fact that the watchman is remiss in the performance of his duties, will not affect the right of the insured to recover under a policy containing a watchman clause. So in the recent case of *E. H. Stanton Co. v. Rochester German Underwriters Agency*, 206 Fed. 978, the policy in suit contained a warranty to the effect that the insured was to maintain certain fire alarm clocks, which required a watchman on duty to ring hourly to the main or central office of the Clock company. It was held that the failure of the watchman to report hourly to the central office would not defeat the right of the insured to recover where it was admitted that the watchman was in fact on duty at the time of the fire and promptly sent the alarm.

In *St. Paul F. etc. Ins. Co. v. Kendle*, 163 Ky. 146, 173 S. W. 373, the action was on a fire policy covering a boat, which policy contained the following warranty clause: "At all times at least two competent watchmen shall be employed, one of whom shall be on board and on duty at all times." The evidence showed that at the outbreak of the fire the watchmen were dozing. The court in discussing the construction of the warranty said: "Appellant contends that the parties did not agree simply that reasonable care should be taken of the boat or that a watch should be kept on the boat in accordance with the usual custom in such cases, for it says that the obligation upon the owner was not only to employ two watchmen, but to keep one on board at all times, and that he should be actually on watch at all times. The reason for this, as argued by appellant, is that by having two watchmen employed they could take alternate turns, and one keep awake and watch while the other slept, and the one awake, that is, actually on duty, would thus be in a position to detect the first sign of fire either by the smell of it or by the sight of the smoke, and thus be enabled to promptly extinguish it, whereas, if he is asleep, the fire may get such headway as to get beyond control. This idea stated in fewer words, could be thus expressed: The company insures the owner against loss by fire on condition that the owner prevents the fire. Manifestly this was not the purpose of the parties. For if the owner may prevent the fire, he needs no insurance. The owner desired protection against the danger of fire, and the purpose of the policy was to afford that protection. It was competent for the company to exact the owner to promise that the risk be reduced by the employment of two competent watchmen, one of whom shall be on board and on duty at all times. It does not say just what place on the boat he shall be or how many rounds of inspection he shall make. No stations were provided for the watchman to call and he was not required to register the hour, so that positive proof might be had that he was awake. It was no doubt contemplated that the watchman should keep awake, for one asleep cannot very well watch, that is, see anything. We do not believe the owner voided the policy by not himself staying awake and standing guard over the watchmen. Fairly construed, the watchman must be deemed as having performed his duty when he exercises such care and skill to watch the boat and prevent and extinguish fire as reasonably prudent persons usually exercise in watching such premises during night hours. Evidently that was all that the warranty required of the owner, that is, that he would employ such men as watchmen. The doctrine of warranties in insurance policies is strictly limited

to the precise undertaking of the parties making it."

Necessity that Watchman Be on Premises.

It has been held recently that a clause in a fire insurance policy requiring the employment of watchmen to keep a continuous watch both day and night in and about an industrial plant is not complied with, where they are employed to watch intermittently and at some distance from the insured property. *Shoshone Concentrating Co. v. Hamburg-Bremen F. Ins. Co.* 64 Wash. 638, 117 Pac. 500.

In that case the action was on a policy which provided that whenever the plant was idle "competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night, in and immediately around said parts of the plant." The court said: "The policy provides that, whenever the plant is idle, 'competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately around said parts of the plant.' Competent men were no doubt employed, but it was understood between them and the plaintiff that they were not to keep a continuous watch both day and night in and immediately around the plant, but that they were to watch intermittently at a distance from the premises, estimated at from six hundred to twelve hundred feet therefrom. The apparent object of the plaintiff was to evade its duties under the policy by making a show of compliance therewith. The diligence exercised was to evade, and not to comply with, the terms of the policy. We think the evidence shows that the men employed were competent watchmen, and that if they had been employed to keep a 'continuous watch . . . in and immediately around' the premises, the property would not have been destroyed. But they were not so employed, and they did not so watch the property. The effect of the testimony of the officers of the plaintiff company was that the men were merely employed to keep an occasional watch from a distance, which they did, and which was the opposite of the duties required by the appellant. This breach of duty avoided the policy. *McKenzie v. Scottish Union, etc. Ins. Co.* 112 Cal. 548, 44 Pac. 922, and cases there cited. This was decisive of the case. There was no question of fact for the jury to pass upon, and the court erred in not granting the defendant's motions."

The absence from a boat of a watchman who left to change his clothes, during which time the boat was destroyed by fire, has been held to be fatal to the right of the insured to recover. *Wheaton Packing Co. v. Aetna*

Ins. Co. 185 Fed. 108, 107 C. C. A. 113, 34 L.R.A.(N.S.) 563, wherein the court said: "While it may be entirely true that some of the courts of this country have gone too far in holding that the breach of an express warranty in an insurance policy, whether material to the risk or not, whether a loss happened through the breach or not, absolutely determines the policy, we are not called upon to either discuss or determine the question in this case. Here the insured warranted that his boat should 'at all times have a competent watchman on board,' and the evidence is undisputed that, while the boat was lying at wharf, the sole watchman aboard went ashore to secure a change of clothing, and while absent the boat caught fire and was consumed. The very fact that his presence at the time was so essentially necessary to put out the fire and prevent the loss clearly demonstrates the insurance company's right to stand upon the express warranty made in the contract that he would be there for that purpose. His absence was certainly not immaterial to the risk, and it is a very reasonable presumption that the loss could have been avoided if he had been there performing his duty. It seems clear that the breach of this warranty by the agent of insured without his knowledge must be held, nevertheless, a violation by the insured with whom alone the company contracted."

Questions of Law and Fact.

The question whether there is a sufficient compliance with a watchman clause in a fire insurance policy is one for the jury to determine. Thus in a recent case arising under a fire insurance policy providing that the insured was to employ at least two competent watchmen, one of whom should be on board the insured boat and on duty at all times, it was held that the question whether he was on duty when at the outbreak of the fire he was dozing was for the jury. *St. Paul F. etc. Ins. Co. v. Kendle*, 163 Ky. 146, 173 S. W. 373, *rehearing denied* 165 Ky. 122, 176 S. W. 368, wherein the court said: "While, in the case at bar, the owner was obligated to keep a watchman there constantly, there is nothing in the warranty to indicate that the duties of the watchmen should be any different from the usage of similar establishments by men of ordinary care and skill. The case of *Wheaton Packing Co. v. Aetna Ins. Co.* 185 Fed. 108, 107 C. C. A. 113, 34 L.R.A.(N.S.) 563, is relied upon by appellant. The owner warranted to keep a competent watchman on board at all times. While the boat was lying at the wharf, the watchman went ashore to secure a change of clothing and while gone the boat caught fire and was consumed. The court held that this was a breach of the warranty, and avoided the pol-

icy. But, as we have already indicated, the case at bar is different. The watchman was on board and on duty, that is, taking his turn to watch. Appellant contends that because he was not awake at all hours, he was not on duty; but that was a question for the jury, in view of the fact that the policy does not say just what the watchman shall do in the performance of his duty."

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STATE

v.

KLASNER.

New Mexico Supreme Court—February 12,
1914.

19 N. Mex. 474; 145 Pac. 679.

Larceny — Indictment — Duplicity.

A count of an indictment charging that defendant, "at the time and place named, nineteen head of calves, of the goods, chattels, and property of owners to the grand jury unknown, then and there being found, did then and there unlawfully, etc., steal, take," etc., is not bad for duplicity, as it prima facie discloses that the larceny occurred at the same time and place, and constituted but a single transaction.

Variance — Owner of Property Alleged to Be Unknown.

Where, upon the trial, witnesses testify that certain known parties owned the alleged stolen animals, and the indictment charges that the owners of the animals are unknown to the grand jury, it is incumbent upon the state to prove that the names of the owners were unknown to the grand jury and could not, by reasonable diligence, have been ascertained.

Criminal Law — Review — Necessity of Objection Below — Variance.

On rehearing, it having been called to the attention of the court that no motion was made for an instructed verdict on the ground of a variance between the indictment and proof, or such variance in any manner called to the attention of the trial court, the judgment of reversal is set aside, as it is a well-established rule of this court that the question of variance, between the allegations in the indictment and the proof, unless raised in the court below, cannot be reviewed here.

Indictment — Variance — Name of Person Aggrieved Alleged to Be Unknown.

Where the name of the owner of an alleged stolen animal is alleged in the indictment to be unknown, it is not incumbent upon the state to prove, in the first instance, affirmatively, that such fact was unknown to the grand jury: but it must show that such

name is unknown, or prove such a statement of facts or circumstances as render the alleged unknown fact uncertain, in which event such fact is presumed to have been unknown to the grand jury. But if there is evidence tending to show that the grand jury did know, or could by the exercise of reasonable diligence have known or ascertained, the name of the true owner, or that it was negligent or perverse in not alleging what was at its command to know, then the burden is upon the state to show that the grand jury did not know such alleged unknown name.

Criminal Law — Arraignment — Waiver.

Failure to arraign a defendant formally is not a fatal objection, where such defendant was present in court and testified as a witness upon his trial in his own behalf, and was represented by counsel, and no objection is interposed to proceeding with the trial without such arraignment.

[See note at end of this case.]

Instructions — Necessity of Exception.

Where no exceptions are taken to instructions given by the court of its own motion, error cannot be assigned on such instructions.

Criminal Law — Evidence — Self-serving Declarations of Accused.

Declarations made by a defendant in his own favor, unless a part of the *res gestae*, or of a confession offered by the prosecution, are not admissible for the defense.

Witnesses — Examination — Hypothetical Question — Evidence to Support.

No error is committed in sustaining an objection to a hypothetical question propounded to a witness, where such question is not based upon facts as to which there is such evidence that a jury might reasonably find that they are established.

New Trial — Newly Discovered Evidence — Showing Required.

Where a motion for a new trial is based on the ground of newly discovered evidence, such motion must, in addition to the affidavit of the applicant, be supported by the affidavits of the new witnesses, which must set forth the newly discovered evidence and the facts to which such witnesses will testify, or a satisfactory excuse must be given for not obtaining such affidavits.

Indictment — Meaning of "Then."

As used in an indictment, the word "then" is an adverb of time, meaning "at that time," and the phrase "then and there" means at the time and place charged, and refers to a single transaction.

Appeal from District Court, Lincoln county: **MEDLER**, Judge.

Criminal action. Lillie C. Klasner convicted of larceny and appeals. The facts are stated in the opinion. **AFFIRMED.**

Renehan & Wright for appellant.

H. S. Clancy for appellee.

[476] ROBERTS, C. J.—Appellant was indicted, tried and convicted in the district court of Lincoln County upon the second count of an indictment, charging her with the larceny of nineteen head of calves, "of the goods, chattels and property owners to the grand jurors unknown." It is contended by appellant that the indictment is fatally defective because it charges more than one offense in the same count. The contention is predicated upon the assumption that the state, by using the plural "owners," meant to charge that the property alleged to have been stolen had more than one owner, and such being the case, more than one offense was charged in the same count. Accepting as correct appellant's construction that the count charged the larceny of property belonging to different owners, would it follow that the same was demurrable? If the indictment can be said to charge but one offense against the state, it would not be open to the objection that it is bad for duplicity. On the other hand if it attempts to charge two or more distinct offenses, it would be demurrable. This indictment, omitting the formal parts, reads as follows: "That Lillie C. Klasner . . . on the 24th day of August, in the year one thousand nine hundred and nine, at etc., nineteen head of calves of the goods, chattels and property of owners to the grand jurors aforesaid unknown, then and there being found, did THEN AND THERE unlawfully, knowingly, and feloniously steal, take, lead and drive away, and the said property did then [477] and there, and in the manner aforesaid, etc." If we give to the language used a fair and reasonable construction, it becomes apparent that but one offense is attempted to be charged. The pleader says that appellant did the acts "then and there:" that is, at the time and place charged she did steal, take, lead and drive away the property.

"Then, as an adverb of time, means 'at that time,' referring to the time stated, and the necessary import of the words 'then and there,' as employed in the information, is that the larceny of the \$9.50 in money as a whole, a part of which is charged as belonging to Jane Engle and a part to Samuel Engle, occurred at the same time and place and constituted but a single transaction." *Furnace v. State*, 153 Ind. 93.

The language quoted from the above case disposes of appellant's contention that several distinct crimes are charged in the same count. While the property is alleged to belong to more than one person, but one taking is charged. In other words, appellant is charged, at the same time and place, with having stolen property belonging to divers owners.

As the Indiana Supreme Court further say, in the above cited case:

"We recognize no good reason to depart from what may be considered the great current of authority and hold the pleading in question bad, when it can reasonably be said that it discloses that the larceny complained of was but a single act or transaction in violation of the law against larceny, although the property which was the subject of the crime belonged to several different persons. The particular ownership, as charged in the pleading, of the money stolen did not give character to the act of stealing it, but was merely a part of the description of the particular crime charged to have been committed. The information, *PRIMA FACIE*, under the circumstances can be said to charge but one offense against the state, and is not open to the objection that it is bad for duplicity."

The principle enunciated by the court is supported by a long list of authorities, which will be found collected in [478] the case cited. See also *State v. Laws*, 61 Wash. 533, 112 Pac. 488.

The indictment charged but a single offense, and the demurrer on the ground stated, was properly overruled.

The cause must be reversed, however, because of the failure of the state to offer any evidence in support of the allegation in the indictment that the defendant stole, took, lead and drove away nineteen head of calves "of the goods and chattels and property of owners to the grand jury unknown." Upon the trial of the cause witnesses for the state testified to the names of the owners of the calves in question, but there was no attempt whatever by the state to prove that the owners of the animals in question were unknown to the grand jury and that the grand jury by reasonable investigation could not have ascertained the names of the true owners.

"Ownership must be proved by sufficient evidence or the conviction cannot be supported. Where the owner is alleged in the indictment as unknown, there can be no conviction unless it is proved that the grand jury did not know his name and could not discover it by due diligence, 25 Cyc. 125. *Sharp v. State*, 29 Tex. App. 211, 15 S. W. 176, And.

"Ownership, except as statutes have varied the unwritten rule, must be proved, as laid; because it identifies the offense, distinguishing it from all other instances." *Bishop's New Criminal Procedure*, sec. 488b.

In the case of *Stone v. State*, 30 Ind. 115, the Supreme Court of Indiana discussed the failure of the state to offer proof to support an allegation that the Christian name of the defendant was unknown to the grand jurors, and held the omission fatal. The court say:

"Our statute requires the names of the parties to be stated, or the person to be

described as one whose name is unknown to the grand jury, 2 G. & H. 400, sections 54 and 60. *Com. v. Stoddard*, 9 Allen (Mass.) 280, it was held that where the name of the person injured was unknown to the grand jury, it may be so alleged in the indictment, but the proof must correspond with the allegation, and unless the travers jury are satisfied that the [479] name was unknown to the grand jury, the defendant is not to be convicted. In this case there is no proof on the subject, and the jury could not form any conclusion as to the truth of the averment that the Christian name of the defendant was unknown to the grand jury. For this failure of proof the case must be reversed."

For the reason stated the cause is reversed and remanded, with directions to the trial court to award defendant a new trial, and, it is so ordered.

ON REHEARING.

(December 1, 1914.)

[481] *ROBERTS, C. J.*—A rehearing was granted by the court in this case, upon motion therefor filed by the state, wherein it is shown that we overlooked the fact that the question, as to whether the owners of the animals in question were unknown to the grand jury, and that the grand jury, by reasonable investigation, could have ascertained such names, was never raised in the court below, and, therefore, such question was not properly before this court for consideration. Also that the question of variance between the allegations in the indictment and the proof was never raised or passed upon in the trial court, and, hence, was not reviewable here.

In the case of *State v. Padilla*, 18 N. M. 573, 139 Pac. 143, we said, in discussing a question of variance between the indictment and proof, where such variance was not called to the attention of the trial court:

"The record does not disclose that this question was raised during the trial of this case in the court below: and it is not, therefore, properly before this court for review and cannot be reviewed by this court as it is not a question which was directly passed upon by the trial judge at the time of the trial and no assignment of error by the trial judge can be made where he was not given an opportunity to and did not specifically pass upon the question raised. It was the duty of the defendant to raise this question before verdict either by a motion to dismiss on the grounds of a variance between the allegations of the indictment and the proofs offered at the trial or by a request for an instruction of not guilty."

The courts generally hold that the question of variance, unless raised in the court below cannot be reviewed in an appellate

court. *Greene v. People*, 182 Ill. 278, 55 N. E. 343; *State v. Boogher*, 8 Mo. App. 600; *Taylor v. State*, 130 Ind. 66, 29 N. E. 415; *State v. O'Connell*, 144 Mo. 387, 46 S. W. 175; *People v. Cruger*, 38 Hun (N. Y.) 500; *State v. Chamberlin*, 30 Vt. 559; *Hinds v. State*, 55 Ala. 145; *Wood v. State*, 64 Miss. 761, 2 So. 247; *State [482] v. Ballard*, 104 Mo. 634, 16 S. W. 525; *State v. Jenkins*, 51 N. C. 19; *Bond v. State*, 56 Ark. 444, 19 S. W. 1062.

And applying the doctrine announced by this court in the cases of *State v. Eaker*, 17 N. M. 479, 131 Pac. 489; *State v. Lucero*, 17 N. M. 484, 131 Pac. 491, and *State v. Analla*, 18 N. M. 294, 136 Pac. 600, it is clear that the court should not have reviewed the question of variance or the sufficiency of the evidence, as such questions were not called to the attention of the trial court upon the trial, and the question of the sufficiency of the evidence to sustain the conviction is based solely upon the technical ground that the state failed to prove that the names of the owners of the alleged stolen animals were unknown to the grand jurors. Under Sec. 37, Chap. 57, S. L. 1907, appellant is precluded from urging here the questions attempted to be raised, because no ruling of the district court was invoked thereon, to which exception was taken. It is true, in the case of *State v. Garcia*, decided at the present term, 143 Pac. 1012, we held that the statute only applied to the parties and not to the court, and that this court had the inherent power to see that a man's fundamental rights were protected in every case, and we there refused to sustain a conviction where the record affirmatively showed that the defendant was not guilty, although the question was never raised in the trial court. We said, however,

"The restrictions of the statute apply to the parties, not to this court. This court, of course, will exercise this discretion very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims; nor will we consider the weight of evidence if any substantial evidence was submitted to support the verdict. If substantial justice has been done, parties must have duly taken and preserved exceptions in the lower court to the invasion of their legal right before we will notice them here."

In this case, it appears that substantial justice has been done, and the objection urged is purely technical. This being so, this court will not consider the question urged, because of appellant's failure to call the question to the attention of the trial court, and invoke its ruling thereon. [483] This being true, the cause should not have been reversed on the grounds stated in our original opinion.

While the order of reversal must be set aside, on the grounds stated, it is perhaps proper to say, in order to avoid a misconstruction of our original opinion, that the attorney general argues that the rule laid down by the court to the effect that, where the name of the owner of an alleged stolen animal is alleged in the indictment to be unknown, there can be no conviction unless it is proved that the grand jury did not know his name and could not discover it by due diligence, is too broad, and places an unnecessary burden upon the state. That under such rule it will be necessary for the state, in all cases, to call the entire panel of the grand jury, and prove by each member thereof such fact so alleged. If the rule is susceptible of this construction it is concededly too broad. The true rule is, where the name of the owner of an alleged stolen animal is alleged in the indictment to be unknown, it is not incumbent upon the state to prove, in the first instance affirmatively that such fact was unknown to the grand jury; but it must show that such name is unknown or prove such a state of facts or circumstances as render the alleged unknown fact uncertain, in which event such fact is presumed to have been unknown to the grand jury; but if there is evidence tending to show that the grand jury did know, or could, by the exercise of reasonable diligence have known, or ascertained the name of the true owner or that it was negligent or perverse in not alleging what was at its command to know, then the burden is upon the state to show that the grand jury did not know such alleged unknown name. *Carter v. State*, 172 Ind. 227, 87 N. E. 1081; Sec. 549 Bishop's New Criminal Procedure (2nd ed.). In this case the proof affirmatively shows that the sheriff copied the brands upon the alleged stolen calves, and had this information at hand at the time he testified before the grand jury. Having the brand of an animal it is an easy matter in this state, to ascertain the name of the owner. A resort to the record-brand will supply the information.

"If the name might be known to the grand jury, yet they will not learn it, their wilful ignorance, thus proceeding [484] from no necessity, creates none." Bishop's New Criminal Procedure (2d ed.) 549.

As the order of reversal on the grounds stated in our original opinion must be set aside, it is necessary for us to consider the grounds urged by appellant for a reversal, which were not considered in our former opinion, in view of our conclusion.

It is urged that appellant was not arraigned. The record in this regard, shows the following: "Whereupon the defendant enters her plea of not guilty to the charge contained in the indictment herein, heretofore

drawn for the purpose of filing demurrer." Later, upon application made by appellant, supported by several affidavits of parties who claimed to have been present in court and to have been cognizant of the fact that appellant had not been arraigned, the trial court, of its own motion, and on the personal recollection of the judge, amended the record so as to show a proper arraignment and plea. This appellant argues, he had no right to do, in view of the affidavits on file showing the contrary. Waiving this question, however, is the failure to arraign a defendant fatal, where he is present in court in person and by counsel, participates in the trial of the cause, goes on the witness stand, and proceeds, without objection, as though he had been arraigned?

Counsel for appellant relies upon the cases of *Territory v. Gonzales*, 13 N. M. 97, 79 Pac. 705, and *U. S. v. Aurandt*, 15 N. M. 292, 107 Pac. 1064, 27 L.R.A.(N.S.) 1181, which concededly lay down the rule that arraignment and plea are indispensable to a valid verdict and judgment of conviction. These cases, however, were decided while New Mexico was a territory, and its courts were required to conform to the views of the Supreme Court of the United States. In these cases the territorial court followed the rule announced by the United States Supreme Court in the case of *Crain v. U. S.* 162 U. S. 625, 16 S. Ct. 952, 40 U. S. (L. ed.) 1097. This case was overruled by that court in the recent case of *Garland v. Washington*, 232 U. S. 642, 34 S. Ct. 456, 58 U. S. (L. ed.) 772. The court said:

[485] "Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckman, speaking for the minority of the court in the *Crain* case, when he said:

"Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which under the circumstances would have

been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if the defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court."

"Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed it is necessarily overruled."

[486] Many of the state courts have departed from the old practice which held that arraignment and plea were indispensable to a valid verdict and judgment of conviction. The cases will be found collected in a case note to *State v. Walton*, 13 L.R.A.(N.S.) 811, an examination of which will show that Arkansas, Iowa, New York, Georgia, Nebraska, Washington and Montana no longer adhere to the old practice. We believe that the correct rule was announced by the Supreme Court of the United States in the *Garland* case, and hold that appellant cannot raise, in this court, the question that she was not arraigned, where she proceeded with the trial as if she had been duly arraigned, and failed to object or in any manner call to the attention of the trial court the fact that she had not been arraigned.

It is next urged that the trial court erred in giving certain instructions to the jury, of its own motion. No exception was taken by appellant, however, to any of the instructions, hence, they are not reviewable here. *State v. Lucero*, 17 N. M. 484, 131 Pac. 491; *U. S. v. Cook*, 15 N. M. 124, 103 Pac. 305.

The calves in question were found enclosed in a small alfalfa pasture near appellant's residence. This pasture was surrounded by a post and wire fence, the wires being either five to seven in number, the bottom wire being eight to twelve inches from the ground and the second wire the same distance from the first, while the remaining wires were somewhat further apart. On the trial, counsel for appellant propounded to one of her witnesses, the following questions:

"Q. State whether Mrs. Klasner at or prior to this 24th day of August, 1909 (which was the date of the alleged larceny) ever said anything to you as to those calves that would get in that pasture."

"Q. I will ask you now to state whether or not you didn't have standing directions from Mrs. Klasner to turn the stock out of that pasture when you found the stock in the pasture. Whether or not your orders from her while you were in her employ up to the 24th day of August, 1909?"

Upon objection interposed by the State, the court refused to permit the witness to answer the questions, on [487] the ground that statements made by appellant to the witness, disconnected from the alleged crime, tending to show absence of criminal intent, would constitute self serving declarations. This action of the court counsel contend constituted error, but aside from the statement that the answers sought to be elicited had a direct bearing on the question of intent, no argument is advanced in support of the admissibility of the evidence. Appellant could testify as to her intent, and we can see no reason why she should have been permitted to prove statements made by her, before the commission of the alleged crime, in no way a part of the *res gestae*, for the purpose of establishing a fact to which she could testify. It is a familiar and well established rule, that declarations made by a defendant in her own favor, unless a part of the *res gestae*, or of a confession offered by the prosecution, are not admissible for the defense. Wharton's Criminal Evidence (10th ed.) Sec. 690. If, while the calves in question in this case had been confined in the appellant's pasture, she had requested the witness to turn them out, such statement would have been admissible as a part of the *res gestae*. The witness had been in the appellant's employ for four or five years, and so far as the question disclosed, the orders referred to might have been given at any time during that period. While some authority can be found in support of the admissibility of such evidence (Wigmore on Evidence, Sec. 1732) the great weight of authority and reason is against the rule. To hold such evidence competent would permit designing criminals to manufacture a defense, in advance of the commission of a crime, by which they would be able to prove absence of criminal intent, by statements made to others of their purpose or object in doing the contemplated act, and by such statements, not made under oath, and upon which the searchlight of a cross-examination would not be available, mislead the jury and escape just punishment. Defendants are permitted to testify, on the witness stand, as to their motive or intent, and no reason exists for permitting third parties to testify to declarations of intent made by a defendant, not against interest, and which form no part of the *res gestae* or of [488] a confession given in evidence by the State. In the case of *State v. Dean*, 72 S. C. 74, 51 S. E. 524, a defendant, charged with murder,

sought to prove certain statements which he had made some hours before the murder as to his purpose in going to a certain place, for the purpose of showing absence of evil intent. The court said:

"In the case of *State v. Adams*, 68 S. C. 421, 47 S. E. 676, it is said: 'The rule is that a defendant cannot introduce in his defense his own statements made to others. The rule is thus stated in 9 Am. & Eng. Enc. of Law 692: "Declarations and statements made by defendant before the homicide regarding matters connected therewith are not admissible in his defense unless they form a part of the *res gestae*, but where they tend to show motive for committing the homicide, or malice in its commission, they may be proved by the prosecution."' The declarations were not a part of the *res gestae*."

In the case of *Com. v. Kent*, 6 Metc. 221, the Supreme Court of Massachusetts held, that, on the trial of a party indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit money, that it was not competent for him to give in evidence his declarations to an artificer at the time he employed him to make such instrument, as to the purpose for which he wished it to be made.

See also *Birdsong v. State*, 47 Ala. 68; *State v. Van Zant*, 71 Mo. 541; *Newcomb v. State*, 37 Miss. 383; *People v. Wyman*, 15 Cal. 70.

For the reason stated, the court committed no error in excluding the offered evidence.

The next assignment of error questions the action of the court in sustaining the objection of the state to the following questions, propounded to a witness for defendant:

"Q. Now I will ask you this question. Take a calf from five to seven months old; state whether a calf of that age is capable of going through a wire fence where the strands of wire range from eight to twelve inches apart; say the bottom wire from the ground ranges from eight to twelve [489] inches and the next wire ranges from eight to twelve inches."

This question was followed by:

"State whether a calf of the description mentioned could go through wires of that kind from the experience which you have had as a stock man covering the period you have mentioned."

This witness had qualified as an expert, and appellant sought to show that calves, such as those in question, could have gone through the fence which surrounded the pasture in which the calves were found. The trouble with the questions, however, is, that the fence surrounding the pasture was not described to the witness. This fence was

shown by all the witnesses to have had, at the time in question, from five to seven strands of wire, while the question stated called for the opinion of the witness, as to whether calves could go through a fence of two wires, which might have been but 16 inches high.

"Hypothetical questions must be based upon facts as to which there is such evidence that a jury might reasonably find that they are established." 17 Cyc. 247.

Lastly it is claimed that the court erred in not granting a new trial on the ground of newly discovered evidence. This ground of the motion is supported by the affidavit of appellant alone, in which she states that Pablo Verial and Jiesto Chaves were repairing a fence on her lands the latter part of August, 1909, and that they saw calves going through the fence in question; that such witnesses resided at Picacho, in said Lincoln County, and that she used due diligence in finding all the facts serviceable to her in her defense. Waiving the question of diligence shown, this ground of the motion for a new trial was properly overruled by the trial court, because of appellant's failure to support her application by the affidavits of the witnesses, as to what they would testify to, or to offer any excuse whatever for the absence of such affidavits. It is a familiar and well established rule that, "in addition to the affidavit of the applicant, the newly discovered evidence must be established by affidavits of the new witnesses, setting forth the facts to which they will testify, or a satisfactory [490] excuse must be given for not obtaining such affidavits." 14 Ency. Pl. & Pr. 825. *Territory v. Claypool et al.* 11 N. M. 568, 71 Pac. 463.

Finding no available error in the record the judgment of the lower court will be affirmed, and, it is so ordered.

Appellant's motion for rehearing denied. January 9, 1915.

NOTE.

Waiver of Arraignment in Criminal Case.

Generally.

Though there is some conflict on the point, the weight of authority is to the effect that an arraignment is necessary in a prosecution for a felony and in most jurisdictions in a prosecution for a misdemeanor. See the notes to *State v. Forner*, 12 Ann. Cas. 703, and *Burroughs v. State*, Ann. Cas. 1915C 1070. As to the right of the accused to waive an arraignment, to which the present discussion is addressed, there is likewise a conflict of authority, but the cases denying the right

confine their holdings to comparatively narrow limits. In Texas an arraignment cannot be waived in a capital case. *Holden v. State*, 1 Tex. App. 225; *Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409; *Smith v. State*, 1 Tex. App. 408; *Plasters v. State*, 1 Tex. App. 673; *Pringle v. State*, 2 Tex. App. 301; *Wilson v. State*, 17 Tex. App. 525; *Steagald v. State*, 22 Tex. App. 464, 3 S. W. 771; *Davis v. State*, 70 Tex. Crim. 563, 158 S. W. 283. In Wisconsin a recent case holding that a waiver is permissible excepts capital cases. See *Hack v. State*, 141 Wis. 346, 124 N. W. 492, 45 L.R.A.(N.S.) 664. In *Wilson v. State*, 42 Miss. 639, it was held generally that an arraignment may not be waived. See also *Sartorius v. State*, 24 Miss. 602. But the later case of *Bateman v. State*, 64 Miss. 233, 1 So. 172, apparently confines the holding to the rule that while the formalities of arraignment may be waived the entry of a plea is indispensable and is not waived by going to trial without objection and trying the case as if a plea of not guilty had been entered. That rule has been laid down in several other jurisdictions. *Territory v. Brash*, 3 Ariz. 141, 32 Pac. 260; *People v. Corbett*, 28 Cal. 328; *People v. Lightner*, 40 Cal. 226; *People v. Tomskey*, 20 Cal. App. 672, 130 Pac. 184; *Hoskins v. People*, 84 Ill. 87, 25 Am. Rep. 433; *Johns v. State*, 104 Ind. 557, 4 N. E. 153; *Hatfield v. State*, 9 Ind. App. 296, 36 N. E. 664; *Hendrickson v. Com.* (Ky.) 64 S. W. 954; *State v. Brennan*, 83 N. J. L. 12, 84 Atl. 1066.

In *People v. Corbett*, supra, the court said: "The indictment was not read to the defendant; a copy of it, with the indorsements, was neither delivered nor tendered to him; nor was he either then, or thereafter, asked whether he would plead guilty or not guilty to the indictment. (Wood's Dig. p. 291, sec. 272.) If the defendant had at any time, anterior to the trial, plead not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured, on the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury—nor did all of them combined—cure the want of a plea. There was not only no arraignment, but over and beyond that there was no issue for the jury to try. Not only did the defendant not plead, but inasmuch as the statute opportunity for pleading was never extended to him he was never under any obligation to plead. A verdict in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no valid judgment can be rendered thereon."

In *State v. Walton*, 50 Ore. 142, 91 Pac. 495, 13 L.R.A.(N.S.) 811, it was said: "Even had defendant intended to waive his

rights in this respect, it must be remembered that this is a matter in which the public has an interest, and which cannot be left entirely to the wishes of the person on trial. Otherwise, a defendant might enter into a binding contract with the state, through the district attorney, to go to the penitentiary for a certain number of years in satisfaction of an offense. But it is too well settled to need citation of authorities, that the public has such an interest in procuring a trial of the citizens of a state according to law as to preclude such proceedings."

But by the weight of authority it is held that the right of the accused to be arraigned and to plead formally to the accusation may be waived, provided only that the accused knows the nature of the charge against him and has a full and fair opportunity to defend himself.

United States.—*Garland v. Washington*, 232 U. S. 642, 34 S. Ct. 456, 58 U. S. (L. ed.) 772 (*overruling Crain v. U. S.* 162 U. S. 625, 16 S. Ct. 952, 40 U. S. (L. ed.) 1097); *U. S. v. Molloy*, 31 Fed. 19.

Arkansas.—*Hayden v. State*, 55 Ark. 342, 18 S. W. 239.

Georgia.—*Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493; *Tarver v. State*, 95 Ga. 222, 21 S. E. 381; *Hudson v. State*, 117 Ga. 704, 45 S. E. 66; *Waller v. State*, 2 Ga. App. 636, 58 S. E. 1106.

Indian Territory.—*Gaines v. U. S.* 1 Indian Ter. 296, 37 S. W. 98; *Roper v. U. S.* 7 Indian Ter. 185, 104 S. W. 584.

Iowa.—*State v. Hayes*, 67 Ia. 27, 24 N. W. 575; *State v. Thompson*, 95 Ia. 464, 64 N. W. 419.

Kansas.—*State v. Cassidy*, 12 Kan. 550; *State v. Glave*, 51 Kan. 330, 33 Pac. 8.

Kentucky.—*Bishoff v. Com.* 123 Ky. 340, 96 S. W. 538.

Louisiana.—*State v. Rasberry*, 113 La. 651, 37 So. 545.

Michigan.—*People v. Weeks*, 165 Mich. 362, 130 N. W. 697.

Missouri.—*State v. O'Kelley*, 258 Mo. 345, 167 S. W. 980, 52 L.R.A.(N.S.) 1063; *State v. Loesch*, 180 S. W. 875.

New Mexico.—*Territory v. Cook*, 7 N. M. 248, 33 Pac. 1022. And see the reported case.

New York.—*People v. Osterhout*, 34 Hun 260. *Compare People v. Munson*, 83 Misc. 308, 144 N. Y. S. 1081 (as to courts of limited jurisdiction).

Oklahoma.—*Jones v. Territory*, 5 Okla. 536, 49 Pac. 934.

South Carolina.—*State v. Brock*, 61 S. C. 141, 39 S. E. 359.

South Dakota.—*State v. Reddington*, 7 S. D. 368, 64 N. W. 170.

Washington.—*State v. Straub*, 16 Wash. 111, 47 Pac. 227. *Compare Elick v. Territory*, 1 Wash. Ter. 136.

Wisconsin.—*Hack v. State*, 141 Wis. 346, 124 N. W. 492, 45 L.R.A.(N.S.) 664 (*overruling Anderson v. State*, 3 Pin. 367, and *Douglass v. State*, 3 Wis. 820).

In *Hack v. State*, 141 Wis. 346, 124 N. W. 492, 45 L.R.A.(N.S.) 664, it was said: "Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned."

The power to waive an arraignment must be exercised by the accused in person or with his express consent. While counsel may make the waiver for the accused in his presence in open court (*Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493) he has no power to do so in the absence of the accused and without his express consent. *Wells v. Terrell*, 121 Ga. 368, 49 S. E. 319; *State v. McMichael*, 60 La. Ann. 428, 23 So. 992. And see *Elick v. Territory*, 1 Wash. Ter. 136. In *State v. McMichael*, supra, it was said: "The fact that counsel of the accused on the second day of the term of court offered on his behalf to waive arraignment, can have no influence upon the decision of this case. The crime with which the defendant was charged was a felony. His attorney was without authority to waive his arraignment on his absence."

In *Wilson v. State*, 42 Miss. 639, in connection with a holding that arraignment cannot be waived, it was said: "The record not only fails to show that the defendant was arraigned, but it appears affirmatively that the defendant was not arraigned; that his arraignment was waived, not by himself, but by his attorney. What the defendant could not do in his own proper person, certainly could not be done by his attorney."

In *Territory v. Cook*, 7 N. M. 248, 33 Pac. 1022, the record showed that the defendant by counsel in open court waived arraignment. After conviction it was asserted in arrest of judgment that the attorney had not been authorized to make the waiver. The court said: "He rested on that plea for a

full year, awaiting the decision of this court in the test case in behalf of Cortesy. When he found that the decision in that case was adverse, he repudiated the plea, and demanded a trial on the merits. Such conduct may indicate a great deal of caution, but it is too speculative to merit indulgent consideration from us. If we once permit parties, charged with the commission of minor misdemeanors in courts of record, to deny the right of counsel to represent them as soon as their forensic efforts have proven unsuccessful, and to contradict the most solemn records of the court, we would set an example fraught with great danger to the public, and introduce a departure in practice rarely warranted by judicial authority."

What Constitutes Waiver.

Where the right of the accused to waive an arraignment is recognized, an express waiver in open court is of course sufficient. *Tarver v. State*, 95 Ga. 222, 21 S. E. 381; *Bishoff v. Com.* 123 Ky. 340, 96 S. W. 538; *State v. Rasberry*, 113 La. 651, 37 So. 545.

The voluntary entry of a plea and participation without objection in a trial had thereon is a waiver of a formal arraignment. *Paris v. State*, 36 Ala. 232; *Ransom v. State*, 49 Ark. 176, 4 S. W. 658; *Moore v. State*, 51 Ark. 130, 10 S. W. 22; *Dixon v. State*, 13 Fla. 631; *Bassett v. State*, 44 Fla. 12, 33 So. 262; *Harris v. State*, 11 Ga. App. 137, 74 S. E. 895; *Fitzpatrick v. People*, 98 Ill. 259; *Molihan v. State*, 30 Ind. 286; *Fouter v. State*, 33 Ind. 283; *Turpin v. State*, 80 Ind. 148; *Meyers v. State*, 156 Ind. 388, 59 N. E. 1052; *State v. Winstrand*, 37 Ia. 110; *State v. Rasberry*, 113 La. 651, 37 So. 545; *State v. Baunschweig*, 36 Mo. 397; *State v. Grate*, 68 Mo. 22; *State v. Weeden*, 133 Mo. 70, 34 S. W. 473; *Goodin v. State*, 16 Ohio St. 345.

In *Turpin v. State*, supra, the court said: "By the 187th section of the Criminal Code, R. S. 1881, section 1762, it is provided that 'the defendant shall be arraigned by the reading of the indictment or information to him by the clerk, unless he waived the reading,' etc. This, however, is not to be construed as a peremptory requirement, which must be waived entirely, else fulfilled to the letter. If the defendant had entered his plea, without a reading of the indictment, by authority of some of the cases cited, it would have been a waiver of formal arraignment, and having entered his plea, without any objection to the manner of the arraignment, it was too late after verdict to make the objection."

In *Dixon v. State*, supra, it was said: "There is so much of an arraignment in this record as identifies the prisoner and discloses

his personal presence in court, and whatever may be the rule where an arraignment is entirely omitted, we are satisfied that the failure to read the indictment or to demand of the prisoner whether he is guilty or not guilty, and asking him how he will be tried, is cured by his appearing and pleading to the indictment. The purpose and end of reading the indictment and making the demand is to advise the party of the nature of the accusation and to learn what he has to say in reference thereto, and if he advises himself and answers the accusation by plea, he waives these formalities, which are mere preliminaries looking to that result."

In *Ransom v. State*, 49 Ark. 176, 4 S. W. 658, the court said: "The record does not show that the indictment was read to the defendant and that he was required to say in open court whether or not he was guilty of what was therein alleged against him. But it does show that he entered his plea of not guilty and announced himself as ready to proceed to trial. As the object of an arraignment is to obtain defendant's plea, and as it may be dispensed with by the court with his consent, it follows that if he voluntarily pleads to the indictment without being formally arraigned, and the court accepts his plea, this is an implied waiver of his right to hear the indictment read."

Except in those jurisdictions wherein the want of a plea may not be waived the accused waives arraignment by going to trial without objection. *Garland v. Washington*, 232 U. S. 642, 34 S. Ct. 456, 58 U. S. (L. ed.) 772 (*overruling Crain v. U. S.* 162 U. S. 625, 16 S. Ct. 952, 40 U. S. (L. ed.) 1097); *U. S. v. Molloy*, 31 Fed. 19; *Hayden v. State*, 55 Ark. 342, 18 S. W. 239; *Hudson v. State*, 117 Ga. 704, 45 S. E. 66; *Waller v. State*, 2 Ga. App. 636, 58 S. E. 1106; *Gaines v. U. S.* 1 Indian Ter. 296, 37 S. W. 98; *State v. Hayes*, 67 Ia. 27, 24 N. W. 575; *Com. v. McKenna*, 125 Mass. 397; *People v. Weeks*, 165 Mich. 362, 130 N. W. 697; *State v. O'Kelley*, 258 Mo. 345, 167 S. W. 980, 52 L.R.A. (N.S.) 1063; *State v. Loesch* (Mo.) 180 S. W. 875; *People v. Osterhout*, 34 Hun (N. Y.) 260; *People v. McHale*, 61 Hun 618 mem. 15 N. Y. S. 496; *People v. Tower*, 63 Hun 624 mem. 17 N. Y. S. 395; *Jones v. Territory*, 5 Okla. 536, 49 Pac. 934; *State v. Brock*, 61 S. C. 141, 39 S. E. 359; *State v. Reddington*, 7 S. D. 368, 64 N. W. 170; *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *Hack v. State*, 141 Wis. 346, 124 N. W. 492, 45 L.R.A. (N.S.) 664 (*overruling Anderson v. State*, 3 Pin. 367, and *Douglass v. State*, 3 Wis. 820).

In *State v. Brock*, *supra*, the court said: "The defendant, by his conduct here, is not entitled to have himself arraigned and to have himself called on to plead to the indictment, for he took part in his trial at every

stage until after the verdict of guilty was rendered, without once demanding this so-called right of arraignment. He thereby waived any so-called right to arraignment."

In *State v. Reddington*, *supra*, it was said: "Neither civil nor criminal cases are tried for the primary purpose of vindicating or exemplifying formulated rules of law or practice. The object of every trial is to get at the very right of the matter in controversy. Rules are intermediate and subsidiary to that end, and nonobservance of an incidental rule, not made mandatory by statute, which obviously did not in any manner interfere with the accomplishment of the very objective end of the trial and so could work no injury to the defendant, is no ground for setting aside the result of such a trial. In this case the record shows that the case was regularly reached for trial; that defendant was present in person and by counsel; that he was ready for trial; that the trial proceeded and continued to verdict, without objection, in every respect as though a plea of 'not guilty' had been made and properly entered; and that the jury was instructed that the defendant had plead 'not guilty,' and the nature and effect of such plea fully explained by the court to the jury. Under these circumstances, we hold, after much deliberation, that the failure of the record to affirmatively show arraignment and plea does not entitle defendant to a new trial."

In *People v. Osterhout*, *supra*, the court said: "The only point made is that the prisoner was not formally arraigned, and did not formally plead. He was present with his counsel throughout the trial; did not object that he had not been arraigned, and did not ask to plead. After the close of the trial, and after the verdict had been rendered and the jury had been discharged, and on the following day this point was first made, and made by a motion in arrest of judgment. It is manifest that no injury has been done the defendant. No plea has been rejected; no evidence offered by him has been excluded. The defect is merely technical, affecting no rights whatever. If he had refused to plead, the trial would have proceeded just as it has. The trial would not be affected because of an imperfection in the indictment which did not tend to the prejudice of the substantial rights of the defendant upon the merits."

Varying but slightly from the rule just stated it has been held that the accused waives an arraignment by announcing himself ready for trial and participating in the trial without objection. *Spicer v. People*, 11 Ill. App. 294; *State v. Cassady*, 12 Kan. 550; *State v. Glave*, 51 Kan. 330, 33 Pac. 8. The cases so holding proceed, however, on the theory that the announcement of the accused that he is ready for trial is the equivalent of

a plea, and in *State v. Baker*, 57 Kan. 541, 46 Pac. 947, it was held that without such an announcement the accused does not by participating in the trial without objection waive an arraignment. The court said: "After the motion to quash had been overruled, 'the court without further plea by the defendant and without objecting or assenting thereto other than his silence, and without the waiver of the defendant to further plead, and without said defendant announcing that he was ready for trial, directed the county attorney to proceed with the examination of the regular panel of jurors,' etc., and the jury were then impaneled and the trial proceeded to the end. In *The State v. Cassady*, 12 Kan. 550, it was decided that the failure to arraign the defendant and to have a formal plea of 'not guilty' entered, is not prejudicial error where it appears that the defendant announced himself ready for trial upon the charge and submitted the question of guilt to the determination of the jury. In the present case, however, the defendant did not announce that he was ready for trial, and there was no waiver of arraignment or plea. Until a plea is entered there is no issue to try. It is an established rule of the criminal law that the defendant shall be arraigned and called upon to plead to the charge against him. In some cases a formal arraignment may not be indispensable, but in every case there must be a plea or the equivalent of one. In *The State v. Cassady*, supra, the announcement by the defendant that he was ready for trial upon the information was treated as a denial of guilt and an informal plea. Here, the defendant not only did not plead, but the opportunity for pleading was never extended to him, although he was charged with felony. So wide a departure from the established rules of criminal procedure cannot be approved, and we think the defendant has cause to complain of the irregularity."

Filing a demurrer or a special plea is a waiver of an arraignment. *Kincade v. State*, 14 Ga. App. 544, 81 S. E. 910.

An arraignment is waived by entering into an agreement that the case shall be tried on a certain date. *State v. Thompson*, 95 Ia. 464, 64 N. W. 419, wherein it was said: "It is not necessary that an arraignment be formally waived. There may be such acts on part of defendant as in law should be held to amount to such a waiver. In this case it clearly appears that by mutual understanding, if not by express agreement, counsel for the defendant and the state had fixed upon a time for the trial; that both sides had subpoenaed witnesses accordingly; that such witnesses had been subpoenaed several days prior to the time agreed upon for trial. These facts warranted the court in holding that

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defendant had waived arraignment. The statute was enacted for the benefit of the defendant, but it was not intended that he might, in fact, realize all of its benefits, and then claim the technical right to be arraigned, when the only effect would be to unnecessarily delay the trial, and impede the business of the court, when, as in this case, no prejudice could result to him."

BRONSON

v.

SYVERSON.

Washington Supreme Court—November 22, 1915.

88 Wash. 264; 152 Pac. 1039.

Imprisonment for Debt — What Constitutes Debt — Liability for Tort.

Rem. & Bal. Code, § 749, providing that a defendant may be arrested in civil cases, in actions for damages, on a cause of action not arising out of contract, where defendant is a nonresident, or is about to remove from the state, where the action is for any injury to person or character, for wrongfully taking, detaining, or converting property, in an action for fines or penalties, on promise to marry, for money received, property embezzled, fraudulently misapplied or converted by a public officer, an attorney or a corporation's agent, or other person in fiduciary capacity, for professional misconduct, for a recovery of possession of personal property unjustly detained, and concealed, removed, or disposed of, when defendant has been guilty of a fraud in contracting a debt, or in concealing or disposing of property sought to be taken by suit, when the action is to prevent threatened injury to or destruction of property, when a defendant refuses to apply money to payment of judgments with intent to defraud plaintiff, or when he refuses to comply with the legal order of the court to defraud plaintiff, is unconstitutional, under Const. art. 1, § 17, providing there shall be no imprisonment for debt except in case of absconding debtors: a judgment founded on tort being a "debt" within the meaning of the constitution.

[See note at end of this case.]

Constitutional Law — Construction of Constitution — Words Taken in Ordinary Sense.

In construing a state constitution the language thereof is to be taken in its general and ordinary sense, and when words having both a restricted and general meaning are used, the general must prevail, unless the context clearly indicates that the limited sense was intended.

Appeal from Superior Court, Lewis county:
WRIGHT, Judge.

Action by Amy D. Bronson, plaintiff, against Harry Syverson, defendant. From judgment rendered, defendant appeals. The facts are stated in the opinion. **REVERSED.**

Hayden, Langhorne & Metzger and Thacker & Hancock for appellant.

G. E. Hamaker for respondent.

[264] FULLERTON, J.—The respondent, Amy D. Bronson, an infant, by her guardian, brought an action against the appellant, Harry Syverson, to recover for her seduction, stating her damages at \$20,000. An answer was filed by Syverson, traversing the allegation of the complaint, and setting up affirmatively facts which were thought to show want of capacity in the plaintiff to sue. The affirmative matter was denied by a reply, and the cause, being thus at issue, was set for trial by the court on a day certain. On the day appointed for [265] the trial, the plaintiff appeared in person and by her counsel and announced herself ready for trial. The defendant did not appear, either in person or by his counsel, and on his counsel being called, they announced that the defendant would not further appear in the action. The court thereupon caused a jury to be empaneled, heard the evidence of the plaintiff, and submitted the cause to the jury under instructions deemed applicable thereto. The jury returned a verdict in the usual form, finding for the plaintiff and assessing her damages at \$20,000. The court, upon the same day, entered a judgment upon the verdict, to the effect that the plaintiff have and recover from the defendant the amount returned by the jury, together with her costs and disbursements. An execution was issued upon the judgment against the property of the defendant and placed in the hands of the sheriff, who returned it wholly unsatisfied.

After the return of the writ, the plaintiff applied to the court, by petition, for an amendment of the judgment, averring in the petition that the cause of action was one under which the defendant could have been arrested in virtue of the statute, and prayed that the judgment be amended by adding thereto a clause permitting the arrest of the defendant. The petition was heard without service upon or notice to the defendant, at the conclusion of which the court made the following order:

"It is therefore ordered, adjudged and decreed, that there be added to the terms of the judgment entered herein, on the 24th day of October, 1913, without otherwise in any way interfering with, changing or modifying the terms or the meaning of said judgment, the following words, and figures, to wit:

"That the clerk of this court is hereby ordered and directed to issue an execution against the person of the defendant and that the sheriff of Lewis county, Washington or the sheriff of any other county in the state of Washington, where the defendant may be found shall be and is hereby required to arrest the defendant and place him in the county jail and hold him there until said judgment is paid and satisfied or until he shall be discharged according to law."

[266] and it is further ordered that upon the filing and entering of this order the clerk immediately issue an execution against the person of the said defendant, Harry Syverson, directed to the sheriff of Lewis county, Washington, or to any other sheriff of any other county of the state of Washington, where the defendant may be found, ordering the said sheriff to whom said execution shall be issued, to forthwith arrest the said defendant Harry Syverson and commit him to the county jail of Lewis county, Washington, until he shall pay such judgment or thence be discharged according to law."

Immediately on the entry of the order, the clerk issued an execution thereon against the person of the defendant, on which the sheriff arrested the defendant and confined him to the jail of Lewis county. After his arrest, the defendant moved for his discharge, basing his motion on a number of grounds. The motion was overruled and an order entered accordingly. From this order, the defendant appeals.

Among the grounds assigned in the motion for the discharge of the defendant was the ground that he was being imprisoned for debt, in violation of art. 1, § 17, of the constitution, which provides, "There shall be no imprisonment for debt except in case of absconding debtors." Our conclusion on this branch of the motion precludes the necessity of discussing the others.

The provision of the statute thought to justify the arrest of the defendant is found at § 749 of Rem. & Bal. Code, and reads as follows:

"The defendant may be arrested in the following cases:—

"(1) In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is a nonresident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property:

"(2) In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent [267] of a corporation in the course of his employment as such, or by any

factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment;

"(3) In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof;

"(4) When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought;

"(5) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors;

"(6) When the action is to prevent threatened injury to or destruction of property, in which the party bringing the action has some right, interest, or title, which will be impaired or destroyed by such injury or destruction, and the danger is imminent that such property will be destroyed or its value impaired, to the injury of the plaintiff;

"(7) On the final judgment or order of any court in this state, while the same remains in force, when the defendant, having no property subject to execution, or not sufficient to satisfy such judgment, has money which he ought to apply in payment upon such judgment, which he refuses to apply, with intent to defraud the plaintiff, or when he refuses to comply with a legal order of the court, with intent to defraud the plaintiff; or when any one or more of the causes exist for which an arrest is allowed in the first class of cases mentioned in this section."

Historically, this section of the statute, although in a somewhat different form, was first enacted into law by the territorial legislature of 1854 (Laws 1854, p. 145); it was re-enacted in its original form in 1860 (Laws 1860, p. 17), and again in 1863 (Laws 1863, p. 100). In 1868, the territorial legislature authorized the governor of the territory to appoint "three discreet persons as code commissioners," [268] to revise, digest and codify the statute laws of the territory, empowering the commission when appointed to thoroughly revise such laws, classify and arrange them under appropriate titles, reject all repealed and obsolete statutes, and "make and incorporate into the civil, criminal, probate and justice's practice acts, such amendments as they or a majority of them deem advisable;" requiring the commission to report the result of the labors to the next session of the legislature (Laws 1868, p. 64). The com-

mission appointed pursuant to the act reported a number of bills, among which was one entitled, "An act to regulate the practice and proceedings in civil actions." The bill was enacted into law by the legislature of 1869, in the form and under the title reported by the commission. In this act the statute in question appears in the laws in its present form for the first time. Laws 1869, p. 28, § 114. It was again re-enacted in the codification of 1873 (Laws 1873, p. 30); again in 1877 (Laws 1877, p. 24); and finally again in the codification of 1881 (Code of 1881, p. 53). Since 1869, there has been no change in its phraseology, and, if not repugnant to art. 1, § 17 of the constitution, remained in force as a part of the state statutes, in virtue of art. 27, § 2, of that instrument. Since statehood the codification of the laws have been unofficial in their inception. Each of the several codifiers has, however, included the statute in his compilation as part of the existing laws (2 Hill's Code, § 229; Code of 1896, § 4616; 2 Ballinger's Code, § 5464; Pierce's Code, § 456; Rem. & Bal. Code, § 749).

The code, in the chapter of which this section forms a part and elsewhere, provides appropriate remedies for carrying the provision of the section into execution. Section 511 (Rem. & Bal. Code), especially provides for a writ of execution against the person; section 513, the form and contents of the writ, providing that "it shall require the sheriff to arrest the debtor, and commit him to the jail of the county until he shall pay the judgment, with interest, or be discharged according [269] to law." Section 517 provides that a person arrested on such execution shall be imprisoned within the jail, or the liberties thereof, and kept at his own expense until satisfaction of the execution or his legal discharge, "but the plaintiff shall be liable to the sheriff in the first instance for such expense as in other cases of arrest in the same manner and to the same extent as therein prescribed." The "other cases of arrest" mentioned refer to arrests made prior to the final judgment in the action, specifically to § 757 of the code. This section provides:

"The sheriff shall execute the warrant by arresting the defendant, and keeping him in custody until discharged by law. And the plaintiff in the first instance, shall be liable for the sheriff's fees, for the food and maintenance of any person under arrest, which, if required by the sheriff, shall be paid weekly in advance. And such fees so paid shall be added to the costs taxed or accruing in the case, and be collected as other costs. And if the plaintiff shall neglect to pay such fees for three days after a demand, in writing, upon the plaintiff or his attorney for pay-

ment, the sheriff may discharge defendant out of custody."

No means are provided by which the judgment debtor can procure his own discharge other than by a payment of the judgment with interest, together with the costs and accruing costs. If the judgment debtor is unable to pay, he may be kept in confinement as long as the judgment creditor wills it; the judgment creditor has but to pay "for food and maintenance" of the judgment debtor to keep him in confinement for the term of his natural life. In this regard the statute has all of the harshness of the ancient common law. Now, in England, under the Victorian statutes, the debtor can be released by taking the poor debtors' oath. And in most of the states of the Union where imprisonment for failure to pay a judgment is allowed at all, there is either a time limit beyond which the imprisonment cannot extend, or a means of procuring a discharge by some act of the debtor himself. The harshness of the remedy afforded by the act does not, of course, argue [270] strongly against its constitutionality, but it does, we think, argue strongly in favor of the belief that the people of the state have generally regarded the remedy as obsolete. Notwithstanding the fact that it has been but infrequently resorted to, we cannot believe that the legislature would have allowed it to remain on the statute books in its present form had they thought that life imprisonment, a punishment now only inflicted for the highest crime known to the law, was a possibility under it. We believe they would have modified it to a degree more consistent with modern thought and ideas; especially since the mother country, from whom it was borrowed, has long since abolished it as contrary to good public policy.

In the cases cited by the parties from our own reports which are thought to sustain their respective contentions, we fail to find that the precise question presented has been authoritatively determined, although in the discussion of cognate questions we have touched upon it to some extent, expressing thereon, perhaps, somewhat discordant views. In *Burrichter v. Cline*, 3 Wash. 135, 28 Pac. 367, the action was upon a foreign judgment, in which the defendant was arrested and held to bail on an affidavit charging that he was about to leave the state with intent to defraud his creditors. The defendant appealed, contending that his arrest was illegal and improvident. The court sustained his contention "on the ground that, by art. 1, § 17, of the constitution, imprisonment for debt, except in the case of absconding debtors, was abolished, and on the further ground that the affidavits presented to the court, and on which the order of arrest was made, stated

no facts sufficient to constitute a cause for arrest under the code (§ 749) if the same had been still operative." From the language of the court it can be inferred that it was thought an arrest of a defendant in a civil action, except in the case of an absconding debtor, was illegal, no matter what gave rise to the cause of action; but as the record of the case shows that the cause of action on which the [271] judgment sued upon was founded arose out of contract, the expression of the court can only be taken as indicative of its views, not as an authoritative determination of the question.

In *Colby v. Backus*, 19 Wash. 347, 53 Pac. 367, 67 Am. St. Rep. 732, the court had before it the constitutionality of the act permitting a committing magistrate to charge the costs of a criminal proceeding instituted before him, if the complaint be found frivolous or malicious, to the prosecuting witness, and to commit such witness until such costs be paid, or he be discharged by due process of law. It was contended that the statute allowed imprisonment for debt, but the court said that the costs were imposed upon him as a penalty, and "did not constitute strictly and simply a debt any more than the fine imposed upon a party convicted of assault and battery is a debt;" further saying that the "imprisonment which is forbidden by the constitution under art. 1, § 17, relates to liability arising on a contract." This case more nearly touches the question than does the earlier one, but the real question before the court was, after all, whether the legislature could, without violating the constitutional provision cited, impose a penalty for frivolous or malicious prosecutions. In other words, the provision is in the nature of a criminal statute, and it is the frivolity and maliciousness that is punished, not the mere failure to pay a debt. The case, therefore, like the earlier one, cannot be said to be determinative.

In the case of *In re Cave*, 36 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736, the petitioner was ordered imprisoned for refusing to obey an order of the court directing him to turn over money and property in his possession in satisfaction of a judgment of alimony, costs, and attorney fees, awarded against him in a suit for divorce. It was contended that the order was a violation of the constitution, but the court held otherwise, using this language: "It is well-settled law of this country that a decree or order for alimony in a divorce proceeding is not a debt within the meaning of that term as used in § 17, art. 1, of our constitution." But it is evident that [272] the real ground of the decision is that imprisonment can be used as a means of coercing the performance of the order of the court; to compel the defend-

ant to do a thing which was in his power to do; not as a punishment for a failure to satisfy a judgment of alimony which he had no means of satisfying. That the judgment of this court would have been otherwise had it been shown that the defendant was without property to satisfy the judgment, is evidenced by our later decision of *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, where we held it "always a defense to a proceeding of this kind to show that the disobedience was not wilful, but was the result of pecuniary inability or other misfortunes over which the accused had no control."

In *In re Milecke*, 52 Wash. 312, 100 Pac. 743, 132 Am. St. Rep. 968, 21 L.R.A.(N.S.) 259, we had before us the act making it a misdemeanor to fail to pay a hotel or board bill. It was contended that the act was violative of the constitution prohibiting imprisonment for debt, but the court refused to sustain the contention, using the following language:

"We cannot read the statute as does counsel for appellant. It does not in our judgment warrant imprisonment for a debt. It would be beyond our province to hold that a person could be imprisoned for a simple contract debt; or, to put it in the way of counsel for appellant, simply because he did not pay his hotel bill. The hotel keeper, if he should undertake to use the law as a whip to compel the payment of an overdue account honestly contracted, would himself be subjected to the penalties of the law, and become liable for damages in a civil action. The law under consideration goes no further than to say that the fraudulent incurring of a debt is a crime. Appellant has obtained a thing of value with intent to defraud. He is liable, as much so as is the one who by fraudulent pretense obtains the goods of a merchant or the money of a banker."

In further arguing the question, the court stated that the prohibition contained in art. 1, § 17, of the constitution related to an obligation arising out of contract, and "is never [273] extended to cover a tort;" citing and quoting authorities to that effect from other jurisdictions. But, again, we think the question whether the constitutional prohibition related to judgments founded upon torts was not strictly before us. It was, of course, a complete answer to the objection raised to say that the constitutional prohibition did not apply to debts contracted in the manner prohibited, yet the result of the case must have been the same had it been determined that the constitutional inhibition did apply to debts contracted in tort; since in the later case of *State v. Pilling*, 53 Wash. 464, 102 Pac. 230, 132 Am. St. Rep. 1080, speaking of a prosecution for drawing a check upon a bank in which drawer had no funds or credit, it was said:

"The contention that the statute authorizes imprisonment for debt, in violation of § 17 of article 1 of the state constitution, is not well founded. The statute punishes the party for his fraud and not for his failure to redeem his check. In *re Milecke*, 52 Wash. 312, 100 Pac. 743, 152 Am. St. Rep. 968, 21 L.R.A.(N.S.) 259."

In *State v. McFarland*, 60 Wash. 98, 110 Pac. 792, 140 Am. St. Rep. 909, the defendant had been convicted of violating the act relating to the inspection of hotels, inns, and public lodging houses, *Rem. & Bal. Code*, §§ 6030-6049. The act, among other things, provides for the inspection of such places, and requires the owner, manager or person in charge to pay the cost of such inspection, making it a misdemeanor to refuse to so pay, punishable by imprisonment. The defendant contended that the act was unconstitutional because authorizing imprisonment for debt, and to the extent that the act permitted such imprisonment, the contention was sustained, the court using this language:

"In this case the entire act, purged of the single invalid feature which provides for imprisonment for debt, can and must be sustained. The only alleged criminal offense, with the commission of which the appellant has been charged, is that he did not pay the inspection fee. He cannot be fined [274] nor imprisoned for any such act, as it cannot be made a criminal offense."

But obviously, notwithstanding the language of the court, the case does not determine, either directly or in principle, the question at bar.

In *Hamilton v. Pacific Drug Co.* 78 Wash. 689, 139 Pac. 642, it appeared that the plaintiff had been engaged in business at Valdez, Alaska, and had incurred an indebtedness to the Pacific Drug Company. He disposed of his business and embarked for Seattle, arriving there in the nighttime. After his arrival at Seattle, and while he was still in his stateroom, he was arrested on the complaint of the drug company as an absconding debtor, and imprisoned in the county jail of King county. After his discharge, he sued the drug company in damages, alleging an illegal arrest and an unlawful imprisonment. He recovered in the court below, and on the appeal to this court the drug company sought to justify the arrest and imprisonment on the constitutional provision cited. The court held that the constitutional provision was not self-executing, and that there was no statute prescribing a procedure by which its provisions could be carried into effect; saying, with reference to the statute now in question, that the effect of the adoption of the constitutional provision "was to abate the right of arrest in all cases specified" therein. Since, however, the case was one where the debt was contractual, and since the statute does not

purport to authorize arrest and imprisonment except "on a cause of action not arising out of contract," the court was clearly right in holding that it did not furnish a procedure for the arrest of an absconding debtor, but the case can hardly be said to determine the question presented in the case at bar.

The authorities cited from other jurisdictions we shall not especially review. They hold with practical unanimity that constitutional provisions prohibiting imprisonment for debt have reference only to contractual debts, not to obligations incurred in the commission of some form of tort.

[275] But notwithstanding our own expressions and the practically unanimous holdings elsewhere to the contrary, we have felt compelled to hold the statute inimical to the constitutional provision cited. As we said on another occasion, it is a cardinal rule of construction that the language of a state constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. When, therefore, words are used in a constitution which have both a restricted and general meaning, the general must prevail over the restricted, unless the nature of the subject-matter or the context indicates that the limited sense was intended. Says Mr. Justice Story:

"Every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtilities, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." 1 Story, Constitution (5th ed.) § 451.

So Mr. Sedgwick in his work on Constitutional Law:

"In the consideration of these questions it may be observed in the first place, that, in the construction of a constitution the rule is, 'its terms must be taken in the ordinary and common acceptance, because they are supposed to have been so understood by the framers and by the people who adopted it.

This is unquestionably the correct rule of interpretation. [276] It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged it by the meaning apparent on its face according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense."

In 6 R. C. L. 52, under the title, "Constitutional Law," it is said:

"Words or terms used in a constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the legislature. This gives rise to the recognized rule of construction that it is presumed that words appearing in a constitution have been used according to their plain, natural and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent. This rule does not apply, however, to technical words and phrases which necessarily should be given a technical signification."

And in *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803, Justice Cobb, speaking of the word "debt" as used in the constitution of Georgia, used this language:

"Constitutions are the result of popular will, and their words are to be understood ordinarily as used in the sense that such words convey to the popular mind. 6 Am. & Eng. Enc. of Law (2d ed.) 924, 925. There is nothing in the paragraph under consideration which indicates that the term 'debt' was used in any other way than in its ordinary and popular sense. If a person unversed in the technical niceties of the law is asked what is the amount of his debts, his answer to the question in every instance would be an amount which would represent the present liability that he is under at the moment the question is answered. A farmer who has been so unfortunate as to be compelled to place a long loan upon his farm, if asked what was the amount of the debt upon his farm, would unhesitatingly answer by giving an amount which would represent the principal of the debt and any interest that was past due and payable at the time the inquiry was made. One who, in making a return of his property for [277] taxation, is required to state to the tax-receiver the amount of solvent debts due him would not, in the case of a perfectly solvent debt, consider that he was under a moral obligation to return for taxation the value of the debt at any higher amount than one which would represent the principal and any interest that was past due at the time the return was made. It is useless to multiply illustrations. The debt of an

individual, or a corporation, or the public, in its usual and popular sense, means the amount for which the individual or corporation or the public would be presently liable if called upon to discharge the obligation. The law deals at all points with the man of ordinary prudence and average capacity as the standard, for the simple reason that communities and commonwealths are made up of persons of this class. Constitutions are adopted by commonwealths so made up, and the meaning to be given to such instruments is that meaning which the man of ordinary prudence and average intelligence and information would give. Generally the meaning given to words by the learned and technical is not to be given to words appearing in a constitution. In other words, the popular meaning is to be given to the words of a constitution, unless the context or the instrument taken as a whole imperatively requires some other meaning. Before the words can be given a purely technical meaning which would be different from the popular meaning, the intention that they should be so understood must be plainly apparent and palpably manifest."

Turning to the constitutional provision now in question, it is at once apparent that the word "debt" therein was used in its popular and general sense. The prohibition is contained in a separate section. It is a simple declaration that there shall be no imprisonment for debt except in cases of absconding debtors. Nothing in the context or subject-matter indicates that it is otherwise limited, nor do we find elsewhere in the constitution anything that indicates that it was intended to be otherwise limited. The question then arises, how was the term "debt" understood in its general and ordinary signification at the time of the adoption of the constitution? Obviously, it seems to us, it was understood to [278] signify obligations due from one person to another of every character, which would include judgments entered in actions *ex delicto* as well as in actions *ex contractu*. The one is as much of an obligation as is the other. Apart from the particular section in question, the same provision has been made by law for the collection of the one as for the collection of the other; in each class the property of the judgment debtor can be seized and sold for the satisfaction of the sum awarded, under an ordinary writ of execution. Again, other provisions of the statute indicate that such is its meaning. The statute, for example, provides for bail upon arrest, for sureties in attachment proceedings, for sureties on the bonds required of public officers, on the bonds of executors and administrators, on bonds of litigants required to secure costs in certain cases, and under multifarious other conditions, all of whom are required to justify that they were worth the

sum for which they become sureties, over and above all of their just debts and liabilities. Surely no such obligor or surety would be permitted to escape punishment under the statute making it a criminal offense to take a false oath in such cases, by showing that the debt which he had overlooked when taking the oath was a judgment in an action arising in tort.

The lexicographers, both ancient and modern, include such a judgment in their definition of the term "debt." Sir Edward Coke, commenting on the word *debitum* as used in the statute of Merton, says: "*Debitum* signifieth not only debt for which an action of debt doth lie, but here in this ancient act of parliament, it signifieth generally any duty to be yielded or paid." Burrill, in his law dictionary, says: "The word debt is of large import, including not only debts of record or judgment, and debts by specialty, but also obligations arising under simple contract to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise." Bouvier defines the word as, "All that is due a man under any form [279] of obligation or promise;" and "Judgment Debt," as "One which is evidenced by matter of record." Webster's International Dictionary defines it as, "That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another or to perform for his benefit; thing owed; obligation; liability." Definitions given by the courts of the term "debt" will be found collected in Cyc. under the title, "Debt." None of them deny that, in ordinary acceptance, a judgment founded upon a tort is a debt, and some of them expressly so state. *Mertz v. Barry*, 101 Mich. 32, 59 N. W. 445, 45 Am. St. Rep. 379, 24 L.R.A. 789; *Carr v. State*, 106 Ala. 35, 17 So. 350, 54 Am. St. Rep. 17, 34 L.R.A. 634; *Dellinger v. Tweed*, 66 N. C. 206; *Hampton v. Truckee Canal Co.* 19 Fed. 1; *Smith v. Omans*, 17 Wis. 395; *Turner v. Wilson*, 49 Ind. 581; *Hunter v. Windsor*, 24 Vt. 327; *Carver v. Braintree Mfg. Co.* 2 Story 432, 448, 5 Fed. Cas. No. 2,485.

If these considerations be sound, it follows as of course that the constitutional inhibition applies to a judgment in an action of tort; for if it be the rule that the words of the constitution must be construed in their general and ordinary sense, and it is further true that a judgment founded on tort is a "debt" within the general or ordinary meaning of that term, there is no escape from the conclusion that the people in adopting the constitution meant to prohibit imprisonment on judgments founded on tort.

Another reason which leads us to the conclusion that judgments in actions for torts are debts within the meaning of the constitu-

tion is found in the fact that the prohibition with respect to imprisonment for debt therein is broader and more sweeping in its terms than are the constitutions of the states whose courts maintain a contrary doctrine. In so far as our researches have gone, the constitutions of such states contain exceptions to the general declaration which materially narrow its scope and effect. Ours, it will be observed, is without limitation as to the character of the debt, the [280] only exception being cases of absconding debtors, which is as applicable to debts evidenced by judgments founded on contract as it is to judgments founded on tort. This distinction we cannot think to be without meaning. It would seem that, had the makers of the constitution intended that there should be limitations to the broad expression used, they would have so stated in express terms, or at least in the terms of the existing constitutions under which the limitations had been declared. *Ex p. Hardy*, 68 Ala. 303; *Carr v. State*, supra; *Ex p. Prader*, 6 Cal. 239.

But there is a reason, aside from the ones discussed, why in this state the penalty of imprisonment should not be imposed in a civil action, be its nature what it may, other than in the one case in which the constitution especially permits it. It is violative of the public policy of the state as announced by the courts and acquiesced in by the legislature. The reason why a judgment in an action in tort is thought not to be within the clause of the constitution prohibiting imprisonment for debt is as well stated in the case of *U. S. v. Walsh*, 1 Deady 281, 1 Abb. 66, 28 Fed. Cas. No. 18,635, as in any of the adjudicated cases. It is there said:

"A person who willfully injures another in person, property, or character, is liable therefor in damages. In some sense he may be called the debtor of the party injured, and the sum due for the injury a debt. But he is in fact a wrong doer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment, because he is pecuniarily unable to pay what he promised to. For instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees ought not to be considered in the same category as an unfortunate debtor. He ought to be liable to arrest in action for damages by the party injured. Deny him this remedy, and in the majority of such cases it would amount to a denial of justice, and a deliberate repudiation and disregard of the injunction contained in section 10 of the same article—'every man shall have remedy by due course of law for injury done him in person, property or reputation.' It may be admitted that a [281] penalty given by statute is technically a debt. It does not, however, arise

upon contract, but by operation of law. It is imposed as a quasi punishment for the violation of law or the neglect or refusal to perform some duty to the public or individuals enjoined by law. Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are either in morals or law, wrong-doers, and not simply unfortunate debtors unable to perform their pecuniary obligations. I do not think the constitutional provision prohibiting imprisonment for debt was intended to apply to or include such cases."

In other words, the reason for the rule lies in the fact that the action is not only compensatory, but is vindictive and punitive, and in the nature of quasi-punishment for the violation of law. But this court early announced, and has consistently adhered to the rule, that vindictive, exemplary, or punitive damages are not recoverable in this state unless the legislature had expressly so provided: that compensation is the fundamental principle of the law of damages; the right to punish for crime being the prerogative of the state. *Spokane Truck, etc. Co. v. Hoefler*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L.R.A. 689; *Sloan v. Langert*, 6 Wash. 26, 32 Pac. 1015; *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620; *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384; *Davis v. Tacoma R. etc. Co.* 35 Wash. 203, 77 Pac. 209, 66 L.R.A. 802; *Woodhouse v. Powles*, 43 Wash. 617, 11 Ann. Cas. 54, 86 Pac. 1063, 117 Am. St. Rep. 1079, 8 L.R.A.(N.S.) 783; *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626; *Corcoran v. Postal Telegraph-Cable Co.* 80 Wash. 570, 142 Pac. 29, L.R.A.1915B 552.

The reason for the rule is forcefully and vigorously stated by Judge Dunbar in the case first cited. After quoting the statement of Greenleaf, to the effect that damages are given as a compensation or satisfaction to the plaintiff for an injury actually received, and that they should be precisely commensurate with the injury, the learned and distinguished jurist continues as follows:

[282] "It seems to us that there are many valid objections to interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of a medley or legal jumble two distinct systems of judicial procedure. While the defendant is tried for a crime, and damages awarded on the theory that he has been proven guilty of a crime, many of the time honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions 'from the time whereof the memory of man runneth not to the contrary,' are absolutely ignored. Under this procedure, the doctrine of presumption of innocence until proven guilty beyond a rea-

sonable doubt finds no lodgment in the charge of the court, but is supplanted by the rule in civil actions of a preponderance of testimony. The fallacy and unfairness of the position is made manifest when it is noted that a person can be convicted of a crime, the penalty for which is unlimited save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state, where the amount of the fine is fixed and limited by law; and, in addition to this, he may be compelled to testify against himself, and is denied the right to meet the witnesses against him face to face under the practice in civil actions of admitting depositions in evidence.

"Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the [283] rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh. Ordinarily the administration of the laws is divided into two distinct jurisdictions, the civil and the criminal, each governed by rules of procedure and by rules governing the admission and weight of testimony different and distinct from the other. The province of the civil court is, as its name indicates, to investigate civil rights. There its jurisdiction ends, or ought to end; while the province of the criminal court is, as its name imports, to investigate and punish crime and restrain its commission. And it is to the criminal and not to the civil jurisdiction that society looks for its protection against criminals. The object of punishment is not to deter the criminal from again perpetrating the crime on the particular individual injured, but for the protection of society at large; and as the state is at the expense of restraining and con-

trolling its criminals, and as fines are imposed for the double purpose of restraining the offender and of reimbursing the state for its outlay in protecting its citizens from criminals, we are at a loss to know by what process of reasoning, either legal or ethical, the conclusion is reached that a plaintiff in a civil action, under a complaint which only asks for compensation for injuries received, is allowed to appropriate money which is supposed to be paid for the benefit of the state. It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the fine at a sum which it deems commensurate with the crime designated; hence, punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated; a theory which is repugnant to every sense of justice."

Since the announcement of this rule, the legislature has not, in so far as we are advised, with the possible exception of one or two instances, and in these seemingly by inadvertence, permitted the recovery of exemplary and punitive damages as a part of the remedy for an act which it has prohibited as a wrong. It has not so provided for the commission [284] of the act for which recovery was had in the present action, although it has made the act felony, and has subjected offenders against it to prosecution as other offenders are prosecuted who violate the laws of the state. Since the reasons for holding that the constitutional inhibition does not operate against judgments founded on tort does not obtain in this state, but is violative of its policy as expressed by its courts, it would seem that the rule itself should not obtain.

For these reasons, we are constrained to hold that the judgment of the court is violative of the section of the constitution prohibiting imprisonment for debt, and that the court erred in overruling the defendant's motion for his discharge.

The order appealed from is reversed, and the cause remanded with instructions to discharge the defendant.

Morris, C. J., Mount, Ellis, and Main, JJ., concur.

NOTE.

Civil Liability for Tort as Debt within Constitutional Provision against Imprisonment for Debt.

The purpose of this note is to discuss the recent cases passing on the question whether

a civil liability for tort is a debt within a constitutional provision against imprisonment for debt. The earlier cases on this point are collected in the notes to *Ex p. Berry*, 20 Ann. Cas. 1344, and *State v. Brewer*, 37 Am. St. Rep. 752.

In a number of jurisdictions there are constitutional or statutory provisions abolishing imprisonment for debt either generally or with an exception in cases of fraud. By the great weight of authority where a person incurs a civil liability by a wrongful act, such a constitutional or statutory provision has no application and he may be lawfully imprisoned since the liability is considered not to be a "debt." *Armstrong v. Ayres*, 19 Conn. 540; *Cowles v. Day*, 30 Conn. 406; *Turner v. Wilson*, 49 Ind. 581; *Tatlow v. Bacon* (Kan.) 165 Pac. 835; *Bromley v. People*, 7 Mich. 472; *Ex p. Clark*, 20 N. J. L. 648, 45 Am. Dec. 394; *Perry v. Orr*, 35 N. J. L. 295; *Keeler v. Clark*, 18 Abb. Pr. (N. Y.) 154; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774. See also *Ruddell v. Childress*, 31 Ark. 511; *Sedgebeer v. Moore*, 1 Phila. 116, 7 Leg. Int. 194. Compare the reported case.

The court in *Armstrong v. Ayres*, 19 Conn. 540, gave the reason for the rule as follows: "Inability to pay debts was no longer to be treated as deserving imprisonment; and this remedy for the collection of debts was considered as too harsh; and the legislature, in very positive language, abolished it, by the introductory clause of the statute. But all other cases of action enumerated under the proviso, were left to be enforced as before. And remedies by action on the case for fraud were provided, even beyond former limits, so that all tortfeasors and fraudulent debtors should be discouraged and checked, by danger of imprisonment. The present cause of action falls clearly within those enumerated under the proviso, to be enforced by imprisonment, if necessary. It is an action on the case, for fraudulently assigning, conveying and concealing a debtor's property away from his creditors, and away from legal process,—remedy not before existing, but expressly given by this statute. *Smith v. Blake*, 1 Day 258. It is an action for fraudulently and collusively obtaining a credit and contracting a debt. It is a strongly marked action in tort."

In *Turner v. Wilson*, 49 Ind. 581, it was said: "A constitution which abolishes imprisonment for debt does not prohibit the legislature from passing a law to imprison on judgments founded on torts. *Cooley Const. Lim.* 341. None but honest debtors are protected from imprisonment for debt; wrongdoers and dishonest men cannot claim the exemption. The act of begetting a bastard child is a tort, contrary to good morals,

and a wrong against society; and, to place the obligation imposed by law to support a bastard child upon the same ground with a debt arising by agreement, and to give to such a tortfeasor the privileges which are granted only to an honest debtor, would be to confound right and wrong, protect the wrongdoer by law, and impose the obligation due from him upon those who are not guilty of any transgression. Such an interpretation of the constitution would be unwarrantable, and render that instrument a curse rather than a blessing."

But it has been held that where a constitution does not except cases of fraud in a provision prohibiting imprisonment for debt, a statute providing for the imprisonment of a banker for fraudulently receiving a deposit is in conflict with the constitutional provision declaring that no person shall be imprisoned for debt. *Carr v. State*, 106 Ala. 35, 17 So. 350, 54 Am. St. Rep. 17, 34 L.R.A. 634.

It has been held that a person may be imprisoned for fraud in avoiding the payment of a debt as well as for fraud in contracting the debt under a constitutional provision whereby fraud is excepted from the prohibition of imprisonment for debt. *Bromley v. People*, 7 Mich. 472. And under a similar provision it has been held that a person may be imprisoned for fraud committed subsequent to the time of the creation of the debt. *Ex p. Clark*, 20 N. J. L. 648, 45 Am. Dec. 394, wherein the court in commenting on the rule said: "The true spirit of the constitution is this—and it speaks the enlightened and benevolent language of the age in which we live—the honest debtor, who is poor and has nothing to pay with, shall not be imprisoned at the mercy of his creditor. But if the debtor, instead of putting himself upon his honest poverty, seek to elude the jurisdiction and process of the courts; if he conceal, or assign or remove his property, to keep it out of the reach of his creditors; or if he have the means in his pocket or under his control, of paying his debt, and refuse to do so, he is a dishonest and fraudulent man. He is the very man that the constitution says may be, and that common sense and common honesty says ought to be, imprisoned, until he disgorge his money and deliver up his property, to his confiding creditor." It was held in *Cowles v. Day*, 30 Conn. 406, that the imprisonment of a debtor for fraudulently concealing property so that it could not be attached was not in conflict with the statute abolishing imprisonment for debt.

Where a statute provided for imprisonment in certain civil actions and no mention was made of absconding debtors, an arrest under that statute of an absconding debtor was held

to be unlawful, the court saying that there must be a direct statutory provision specifying the causes for which a defendant in a civil action might be arrested. *Hamilton v. Pacific Drug Co.* 78 Wash. 689, 139 Pac. 642.

Where a statute provided for the arrest of a person for fraudulently concealing property from his creditors, it was held that the arrest of the transferee of an insolvent debtor was unlawful under a constitutional provision abolishing imprisonment for debt except in cases of fraud. *Cooper v. Nolan*, 138 Cal. 248, 71 Pac. 179.

Where the plaintiff has a right to elect between assumpsit and tort as in the case of a conversion by an agent, if he elects to sue in tort he is entitled to a *capias*. *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774.

Imprisonment for defrauding a person by a conspiracy to induce him to exchange land for a worthless deed has been held not to be in violation of the bill of rights of Kansas which prohibits imprisonment for debt except in cases of fraud. *Tatlow v. Bacon* (Kan.) 165 Pac. 835.

It was held in *Perry v. Orr*, 35 N. J. L. 295, that, if a man promises to marry a woman and through the influence of this promise seduces her, his original promise is a fraud and his imprisonment is lawful under a constitutional provision prohibiting imprisonment for debt except in cases of fraud. *Compare* the reported case.

It has been held that an action for an injury to the plaintiff's ox which was in the possession of the defendant was an action in tort and that an arrest to enforce execution of the judgment was lawful and not in conflict with a provision abolishing imprisonment for debt. *Keeler v. Clark*, 18 Abb. Pr. (N. Y.) 154.

CITY OF GAINESVILLE

v.

ALACHUA COUNTY.

Florida Supreme Court—May 11, 1915.

69 Fla. 581; 68 So. 759.

Taxation — Specific Assessments — Property Subject — County Property.

There is no express provision in the constitution of the state of Florida as to special assessments by a municipality for local improvements. Under the provisions of section 8, art. 8, of such constitution, the legislature may, by statute, give to a city authority to

make a special assessment for street improvements against property belonging to the county located within the city and used for governmental purposes, and such authority may be conferred by a special act.

(Syllabus by court.)

Error to Circuit Court, Alachua county:
WILLS, Judge.

Action by City of Gainesville, plaintiff, against Alachua county, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

Robert E. Davis for plaintiff in error.

W. S. Broome for defendant in error.

[581] SHACKLEFORD, J.—The City of Gainesville brought an action at law against Alachua County whereby it was sought to recover for street improvements on property of the County of Alachua situated in the City of Gainesville [582] on which the County Court House is located. A demurrer to the declaration was interposed which was sustained, and the plaintiff declining to plead further, judgment was entered in favor of the defendant. The declaration contains four counts, but we see no occasion for copying them. Suffice it to say that the municipality bases its action upon Chapter 6348 of the Laws of Florida, Acts of 1911, page 492, which authorizes such municipality to provide for the making of certain street improvements therein specified and for the payment therefor by special assessment of the cost thereof upon the abutting property. We copy the following provision from such Chapter: "All lands fronting or abutting upon any street, alley or public place owned or belonging to the State of Florida, Alachua County, the State Board of Education, Board of Public Instruction, or any Sub-School District shall be required to pay its proportion of the costs of such improvements as other lands and property fronting or abutting thereon is required to pay."

The declaration, which is quite lengthy and has a number of exhibits attached thereto, alleges the passage of the ordinance providing for such improvements on the streets situated on the property in question, the performance of the work in compliance with the ordinance and the proportionate part of the cost thereof assessed against the property abutting on such streets owned by the county. The demurrer covers several pages and contains a number of grounds, but, as is stated in the brief of the plaintiff in error, which is acquiesced in by the defendant in error, these grounds may be summarized as follows:

"1. There is no cause of action.

2. Because there was no consent upon the part of [583] the County of Alachua to the passage of Chapter 6348, Acts of 1911.

3. Because there was no valid contract on part of the county to pay the assessment.

4. Because a court of law cannot enforce the alleged liability against the county."

It may be well to state that the municipality had previously filed its bill in chancery against the county by which it sought to enforce its lien against the property of the county for such street improvements. A demurrer was interposed to the bill, which was overruled, and upon an appeal by the county we reversed such order on the ground that Chapter 6348 of the Laws of Florida "does not purport to give to the City of Gainesville a right to a lien for street improvements upon abutting county property on which the County Court House is situated." *Alachua County v. Gainesville*, 67 Fla. 506, 65 So. 653.

Now we are called upon to determine whether or not such municipality can maintain its action at law against the county for the cost of such improvements. The first question which presses for an answer is, can the Legislature give to a city authority to make a special assessment for street improvements against property belonging to the county located within the city and used for governmental purposes? We have practically answered this question in the affirmative in *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421, holding that there was no express provision in our State Constitution as to special assessments and that Section 8 of Article VIII, which we quoted, empowered the Legislature to confer such authority upon [584] a municipality. See also our discussion in *Anderson v. Ocala*, 67 Fla. 204, 64 So. 775, 52 L.R.A. (N.S.) 287. We recognize, as was pointed out in *Edwards v. Ocala*, *supra*, that there is a difference of opinion upon this point in some of the jurisdictions, which we think, is largely due to dissimilar constitutional provisions. We refer to *Franklin County v. Ottawa*, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 496, to which a comprehensive note is appended; *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; *Arnold v. Knoxville*, 115 Tenn. 195, 90 S. W. 469, 5 Ann. Cas. 881, 3 L.R.A. (N.S.) 837; *Edwards, etc. Constr. Co. v. Jasper County*, 117 Ia. 365, 90 N. W. 1006, 94 Am. St. Rep. 301, wherein the authorities upon the point will be found fully collected.

The other question which presents itself is, even if the Legislature has power to enact a general law conferring such authority upon municipalities, can it confer such authority upon one municipality by a special act? We think that an affirmative answer

must also be returned to this question. We find that such legislation does not fall within the class of special or local laws inhibited by Section 20 of Article III of our State Constitution, and we think that Section 8 of article VIII, to which we have previously referred, is sufficiently comprehensive to empower the Legislature to confer such authority. See *Jacksonville v. Bowden*, 67 Fla. 181, Ann. Cas. 1915D 99, 64 So. 769, L.R.A. 1916D 913, and *Anderson v. Ocala*, *supra*.

It follows that the judgment must be reversed, with directions to overrule the demurrer.

Judgment reversed.

Taylor, C. J., and Whitfield and Ellis, JJ., concur.

Cockrell, J., dissents.

NOTE.

Public Property as Subject to Special Assessment.

Introductory, 844.

National Property, 844.

State Property, 845.

County Property, 847.

Municipal Property, 849.

Introductory.

The present note is devoted to the consideration of the question whether public property is subject to a special assessment. The general principle underlying the entire subject appears to be that a municipality has no power to subject to a special assessment the property of the nation or the state or that of a county without legislative permission, and that permission so to do will not ordinarily be implied from a grant of the power to assess property generally but must be given expressly.

The liability of school property to special assessment is considered in the notes to *Matter of Howard Ave. v. Seattle*, 12 Ann. Cas. 417; *Kalispell v. School Dist. No. 5*, Ann. Cas. 1913D 1101; and *Franklin County v. Ottawa*, 33 Am. St. Rep. 396. For a discussion of the property subject to a special sewer assessment see the note to *Graham v. Grand Rapids*, Ann. Cas. 1915D 380.

National Property.

Public property of the national government is not subject to special assessment for local improvements. *Fagan v. Chicago*, 84 Ill. 227; *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004; *Ivinson v. Hance*, 1 Wyo. 270. See also *Dobbins v. Erie County*, 16 Pet. 447, 10 U. S. (L. ed.) 1022; *Nathan v. Louisiana*, 8 How. 82, 12 U. S. (L. ed.)

69 Fla. 581.

992; *People v. Shearer*, 30 Cal. 645; *People v. McCreery*, 34 Cal. 432; *McLean County v. Bloomington*, 106 Ill. 209; *San Diego v. Linda Vista Irrigation Dist.* 108 Cal. 189, 41 Pac. 291, 35 L.R.A. 33; *Edwards, etc. Constr. Co. v. Jasper County*, 117 Ia. 365, 90 N. W. 1006, 94 Am. St. Rep. 301; *Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590, 139 Am. St. Rep. 1076. Compare *Baltimore v. Green Mt. Cemetery*, 7 Md. 517.

Thus in *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004, the court after stating the rule that an exemption from taxation does not exempt from special assessment said: "Though property belonging to the federal government is exempted in the same terms as is the other property enumerated, and would otherwise fall within the letter of the decision, yet for the reason that the federal government is supreme within the purview of the powers granted to it by the constitution, and cannot be subject to any state, its property is exempt from special assessments, as well as ordinary taxes, and this even in the absence of any such provisions as those found in our constitution or state laws."

In *Fagan v. Chicago*, 84 Ill. 227, it was held that the city of Chicago had no power to levy a special assessment for paving a street on a block of ground owned by the United States Government and used, with the buildings thereon, for the purposes of a post office, custom-house, courts, etc. The court said: "A municipal corporation has no power to assess or exact from the state or the general government any sum for benefits conferred."

So in *Ivinson v. Hance*, 1 Wyo. 270, the court said that there was no room to doubt that there was no power given to either the territorial legislature, or any municipal corporation within the territory, to tax lands the title to which was in the United States, and that they were expressly prohibited by the sixth section of the organic act from the assessment or collection of taxes from lands so long as the title remained in the United States.

In *Hornsey Urban Dist. Council v. Hennell* [1902] 2 K. B. (Eng.) 73, 66 J. P. 613, 71 L. J. K. B. 479, 86 L. T. N. S. 423, 50 W. R. 521, it was held that the commanding officer of a volunteer corps, who had acquired premises by virtue of the Volunteer Act of 1863, for the use of the corps, was not liable to pay an assessment as an owner inasmuch as the premises were owned on behalf of the crown.

State Property.

A municipality has no power without legislative permission to levy a special assessment on state property within its borders.

State v. Hartford, 50 Conn. 89, 47 Am. Rep. 622; *State v. Kilburn*, 81 Conn. 9, 69 Atl. 1028, 129 Am. St. Rep. 205; *Fagan v. Chicago*, 84 Ill. 227; *In re Mt. Vernon*, 147 Ill. 359, 35 N. E. 533, 23 L.R.A. 807; *Polk County Sav. Bank v. State*, 69 Ia. 24, 28 N. W. 416. A *fortiori* state property may be expressly exempted from special assessments. *People v. Austin*, 47 Cal. 353. The rule has been put on the ground that the property of the state cannot be taken on execution. *Edwards, etc. Constr. Co. v. Jasper County*, 117 Ia. 365, 90 N. W. 1006, 94 Am. St. Rep. 301. See also *State v. Hartford*, 50 Conn. 89, 47 Am. Rep. 622. So a constitutional provision whereby certain state lands are made inalienable has been said to preclude the levy of a local assessment thereon. *Ellwood v. Rochester*, 43 Hun 102, 6 N. Y. St. Rep. 132, *affirmed* 122 N. Y. 229, 25 N. E. 238; *State v. Savidge* (Wash.) 163 Pac. 738. But in *Cotting v. Com.* 205 Mass. 523, 91 N. E. 900, it was said that though the lien of an assessment cannot be enforced against state lands, the lien of an assessment for an improvement commenced while the land belongs to the state may later be enforced against a purchaser thereof.

A constitutional prohibition against suits against the state has also been held to preclude the levy of a special assessment on its property. *In re Mt. Vernon*, 147 Ill. 359, 35 N. E. 533, 23 L.R.A. 807.

The state may if it so desires subject its property to special assessments. The question is entirely one of legislative policy. *Higgins v. Chicago*, 18 Ill. 276; *State v. Elizabeth*, 65 N. J. L. 483, 47 Atl. 455, *affirmed* 66 N. J. L. 688, 52 Atl. 1130. And a constitutional exemption of the property of the state from "taxation" does not prevent such a grant. *Hager v. Gast*, 119 Ky. 502, 84 S. W. 556, 67 L.R.A. 815; *Hassan v. Rochester*, 67 N. Y. 528.

A grant of the power to levy special assessments on state property is not to be implied from a statute giving a general power to make assessments to meet the cost of local improvements. The intent that the property of the state shall be subject to assessment must be clearly expressed. *Huntsville v. Madison County*, 166 Ala. 389, 52 So. 326, 139 Am. St. Rep. 45; *State v. Hartford*, 50 Conn. 89, 47 Am. Rep. 622; *State v. Kilburn*, 81 Conn. 9, 69 Atl. 1028, 129 Am. St. Rep. 205; *Fagan v. Chicago*, 84 Ill. 227; *Polk County Sav. Bank v. State*, 69 Ia. 24, 28 N. W. 416; *Baltimore County Com'rs v. Maryland Insane Hospital*, 62 Md. 127. And see *Van Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677.

In *State v. Kilburn*, *supra*, the court said: "The city could not, without the permission of the state, assess benefits against it as the

owner of land benefited by a public improvement. General expressions, granting it liberty to assess all persons specially benefited would not import such permission. The state holds the immunities in this respect belonging by the English common law to the King. It is not to be sued without its consent. Its rights are not to be diminished by statute, unless a clear intention to that effect on the part of the legislature is disclosed, by the use of express terms or by force of a necessary implication."

So in *Baltimore County Com'rs v. Maryland Insane Hospital*, 62 Md. 127, construing a statute allowing an assessment "upon the owners of the property benefited," it was said: "The phraseology of the act on which this suit is sought to be maintained, is that common and appropriate to legislation designed to affect private property only. The word 'owner' is used interchangeably with the word 'person;' and it is not to be supposed that the state would refer to itself by such designations, if meaning to subject its own property to the operation of the act. The question at issue being one of the intent of the legislature, it cannot be successfully contended that the state meant to become a party litigant before the county commissioners, or the circuit court, under the description of 'any person aggrieved;' nor to subject its property to a lien and execution on failure to pay the assessment, as is provided in case of default in section 6 of said act. Plain and apt words to subject the property of the state to such a process cannot be found in our opinion in the act in question, which by fair and reasonable construction can be held to apply to the case only of such private parties or bodies corporate as owned their property, and whose property would be benefited by an improvement confessedly local."

In *Polk County Sav. Bank v. State*, 69 Ia. 24, 28 N. W. 416, the court said: "The city has such powers only with reference to the subject as are conferred upon it by statute; and, if the power to assess the cost of said improvement against the property of the state is not conferred by the act referred to above, it does not exist. The first section of the act empowers the councils of cities of the first class to provide by ordinance for the construction of sewers, and to pay the cost of constructing the same out of the general fund of the city, or assess the same on the adjacent property, or to levy a sewerage tax within the sewerage district, out of which to pay the cost of constructing the same. Another section of the act provides that special taxes levied under it for the construction of sewers shall be payable by the owners personally at the time of the assessment, and shall be a lien upon the

property so assessed, and that the property may be sold for the payment thereof in the same manner and with like effect as in case of sales for the nonpayment of ordinary city taxes. It is apparent, we think, from a casual reading of the statute that the legislature never intended to confer upon cities the authority contended for in this case. It is not conferred in express terms by any provision of the act. If it had been the intention to confer such power, we would naturally expect to find some provision making it the duty of some officer or agent of the state to pay such assessments when made, and making the necessary appropriations for meeting such charges when they accrued. But no such provisions have been enacted. The power to sell the property assessed for the payment of the tax is as certainly conferred by the act as is the power to make the assessment; and, if the position of plaintiffs and the city is correct, it follows that the capitol of the state, or any of its charitable or reformatory institutions, which may be situated within cities of the first class, may be sold for the payment of such assessments, and the title of the state thereto divested. We will not presume that such a result was intended."

In *State v. Hartford*, 50 Conn. 89, 47 Am. Rep. 622, it was said: "The appellees urge upon our consideration the fact that the property in question belonging to the state will be benefited to the amount of the assessment by the construction of the sewer, and that it is unjust that individuals should bear the burden properly belonging to the property of the state, while it virtually puts into its treasury the enhanced value of its property acquired at others' expense. It is said that this is akin to the taking of private property without compensation. But considerations like these should be addressed to the legislature, and not to the court, whose duty and power extend only to the determination of what the law is, and not to that of what it should be."

In *Washington* it is expressly provided by statute that all state lands except tide lands situated within the limits of an incorporated city "may be assessed and charged for the cost of local improvements specially benefiting such lands which may be ordered by the proper authorities of any such city." See *In re Western Ave.* 93 Wash. 472, 161 Pac. 381. But the foregoing statute has been held to be invalid to the extent that it attempts to grant a right to assess harbor areas in navigable non-tidal waters, harbor areas and tide lands being alike declared by the constitution to be inalienable. *State v. Savidge* (Wash.) 163 Pac. 738. Not only is the interest of the state in tide lands not subject to an assessment for local im-

provements, but the rights of private leasees therein are not subject to assessment without express legislative authority. *Rabel v. Seattle*, 44 Wash. 482, 87 Pac. 520. And see *North American Lumber Co. v. Blaine*, 81 Wash. 13, 142 Pac. 438. Legislative authority has however been granted for the assessment of private leasehold interests in tide lands. *Trimble v. Seattle*, 64 Wash. 102, 116 Pac. 647, *affirmed* 231 U. S. 683, 34 S. Ct. 218, 58 U. S. (L. ed.) 435. Such a grant does not however permit the assessment of leasehold interest in harbor areas. *North American Lumber Co. v. Blaine*, *supra*.

County Property.

In one jurisdiction it is held that a constitutional exemption of county property from "taxation" precludes the levy of a special assessment thereon. *Harris County v. Boyd*, 70 Tex. 237, 7 S. W. 713, wherein the court said: "There is no apparent reason why the exemptions in the constitution should not be taken in the ordinary and more comprehensive sense so as to include all taxation, special, as well as general. The purposes of the exemption obtain equally against special assessments as against general taxation. The inhibition against sale would seem to negative the power to assess. If the property cannot be subjected by sale to the tax a mere assessment in many cases would be useless. Besides in any decree foreclosing a lien, execution ordinarily runs against the defendant for the residue after exhausting the subject of the lien. (Rev. Stats. art. 1340.) To allow judgment to run against the county first would be to allow the city authorities to add to the county liabilities and increase the taxation necessary to be levied by the county commissioners. They are intrusted with the discretion of determining, at least so far as contracts extend, what outlay be made of the general revenues of the county. They should not be interfered with by the city authorities."

In other jurisdictions, while a legislative power to permit the levy of special assessments on county property is recognized, it is held that a statute granting the power to make local assessments will not be construed as extending to county property unless such an intent unmistakably appears. *Huntsville v. Madison County*, 166 Ala. 389, 52 So. 326, 139 Am. St. Rep. 45; *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421; *La Grange v. Troup County*, 132 Ga. 384, 16 Ann. Cas. 885, 64 S. E. 267; *Mt. Sterling v. Montgomery County*, 152 Ky. 637, 153 S. W. 952, 44 L.R.A. (N.S.) 57; *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677; *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796. See also

Worcester County v. Worcester, 116 Mass. 193, 17 Am. Rep. 159.

Thus in *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421, the court said: "Under our system of county and municipal government statutory authority given to a city to impose and enforce special assessments for local street improvements will be held not to extend to a county courthouse square located in the city and used for governmental purposes, unless an intent to include such property clearly appears from the statute."

In *Huntsville v. Madison County*, 166 Ala. 389, 52 So. 326, 139 Am. St. Rep. 45, the court said that general language in a statute giving to cities power to levy assessments for street improvements was not sufficient to embrace the property of a county which was devoted to strictly public uses, unless the intent of the legislature to render it so clearly appeared.

So in *Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796, the court said: "The act contains no direct or special authority for the making of such special assessment on the county's property. The property of the county, in fact, is not mentioned at all in the act, and if the liability be adjudged it must be on the assumption that a general act will confer the power. We are of the opinion that the power must be specially conferred in order to affect the county, since it is but an arm of the state government."

Likewise in *La Grange v. Troup County*, 132 Ga. 384, 16 Ann. Cas. 885, 64 S. E. 267, it was said: "We think the better view is that where general power is given a municipality to levy local assessments upon the property benefited by street improvements, and there is no provision clearly showing that public property shall be subject to such assessment, there is an implied exception in favor of its exemption."

In *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415, holding the property of a county used for public purposes to be exempt from a special improvement tax imposed by the city, the court said: "The property here in question is strictly public property, and on well settled principles of law cannot be held liable for these local improvement assessments until the legislature so says in clear terms or by necessary implication, and that it has not done by the statute relating to cities of the third class. There is much merit in the argument that the public, the beneficial owner of the courthouse property, ought, as a matter of fairness, to bear a part of the cost of improving the streets, but the argument addresses itself to the legislature."

Likewise in *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159, the court said that the charter of the city of

Worcester, authorizing local assessments on all property benefited, did not extend to property of the county, because it was not clearly expressed that such property might be so assessed.

In *Von Steen v. Beatrice*, 36 Neb. 421, 54 N. W. 677, a reference in a city charter for the payment out of municipal funds of the sum which would otherwise be charged against "real estate not subject to assessment" was held in connection with the general policy against the taxation of public property to exclude any inference of an intention to permit the assessment of county property.

In some jurisdictions, however, it is held that a general grant of the power to assess the cost of an improvement on the property benefited thereby gives the power to assess county property notwithstanding an exemption of such property from "taxation." *Higgins v. Chicago*, 18 Ill. 276; *McLean County v. Bloomington*, 106 Ill. 209; *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L.R.A. 155; *Edwards, etc. Constr. Co. v. Jasper County*, 117 Ia. 365, 90 N. W. 1006, 94 Am. St. Rep. 301; *Franklin County v. Ottawa*, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396; *Franklin v. Police Jury*, 126 La. 2, 52 So. 172; *Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590, 139 Am. St. Rep. 1076. See also *In re Mt. Vernon*, 147 Ill. 359, 35 N. E. 533, 23 L.R.A. 807.

Thus in *Higgins v. Chicago*, 18 Ill. 276, holding that the assessment of public taxes or special assessments for public improvements on public property of the county was a mere matter of policy the court said: "The language authorizing an assessment on property for benefits from laying or extending streets (Charter, cap. 6, sec. 2) is very broad and comprehensive, and no reason is apparent why the public square may not receive a due share of the benefit with any other realty on the same street. The corporation of the city or the county may, if not specially exempted, justly pay a part of the assessments proportionate to the benefits conferred by the improvements."

In *McLean County v. Bloomington*, 106 Ill. 209, the court, declaring that it had been too long and too firmly committed to the doctrine that exemption from taxation did not exempt from special assessments, to admit that it was even debatable, said: "The second objection rests entirely upon the assumption that to include the property of counties it should be expressly named,—that language, however comprehensive, in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The exemption, not the inclusion, must specifically appear. General language, like that under which the city is

proceeding, includes the property of counties, cities, etc., as well as private property."

So in *Edwards, etc. Constr. Co. v. Jasper County*, 117 Ia. 365, 90 N. W. 1006, 94 Am. St. Rep. 301, it was held that as there was no statute exempting from special assessment the property of a county occupied by its courthouse and public buildings, a city in which it was situated had the right to tax it as other property and compel the county authorities to pay the cost of the improvement. The court said: "If there be any exemption, it must be one implied by law, for the statute authorizing the assessment is broad enough to cover all owners of property. The reason for exempting property belonging to the state or to any of its instrumentalities, as counties and cities, from general taxation, does not, as it appears to us, apply to special assessments. While authority to levy such assessments is traceable to the taxing power, they are nevertheless assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy, and the municipality acts as an agent, merely, in collecting the tax. The district improved is never coextensive with the county or city, and it is not true that in paying the assessment the county must raise money to pay over to itself, and that no one would be benefited but the officers employed in the collection of the tax. There is no reason why the county, the city, or the school district should not pay for the benefits received by it the same as any other property owner. Of course, their property may not be sold, but there is no reason why the amount of the tax should not be paid out of the treasuries of these institutions; and, if the governing bodies fail to make payment, mandamus will lie to compel them to do so. . . . A county should, in our judgment, provide sidewalks in front of its property, and, when the city orders, pay its proportion of the costs of paving the streets."

Likewise in *Franklin v. Police Jury*, 126 La. 2, 52 So. 172, it was held that the exemption from taxation of a courthouse square did not extend to a special assessment for paving sidewalks levied against all abutting real estate. The court said: "Act 147 of 1902 embraces in its sweep all abutting real estate. This act specially empowers 'parish sites,' necessarily including within their limits the parish courthouse and grounds, to levy special assessments on all abutting real estate for sidewalk purposes. It follows, as a necessary implication, that the lawmaker, as he did not except, intended to include, courthouse squares, without which parish sites cannot exist."

In *Franklin County v. Ottawa*, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396, it

was held that the city had power to levy on the public grounds of the county, used for the purposes of a courthouse, the special assessments necessary to improve the streets and sidewalks in front thereof, without the consent of the county commissioners. The court said: "This court has ruled that § 1, article 11, of the constitution of the state, providing for a uniform and equal rate of assessment and taxation, relates to taxes, and does not apply to such special assessments or taxes as are imposed upon abutting lot owners in cities for street improvements. . . . It has been decided frequently by this court that a city has exclusive care and control of its streets and sidewalks, and must make them reasonably safe for travel. . . . It follows necessarily that a city must keep in repair its streets and sidewalks. The statute provides how this may be done. There is no exemption in the statute of the courthouse or other public grounds. Streets and sidewalks in front of or around a courthouse square, or other public ground, should be kept in as safe condition by the city as other streets and sidewalks. It is not just that the other abutting lot owners pay the special assessments intended to improve or benefit the courthouse square. It is certainly unfair that the taxpayers of the city should pay for all the special improvements beneficial to the courthouse square, when all the taxpayers of the county are equally interested therein."

Municipal Property.

In one jurisdiction it is held that a municipality has no power to subject its own property used for public purposes to a special assessment for a local improvement. *Herman v. Omaha*, 75 Neb. 489, 106 N. W. 593; *State v. Several Parcels of Land*, 79 Neb. 638, 113 N. W. 248. Thus in the case first mentioned the court said: "The conclusion reached from an examination of . . . authorities, . . . is that it is competent for one political subdivision of a state to impose upon another subdivision the burden of special assessments for public improvements, where the property of the subdivision so burdened is especially benefited thereby, and this upon the theory that the general public is benefited by such improvements. No case, however, has come under our observation where it is held that the city, or other municipality, should be required to assess its own property to pay the cost of public improvements within its corporate limits."

In other jurisdictions public property of the municipality is not subject to a special assessment for local improvements unless the assessment of such property is expressly authorized by statute. *St. Louis v. Brown*, 155 Ann. Cas. 1917D—54.

Mo. 545, 56 S. W. 298; *Barber Asphalt Paving Co. v. St. Joseph*, 183 Mo. 451, 82 S. W. 64; *Robb v. Philadelphia*, 25 Pa. Super. Ct. 343. Thus in the case last cited the court said: "Property belonging to the state and its municipalities, and which is held for governmental purposes, is presumed to be exempt, and is not included in any designation of property to be taxed, however sweeping, unless the statute authorizing the tax expressly so provides."

In *St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298, it was said: "Whilst it is competent for the law-making power to include public property belonging to a city or county within the limits of special assessments for public improvements, yet such property is not so included, unless it is so by express enactment or clear implication, and where the only remedy for the collection of the tax provided by law is of a character inapplicable to such property the court cannot provide a remedy, but must conclude that the law-makers did not intend such property to be affected by the act."

In *Harrisburg v. Shepler*, 190 Pa. St. 374, 42 Atl. 893, the court said that whether as an abstract proposition city property was liable to assessment for a local improvement was immaterial, but that it could contract to pay a part of the cost of such improvement which could have been assessed against property which it owned if it had been the property of private individuals.

By the great weight of authority public property of the municipality is subject to special assessment for local improvements.

United States.—*Warner v. New Orleans*, 87 Fed. 829, 59 U. S. App. 131, 31 C. C. A. 238, *certiorari granted* *New Orleans v. Warner*, 172 U. S. 648, 19 S. Ct. 884, 43 U. S. (L. ed.) 1179, *appeal dismissed* 171 U. S. 685, 19 S. Ct. 874, 43 U. S. (L. ed.) 1179. See also *Warner v. New Orleans*, 81 Fed. 645, 52 U. S. App. 348, 26 C. C. A. 508, *modified* *New Orleans v. Warner*, 175 U. S. 120, 20 S. Ct. 44, 44 U. S. (L. ed.) 96.

Illinois.—*Higgins v. Chicago*, 18 Ill. 276; *Scammon v. Chicago*, 42 Ill. 192; *McLean County v. Bloomington*, 106 Ill. 209. See also *West Chicago Park Com'rs v. Chicago*, 152 Ill. 392, 38 N. E. 697. *Compare* *Taylor v. People*, 66 Ill. 322.

Louisiana.—*Marquez v. New Orleans*, 13 La. Ann. 319; *Correjolles v. Foucher*, 26 La. Ann. 362; *Shreveport v. Weiner*, 134 La. 800, 64 So. 718.

Michigan.—*Newberry v. Detroit*, 164 Mich. 410, 129 N. W. 699, 32 L.R.A. (N.S.) 303, 17 Detroit Leg. N. 1133.

New York.—*In re Turfler*, 44 Barb. 46; *In re Church St.* 49 Barb. 455; *Ross v. New York*, 3 Wend. 333.

Ohio.—*Dick v. Toledo*, 5 Ohio Cir. Dec. 157, 11 Ohio Cir. Ct. 349.

South Dakota.—*Whittaker v. Deadwood*, 23 S. D. 538, 122 N. W. 590, 139 Am. St. Rep. 1076.

Wisconsin.—*Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

Thus in *Dick v. Toledo*, 5 Ohio Cir. Dec. 157, 11 Ohio Cir. Ct. 349, it was held that property of the city, whether public grounds or street intersections, was liable for an assessment for street improvements. The court said: "There is in this street a space that was originally dedicated as a market space. It is claimed by the city that this has never been accepted; but an ordinance of the city was introduced in evidence in which they recognized it, and that, in our judgment, is sufficient to amount to an acceptance, and that this property is properly dedicated and accepted as a market space. Along the boundaries of that market space the city improved this street on both sides, and at a greater width than they improved it at other points on the street. They should pay one-half of the cost of making this improvement or of these damages along the property abutting on this market space, and the balance should be assessed, according to the terms of the original ordinance."

In *New Orleans v. Warner*, 175 U. S. 120, 20 S. Ct. 44, 44 U. S. (L. ed.) 96, the court said: "The argument is that public property, being exempt from taxation, is also exempt from these assessments; but the authorities have long recognized a distinction between general taxes, which are for the benefit of the public generally, and which in the nature of things the public must directly or indirectly pay, and special assessments for the benefit of particular property, which are a charge upon the property benefited. If this be private property, then each owner of such property pays his share; if it be public property, the city pays it as the agent of the entire body of its citizens, who are assumed to have been benefited to that extent."

So in *Ross v. New York*, 3 Wend. (N. Y.) 333, it was said: "The property of the corporation, if benefited by the improvement, is as much the subject of assessment as the property of individuals. The intention of the legislature is manifest, that the property in the vicinity shall contribute two-thirds of the expense, and whether that property belongs to the corporation of the city, or any other body corporate, or to individuals, is immaterial."

Likewise in *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603, the court said that the charter of the city provided that the expense of paving to the middle of the street, opposite public grounds, should be paid from

the ward fund. In the case of *In re Turfler*, 44 Barb. (N. Y.) 46, it was held that a city, the owner of a public park, had the power to assume a portion of the expense of paving streets. The court said: "The authority over the streets, and the regulating and repairing of them, was originally conferred upon the common council by the old charter of the city. They were authorized to lay out, alter, mend and repair all the streets and highways then or thereafter to be laid out in the city of New York, in such manner as they should judge to be necessary or convenient. This necessarily involved the right to pay for the same out of the treasury."

In *Scammon v. Chicago*, 42 Ill. 192, in holding that a public park owned by a city was not exempt from special assessments for the improvement of streets on which it abutted, the court said: "The practice is one that should be sparingly indulged, and should never be adopted except in clear cases."

So in the case of *In re Church St.* 49 Barb. (N. Y.) 455, it was held that city parks and markets assessed for benefit, the payment of which fell on the city treasury and on the public as taxpayers, had the same value as property as other lands and it was just that they should bear a pro rata assessment for public improvements.

In *Newberry v. Detroit*, 164 Mich. 410, 129 N. W. 699, 32 L.R.A. (N.S.) 303, 17 Detroit Leg. N. 1133, it appeared that the charter of the city of Detroit provided as follows: "For the purpose of such assessment, the lots and parcels of real estate situated on said street, and fronting the portion thereof ordered to be improved, shall constitute one local assessment district; . . . the cost and expense of the paving to be assessed according to frontage." The court in construing the language of the statute said that there was no exemption of public grounds and that a park owned by the city was not exempt from assessment for paving an avenue abutting thereon.

In *Marquez v. New Orleans*, 13 La. Ann. 319, it was held that a city must pay her share of an assessment for the paving of streets on which a public promenade belonging to her abutted. The court said: "The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 119 of the city charter, but also because the middle ground in Claiborne street is the property of the city and intended or dedicated as a public promenade and for the public good and enjoyment. It is then just when the city has property of this character, that she should pay her proportion of expenses necessary for the construction of a public highway along the borders of her property, and not coerce opposite proprietors to pay the

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whole, and thus tax them in particular to enable the community to enjoy a pleasant promenade and free circulation of air." See to the same effect *Corejollis v. Foucher*, 26 La. Ann. 362.

In *Shreveport v. Weiner*, 134 La. 800, 64 So. 718, wherein it appeared that a city reserved "Esplanades" as grass plots, not forming part of the street, the court said that such being the case, the city, as owner of the plots, must under a jurisprudence now fairly well settled, be held to occupy the position of an ordinary abutting owner, and to be liable as such for assessments for improvements. See also *People v. Gilon*, 41 Hun 510, 3 N. Y. St. Rep. 358. Compare *Crowley v. Police Jury*, 138 La. 488, 70 So. 487.

In *West Chicago Park Com'rs v. Chicago*, 152 Ill. 392, 38 N. E. 697, the court, saying that it was not unmindful that the rule had become well established that public grounds, such as parks, owned by a municipal corporation, were liable to assessment for their proper share of the burden of street improvements made by the corporation and therefore the court's conclusion in the present instance in no way conflicted therewith, continued as follows: "The view we are disposed to take in the present case is, not that the parks under the control of the West Chicago park commissioners are exempt from assessment, by the proper municipal authority, for local street improvements, any more than the other public grounds, but only that, by the park acts, jurisdiction to make such assessments is withdrawn from the city of Chicago, the parks being, by force of those acts, for all street purposes, taken out of the territorial limits of the city and placed within the exclusive jurisdiction of the park board."

In *Mansfield v. Lockport*, 24 Misc. 25, 52 N. Y. S. 571, it was held that a city could not levy an assessment for a street improvement on the ground of benefit, the lands by dedication or long user having become a public highway. See to the same effect *Granite Bituminous Paving Co. v. McManus*, 144 Mo. App. 593, 129 S. W. 448; *Smith v. Buffalo*, 90 Hun 118, 35 N. Y. S. 635, judgment affirmed 159 N. Y. 427, 54 N. E. 62. Compare *Dick v. Toledo*, 5 Ohio Cir. Dec. 157, 11 Ohio Cir. Ct. 349.

In *Boeres v. Strader*, 1 Cinc. Super. Ct. 57, it was held that the owner of a wharf could not claim exemption from an assessment, as public property, where he retained the right to wharfage from those using it.

In *Spokane v. Curtis*, 66 Wash. 555, 120 Pac. 70, the court said: "The city, like a private owner, can only be assessed for an improvement where it is especially benefited." See also *Spokane v. Miles*, 72 Wash. 571, 131

Pac. 206. And in *Powell v. Walla Walla*, 64 Wash. 582, 117 Pac. 389, wherein it appeared that a city could not devote property purchased by it for use as a park to the improvement of a public street, it was held that the attempted levy of an assessment thereon was invalid in so far as it sought to bind the property. See also *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211.

DOYLE

v.

NEW JERSEY FIDELITY AND PLATE
GLASS INSURANCE COMPANY.

Kentucky Court of Appeals—March 2, 1916.

168 Ky. 789; 182 S. W. 944.

Accident Insurance — "Immediate"
Disability — What Constitutes.

An accident policy, providing for payment of death claim, declared that if death should result independently of all other causes within ninety days from the accident, though not necessarily causing immediate and continuous disability, the death benefit should be paid, while if injuries should, independently of all other causes, immediately, continuously, and wholly disable and prevent insured from performing all duties pertaining to his occupation, the death benefit should be paid in case of death occurring within 200 weeks of the date of the accident. Insured, a dentist, injured his finger with a burr, contracting blood poisoning in the wound, though for several days before he was forced to retire, he was able to go to his office and perform part of his ordinary duties. After a month in bed, he returned to his office and for over three months performed all of his regular duties, dying suddenly at the end of that period. It is held that insured's disability was immediate and continuous during the time between the infliction of the wound and the development of infection, and so recovery cannot be defeated on the ground that there was no continuous disability.

[See note at end of this case.]

Same.

In such case, as insured discharged all the duties of his profession as a dentist during the three months before he met his death, the accident cannot be held to have caused continuous and immediate disability up to the time of death, and therefore the question should not be submitted to the jury.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, Second Division.

Action by Mary R. Doyle, plaintiff, against New Jersey Fidelity and Plate Glass Insurance Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Hite H. Huffaker and Straus, Lee & Krieger for appellant.

Hugh B. Fleece for appellee.

[789] CLARKE, J.—Dr. Howard S. Doyle, a dentist in Louisville, on June 21, 1912, while operating upon a tooth for a patient was injured by a burr, with which he was working, slipping [790] against and wounding the knuckle of the second finger of his left hand. The finger about the wound became inflamed, and the doctor became ill, but for several days was able to go to his office and perform a part of his ordinary duties. His condition continued to grow worse until on the 26th or 29th of June he was forced to go to bed, and it developed that he was suffering from blood poisoning as a result of this injury to his finger. He was confined to his bed continuously until July 31st, when, contrary to the advice of his physician, he returned to his office; and from August 7th until November 4th, he was at his office regularly and performed at times substantially all of his accustomed duties, though feeling badly much of the time.

On the night of November 4, 1912, about four months and a half after the injury to his finger, he was taken violently ill and died suddenly.

At the time of this accident Dr. Doyle was insured under an accident policy issued by appellee, and his mother, the appellant, was the beneficiary thereunder. The appellee having refused, after receiving proof of the doctor's death, to pay the appellant the indemnity provided for death under said policy, she fled this suit.

Upon the trial at the close of all the evidence the court sustained appellee's motion for a peremptory instruction, and entered a judgment dismissing appellant's petition, to reverse which judgment, upon the ground that the peremptory instruction was erroneously given, appellant is prosecuting this appeal.

The policy sued on provides for the payment of \$2,500.00 to the beneficiary upon the death of the insured under the conditions set out in the two following clauses:

"If any one of the losses named in this section shall result directly and independently of all other causes from such injuries within ninety days from date of accident, but not necessarily causing immediate and continuous disability, the company will pay the sum set opposite such loss, and in addition the weekly indemnity from date of accident;

or, if such injuries shall, directly and independently of all other causes, immediately, continuously and wholly disable and prevent the assured from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability, and within two hundred weeks from date of [791] the accident shall result in any one of the losses hereafter named in this section, the company will pay the sum set opposite such loss, and in addition thereto the weekly indemnity from date of accident to date of death, dismemberment or loss of sight."

The insured did not die for more than ninety days after the injury, and the first of the two above clauses has no application here except that it may be helpful to a correct understanding of the second clause under which appellee's liability is asserted.

Appellee's defense is a denial that "resulting directly, independently and exclusively of all other causes by reason of such wounding and simultaneously therewith, he was inoculated with septicaemia or blood poisoning, due directly or at all to said bodily injury sustained while said policy was in force, and defendant denies that it resulted directly and independently of all other causes in his immediate, continuous or total disablement so as to prevent him from performing any and every kind of duty pertaining to his occupation or that said injury resulted directly or indirectly, exclusively or independently of all other causes in his death on the fourth day of November, 1912, and defendant denies that the death of said Howard S. Doyle was caused either directly or indirectly by said accident."

While it is not contended in this case that death from blood poisoning resulting from an accident was not covered by the policy held by the insured, it is contended by counsel for appellee that the insured's disability was not immediate, total or continuous during the period from June 21st to June 26th or 29th while the infection was developing, and therefore appellee was not liable. This contention has been allowed in some jurisdictions, authorities for which are cited for appellee, but this court in the case of *the Continental Casualty Co. v. Mathis*, 150 Ky. 477, 150 S. W. 507, refused to follow that doctrine, and held that under a clause similar to the one before us now the insured suffered an immediate and continuous disability upon facts quite similar to those in this case, citing *Commercial Travelers v. Barnes*, 72 Kan. 293, 7 Ann. Cas. 809, 80 Pac. 1020; *Brendon v. Traders' etc. Acc. Co.* 84 App. Div. 530, 82 N. Y. S. 860; *Hohn v. Interstate Casualty Co.* 115 Mich. 79, 72 N. W. 1105; *Omberg v. U. S. Mut. Acc. Assoc.* 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413;

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Cary v. Preferred Acc. Ins. Co. 127 Wis. 67, 7 Ann. Cas. 484, 106 N. W. 1055, 115 Am. St. Rep. 997, 5 L.R.A.(N.S.) 926 and note, and Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 5 Ann. Cas. 155, 77 N. E. 123, 110 Am. St. Rep. 235, 5 L.R.A.(N.S.) 933.

[792] And in the same case this court expressly disavowed the dictum in General Acc. etc. Assur. Corp. v. Meredith, 141 Ky. 92, 132 S. W. 191, which is cited and relied upon by appellee here.

In the Mathis case the insured was a physician in whom blood poisoning developed as a result of an accident, and who, while the infection was developing, for three days attempted to attend to the duties of his calling. In the case at bar the insured during a period of from five to eight days made the same attempt under similar circumstances, and being convinced that the reasoning and decision of this court in the Mathis case are sound, we are unwilling to depart therefrom, and it results that this contention of counsel for appellee is untenable, as the trial court held.

2. The next question presented is whether or not the insured's condition, evidenced by his acts from August 7th until November 4th as disclosed from the evidence, was such as warranted a determination by the jury of whether or not the insured's disability was continuous and entire, as claimed by appellant; or whether it was such as to warrant the court in sustaining appellee's motion for a directed verdict in its favor as contended by appellee.

Upon this question there is also much contrariety in the authorities of different jurisdictions, depending upon whether a strict or a liberal construction is given to the words "continuously" and "wholly" when used in an accident insurance policy with reference to disability in a clause similar to the second clause in the policy before us here.

In the case of the National L. etc. Ins. Co. v. O'Brien. 155 Ky. 499, 159 S. W. 1134, this court after an extensive review of the authorities from the different states upon this question, without attempting to harmonize the differences, adopted a liberal rather than a strict construction of such a clause, and in support of that conclusion cited the following authorities: Young v. Travelers' Ins. Co. 80 Me. 244, 13 Atl. 896; Lobdill v. Laboring Men's Mut. Aid Assoc. 69 Minn. 14, 71 N. W. 696, 65 Am. St. Rep. 542, 38 L.R.A. 537; Pennington v. Pacific Mut. L. Ins. Co. 85 Ia. 468, 52 N. W. 482, 39 Am. St. Rep. 306; McKinley v. Bakers' Acc. Ins. Co. 106 Ia. 81, 75 N. W. 670; Commercial Travelers' Acc. Assoc. v. Springsteen, 23 Ind. App. 657, 55 N. E. 973; Neafie v. Manufacturers' Acc. Indemnity Co. 55 Hun 111, 8 N. Y. S. 202; American Surety Co. v. Pauly, 170 U. S. 133, 18

S. Ct. 552, 42 U. S. (L. ed.) 977; Kansas City First Nat. Bank v. Hartford F. [793] Ins. Co. 95 U. S. 673, 24 U. S. (L. ed.) 563; Anderson v. Fitzgerald, 4 H. L. Cas. (Eng.) 484.

After citing the above authorities with approval, this court said:

"The clause of the policy under which appellant seeks to escape liability, though broad enough in its terms to give color to the meaning it attributes to it, should nevertheless be given a reasonable construction that would be as just to the assured as to the insurer."

"While the language of the policy here is that the disability, entitling the assured to the indemnity provided, must be so total as to prevent him from 'performing every duty of any business or occupation,' it would do no violence to the language used or the rights of appellant to say that the words quoted, fairly interpreted, should be held to mean that the disability would be total, is of such a character as to prevent the assured from transacting any kind of business pertaining to his occupation. In other words, it is sufficient if the disability of the insured in this case was such as to prevent him from doing all the substantial acts required of him in his business. Giving the clause of the policy in question this meaning, it does not limit the liability of appellant as claimed by it. The appellant's defense is not rested upon any claim that the assured was not injured in the accident mentioned in the petition but that the disability resulting therefrom was not total and that it only continued from December 24, 1908, to January 25, 1909."

From the above quotation from the O'Brien case it will be seen that this court is committed to a "reasonable construction" of the clause in question "that is as just to the assured as to the insurer," and that that end is attained "if the disability of the insured is such as to prevent him from doing all the substantial acts required of him in his business." And while it is difficult to state a general rule of construction that will be applicable to all cases, we think we may safely state as an elaboration of our views upon this subject that a recovery should not be denied under such a clause as we have before us when the evidence shows that the insured was able to be up and about, and to do minor and trivial things not requiring his time or attention, or to direct his business and do some of the work himself, if his injuries are such that common prudence demands he desist from his labors and rest, so long as it is reasonably necessary to effect [794] a speedy cure, and he is unable to do the things which constitute substantially all of his occupation, or wholly disabled from doing all the substantial and material acts necessary to be done.

It may be admitted that some of the authorities seem to warrant even a more liberal construction of this clause than we have indicated, but the same justice that forbids a construction so strict, although justified by the literal meaning of the words employed, which would in practice relieve the insurer from liability in practically every case where death does not immediately ensue, and render the policy of no effect in many cases, in which it was evidently held out to afford indemnity, also demands that the construction shall not be so liberal as to render the company liable in every state of case in utter disregard of the contract made by the parties. Both of these clauses should be given a liberal and reasonable construction, when considered together and with reference to each other.

Under the policy before us, by the first clause copied herein, the insurer is liable if death occurs within ninety days after the accident, even though the disability is not immediate and continuous; but by the second clause quoted above, it is not liable if death ensues after ninety days and within two hundred weeks from the accident, unless the disability occasioned thereby is immediate, continuous and entire. From which it is apparent that the parties in executing this contract had in contemplation a limitation upon the beneficiary's right to recover for the death of the insured during said period based upon a reasonable construction of the words of limitation used in said second clause.

We have endeavored to set out above what we deem to be a reasonable construction thereof.

It now remains for us to apply that construction to the facts in this case.

The evidence may be fairly stated to show that from August 7th to November 4th the insured visited his office practically every day, remaining from one to six hours a day: that he had entire supervision of his business, examined patients and directed his assistants as to what was necessary to be done: that in addition he frequently did the work himself required by patients; and it also may fairly be stated that the evidence for appellant not only fails to show that there was any substantial part [795] of his work that he did not at times perform, but on the other hand shows that during all of this time he did not lose a single day from his business, and upon occasions throughout that period performed every substantial duty and service that could be performed by any one in said business, remaining a part of that period in his office and performing all sorts of work involved in his profession as much as six hours a day.

We are convinced from a careful reading of the evidence that it does not even tend to

show that the assured's disability was such as prevented him continuously from performing all of the substantial acts required of him during the period from his return to his office about August 7th until his death on November 4th.

To have so shown by the evidence was necessary to make out a case for appellant under the clause in the policy under which appellant claims as construed in the O'Brien case, and in this case.

It therefore results that the evidence did not present a case entitling appellant to a submission of the question to the jury and that it was not error upon the part of the court in directing a verdict in favor of appellee.

Wherefore the judgment is affirmed.

NOTE.

Construing an accident insurance policy securing a weekly indemnity in case of an accident causing "immediate and continuous disability," the reported case holds to be within the terms of the policy an accident which produces immediately an inflamed wound but does not cause disability for five days, at which time blood poisoning sets in. The cases construing the term "immediate" or "immediately" as used in an accident insurance policy with respect to a disability following an accident are discussed in the note to *Continental Casualty Co. v. Ogburn*, Ann. Cas. 1914D 377.

UNITED STATES

v.

JIN FUEY MOY.

United States Supreme Court—June 5, 1916.

241 U. S. 394; 36 S. Ct. 658.

Food and Drugs — Federal Regulation of Opium — Construction.

The grave doubts as to congressional power which any other construction would raise require that the provision of the Act of December 17, 1914 (38 Stat. L. 789, chap. 1, § 8; 4 Fed. St. Ann. 2d ed. 187), making it unlawful for "any person" who has not registered or paid the special tax imposed by that act to have in his possession or control opium or coca leaves, their salts, derivatives, or preparations, be construed as referring to those only who are required by that statute to register and pay the special tax, viz., all persons who produce, import, manufacture, compound, deal in, dispense, sell, dis-

tribute, or give away, any of said drugs, notwithstanding the exception in such section in favor of the possession of drugs prescribed in good faith by a physician, since this exception stands alongside of one that saves employees of registered persons and nurses under the supervision of a physician, etc., and is so far vague that it may have been intended to mean other persons carrying out a doctor's order, rather than the patient's.

[See note at end of this case.]

Error to United States District Court, Western District of Pennsylvania.

Criminal action. Jin Fuey Moy indicted for conspiracy for possession of opium and salts thereof. Indictment quashed. United States brings error. The facts are stated in the opinion. **AFFIRMED.**

Assistant Attorney General Wallace and W. C. Herron for plaintiff in error.

H. Ralph Burton, Levi Cooke, George X. McLanahan, and William Strite McDowell for defendant in error.

[399] HOLMES, J.—This is an indictment under § 8 of the Act of December 17, 1914. c. 1; 38 Stat. 785, 789 (4 Fed. St. Ann. 2d ed. 187). It was quashed by the District Court on the ground that the statute did not apply to the case. 225 Fed. 1003. The indictment charges a conspiracy with Willie Martin to have in Martin's possession opium and salts thereof, to wit, one dram of morphine sulphate. It alleges that Martin was not registered with the collector of internal revenue of the district, and had not paid the special tax required; that the defendant for the purpose of executing the conspiracy issued to Martin a written prescription for the morphine sulphate, and that he did not issue it in good faith, but knew that the drug was not given for medicinal purposes but for the purpose of supplying one addicted to the use of opium. The question is whether the possession conspired for is within the prohibitions of the act.

The act is entitled "An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes." By § 1 the persons mentioned in the title are required to register, and to pay [400] a special tax at the rate of \$1 per annum, with certain exceptions, and it is made unlawful for the persons required to register to produce, etc., the drugs without having registered and paid the special tax. All provisions of law relating to special taxes are extended to this tax.

By § 2 it is declared unlawful for any person to sell or give away the drugs mentioned without a written order, provided for, excepting deliveries by physicians, etc., or on their order, and certain other cases. Then after provision for returns it is made unlawful by § 4 for any person who shall not have registered and paid the special tax to send, carry or deliver the drugs in such commerce as Congress controls, again with exceptions. By § 6 preparations containing certain small proportions of the drugs are excluded from the operation of the act, under conditions. By § 7 internal revenue tax laws are made applicable, and then comes § 8 under which the indictment is framed.

By § 8 it is declared unlawful for "any person" who is not registered and has not paid the special tax to have in his possession or control any of the said drugs and "such possession or control" is made presumptive evidence of a violation of this section and of § 1. There is a proviso that the section shall not apply to any employee of a registered person and certain others, with qualifications, or to the possession of any of the drugs which have been prescribed in good faith by a physician registered under the act, and to the possession of some others. And finally it is provided that the exemptions need not be negated in any indictment, etc., and that the burden of proving them shall be upon the defendant. The district judge considered that the act was a revenue act and that the general words "any person" must be confined to the class of persons with whom the act previously had been purporting to deal. The government on the other hand contends that this act was passed with two others in order [401] to carry out the International Opium Convention: 38 Stat. Part 2, 1929; that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature and that § 8 means all that it says, taking its words in their plain literal sense.

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. U. S. v. Delaware, etc. Co. 213 U. S. 366, 408, 29 S. Ct. 527, 53 U. S. (L. ed.) 836. If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress, at all events, contemplated production in the United States and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the states obviously the

gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. *U. S. v. Dewitt*, 9 Wall. 41, 19 U. S. (L. ed.) 593. The government invokes article VI of the Constitution, that treaties made under the authority of the United States shall be the supreme law of the land. But the question arises under a statute not under a treaty. The statute does not purport to be in execution of a treaty but calls itself a registration and taxing act. The provision before us was not required by the opium convention, and whether this section is entitled to the supremacy claimed by the government for treaties is, to say the least, another grave question, and, if it is reasonably possible, the act should be read so as to avoid both.

The foregoing consideration gains some additional force from the penalty imposed by § 9 upon any person who violates any of the requirements of the act. It is a fine of not more than \$2,000 or imprisonment for not more than [402] five years, or both, in the discretion of the court. Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least *prima facie* criminal and subject to the serious punishment made possible by § 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.

Approaching the issue from this point of view we conclude that "any person not registered" in § 8 cannot be taken to mean any person in the United States but must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by § 1. It is true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument taken by itself for a broader meaning. But every question of construction is unique, and an argument that would prevail in one case may be inadequate in another. This exemption stands alongside of one that saves employees of registered persons as do §§ 1 and 4, and nurses under the supervision of a physician, etc., as does § 4, and is so far vague that it may have had in mind other persons carrying out a doctor's orders rather than the patient's. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of the

proviso is not enough to overcome the dominant considerations that prevail in our mind. Judgment affirmed.

Hughes and Pitney, JJ., dissent.

NOTE.

Validity and Construction of Federal Regulation of Manufacture, Sale or Possession of Opium or Other Narcotic.

Introductory, 856.

Validity:

Act of February 9, 1909, 856.

Act of December 17, 1914, 858.

Construction:

Act of February 9, 1909, 858.

Acts of October 1, 1890, and January 17, 1914, 858.

Act of December 17, 1914, 860.

Introductory.

The manufacture, sale and possession of opium and its derivatives in the United States are regulated by the following Acts of Congress: the Act of January 17, 1914, chapter 10 (38 Stat. L. 277, 4 Fed. St. Ann. 2d ed. 173), which deals with the manufacture of smoking opium and prescribes regulations for the conduct of the business, the Act of February 9, 1909, chapter 100 (35 Stat. L. 614, 3 Fed. St. Ann. 2d ed. 723), which prohibits the importation and use of opium for other than medicinal purposes and specifies the penalty for the possession of the prohibited drug; and the Act of December 17, 1914, chapter 1 (38 Stat. L. 785, 4 Fed. St. Ann. 2d ed. 177), known as the "Opium Act of 1914" or "Harrison Act" and sometimes called the "Harrison Narcotic Law" which is in the nature of a revenue and tax measure, providing for the regulation of and imposing a tax on all persons who produce, import, manufacture, sell, etc., the drug or its derivatives. The Act of October 1, 1890, relating to the manufacture of opium was in part repealed and in part re-enacted in substance in the Act of January 17, 1914, *supra*. The Act of 1890 was not repealed by the Act of February 9, 1909, *supra*. 29 Op. Atty. Gen. 108.

Validity.

ACT OF FEBRUARY 9, 1909.

The Act of February 9, 1909 (3 Fed. St. Ann. 2d ed. 723), has been sustained in every case passing on its validity.

In *Brolan v. U. S.* 236 U. S. 216, 35 S. Ct. 285, 59 U. S. (L. ed.) 544, the court

said: "The contention of the defendant that § 2 of the Act of 1909 is repugnant to the Constitution of the United States because beyond the legislative power of Congress to enact and because it is a usurpation of the powers reserved to the states by the Constitution, is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based upon such contention."

In *Steinfeldt v. U. S.* 219 Fed. 879, 135 C. C. A. 549, the defendant was indicted and convicted under the Act of February 9, 1909 (3 Fed. St. Ann. 2d ed. 723), which in substance prohibits the importation of opium, except for medicinal purposes, or under certain regulations, etc., and provides that on a trial therefor possession of the drug "shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." The contention of the defendant was stated as follows: "The plaintiff in error admits that the first portion of the section, which prohibits the importation of opium into the United States, is constitutional, but denies the constitutionality of the portion thereof under which he was indicted and convicted, and he contends, in effect, that the point at which opium unlawfully imported into the United States is transferred to the possession of another, is the disappearing point of the authority of the United States over the same, and that at that point the opium loses its identity as an article of foreign commerce, and becomes mixed with the taxable property of the state, and becomes subject to the police power of the state to regulate the public health, morals, and social welfare of the citizens of the state, and is no longer subject to federal authority." The court in affirming the conviction said: "The contention cannot be sustained. We may assume, as the plaintiff in error contends, that the act under consideration was passed under the authority of Congress to regulate commerce with foreign nations, and that it is an absolute prohibition of the importation of opium, and is not the exercise of the authority of Congress to levy duties, imposts, and excises; but we find no ground for holding that the authority of Congress does not go the full extent of the legislative act in question. To receive or conceal opium after it is imported, and with knowledge of its illegal importation, is in effect to participate in the illegal importation. It is an act which encourages, induces, and supplements the act of the illegal importer. This is what the plaintiff in error did. Opium was found in his possession, and he knew that it had been imported contrary to law."

In *U. S. v. Yee Fing*, 222 Fed. 154, the defendant was convicted for having in his possession nearly three pounds of smoking opium. A motion for a new trial was made on the ground that "the evidence apart from statutory presumptions is insufficient to sustain the verdict, and that said presumptions should be rejected as unconstitutional in that their application deprives defendant of liberty and property without due process of law." The court said: "The statute of February 9, 1909, prohibits importation of opium after April 1, 1909, save that opium for medicinal purposes and other than smoking opium can be imported under regulations. Unlawful importation and knowingly receiving such opium are offenses and incur forfeiture and punishment, and upon trial therefor possession of such opium 'shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.' 35 Stat. 614. The statute of January 17, 1914, provides that on and after July 1, 1913, all smoking opium 'found within the United States shall be presumed to have been imported after the first day of April, 1909, and the burden of proof shall be on the claimant or the accused to rebut such presumption.' 38 Stat. 276. These statutes provide for presumptions or prima facie proof of the offense, which, while sufficient to sustain a verdict of guilty, may or may not be sufficient to satisfy the jury of the guilt of the accused beyond a reasonable doubt. They are but what are commonly styled rules of evidence and not substantive law creating offenses, and do not deprive the jury of its function of weighing evidence and determining facts. Though the accused presents no evidence, the circumstances inevitably appearing in the prosecution's evidence may often be such that the jury will and should refuse to draw the inferences these statutes authorize, but do not and probably could not command, in that it is not satisfied they should be drawn—not convinced that the accused is guilty beyond a reasonable doubt. Like presumptions are familiar to common and statutory law in England and this country, in the former prior to emigration of our ancestry and now. So too, to civil law. They dictate the burden of evidence as public policy may require. Conforming to ancient procedure, when not prohibited by constitutions legislative bodies have power to create them, and in their application is 'due process of law,' provided there is rational connection between the facts proved and the facts therefrom inferred, that the inferences are not so unreasonable as to be mere arbitrary mandates, and that the party affected is free to oppose them."

ACT OF DECEMBER 17, 1914.

The Act of December 17, 1914 (4 Fed. St. Ann. 2d ed. 177), is held to be a valid exercise not only of the power to regulate foreign commerce but of the taxing power. In discussing the constitutionality of the act the court in *U. S. v. Brown*, 224 Fed. 135, said: "By this act the drug became an 'outlaw' in the country, its presence Congress has the right to trace, and has the power to punish any person in whose possession this 'outlawed' article may be found. The possession of such drug or control thereof is made presumptive evidence of the unlawful importation, manufacture, etc., as well as an obligation to pay the special tax provided by the act, and a failure to register and pay the tax as provided in section 1 would be a fraud upon the United States, in that it deprived the government of the revenues provided by the act. . . . Congress, having the power to exclude the drug entirely from the United States, and the right to regulate its relation to interstate commerce, and to levy a tax, must be held to have the right to make it unlawful for any person who has not complied with the provisions of the act by registration or paying a tax, to have in his possession this 'outlawed' article. The act must be construed as a whole, and force given to every part when this can be done."

In *U. S. v. Charter*, 227 Fed. 331, the defendant attacked the act on the ground that "it violates the right of contract between the state of Ohio and the defendant, assumed to exist in the fact that he has been licensed to practice as a physician in this state; that it is an act actually designed to regulate the use of certain drugs, but is masquerading as one purporting to raise revenue; that it is not uniform in its character, but is intended to affect a special class of persons only, namely, physicians, dentists, veterinarians, and druggists." The court in overruling a motion to quash the indictment said: "Some of these objections to this act answer themselves so plainly that they require no discussion. So far as the present case is concerned, we consider only that objection which assumes the act to be an attempt to exercise a police power only. We are not content to hold that the only ground upon which the constitutionality of this act can be sustained is that it is designed to protect the revenues of the United States. The indiscriminate and unrestrained use of opium, coca, and their derivatives is well known to be a great evil, gravely affecting the general welfare of the country. These are exclusively foreign products, and it is entirely within the power of Congress, in the interest of the general welfare, to exclude their importation entirely, or to so regulate

the traffic in them in this country that their importations may be traced. A careful study of the act shows that the various provisions for registration, recording, etc., are effective in the tracing of the origin of a drug derived from these foreign products, to the end that infractions of the revenue laws may be ascertained. We therefore approve the general view of the law expressed by Judge Neterer in *U. S. v. Brown*, 224 Fed. 135, in Western district of Washington."

The exaction by the national government of a license to dispense the drugs named in the act is nothing more than a mere form of imposing a tax, and implies nothing more, except that the licensee shall not be subject to the penalties of the law if he pays the tax. It is not an exercise of the police power, but is for the purpose of revenue. *Tucker v. Williamson*, 229 Fed. 201.

Construction.

ACT OF FEBRUARY 9, 1909.

While the Act of February 9, 1909 (3 Fed. St. Ann. 2d ed. 723), prohibits the importation of opium except for medicinal purposes, it does not make it a criminal offense to use it for other purposes unless the person so using it knows "the same to have been imported contrary to law" and it does not apply to opium imported before its enactment. Obviously also it has nothing to do with domestic grown opium. *Marks v. U. S.* 196 Fed. 476, 116 C. C. A. 250.

Where a conviction for a violation of the Act of February 9, 1909, rests in part on circumstantial evidence, the conviction will not be disturbed and the court's rulings in admitting evidence of that character will be sustained, if the admitted testimony tends even remotely to establish the ultimate fact. *Louie v. U. S.* 218 Fed. 36, 134 C. C. A. 58.

Where the defendant who was a steward on a vessel within the territorial limits of the United States was arrested and found in possession of opium it was held in *U. S. v. Caminata*, 194 Fed. 903, that the offender's possession of the opium within the boundaries of the United States was sufficient evidence of guilt to justify a jury in convicting under the Act of February 9, 1909.

ACTS OF OCTOBER 1, 1890, AND JANUARY 17, 1914.

The conviction of a person charged with the manufacture of opium within the provisions of section 36 of the Act of October 1, 1890 (now repealed by section 6 of the Act of January 17, 1914, 4 Fed. St. Ann. 2d ed. 176), cannot be sustained, where it is shown that the defendant merely added water

to smokable opium for the purpose of reducing the strength of the drug so as to make it easier to smoke. *Seidler v. U. S.* 228 Fed. 336, 142 C. C. A. 628, wherein the plaintiff in error was convicted of manufacturing opium for smoking purposes prohibited by the Act of October 1, 1890. The testimony showed that the defendant had added water to Wyeth's aqueous extract of opium, which is made for therapeutical purposes and then smoked it; also that the extract itself, though strong, can be smoked, but is made milder by adding water to it. In reversing the judgment of conviction the court said: "We cannot agree that adding water to an extract of opium, which is itself smokable, is a manufacture of opium for smoking purposes. The character of the article is not thereby changed. It would be as fair to say that grinding coffee beans was manufacturing coffee for drinking purposes, or that adding water to raw whiskey was manufacturing whiskey for drinking purposes. To manufacture an article, as stated in *Anheuser-Busch Brewing Assoc. v. U. S.* 207 U. S. 556, 28 S. Ct. 204, 52 U. S. (L. ed.) 336, implies a change in its nature—'there must be transformation; a new and different article must emerge having a distinctive name, character or use.' Congress has no authority to exercise police power in the states, and a revenue law should not be strained for the purposes of conviction."

In *U. S. v. Shelley*, 229 U. S. 239, 33 S. Ct. 635, 57 U. S. (L. ed.) 1167, it was held that the mere mixing of smoking opium with the residue of opium that has been smoked, and heating the same, is not a "manufacture of opium for smoking purposes" within the meaning of the statute. The manufacture which the statute contemplates is complete where from the crude opium there has been produced the smoking opium. The court said: "Section 36 [of the Act of October 1, 1890 (repealed as heretofore noted)] must be read in connection with the accompanying administrative provisions, which render it clear that the tax was designed to yield substantial revenue, and not merely or primarily to prohibit the manufacture of smoking opium. It may easily be believed that if (irrespective of constitutional limitations upon its power) Congress were undertaking to stamp out the practice of opium smoking, it might prohibit such processes of reclaiming as were charged against the defendant in the second and third counts of this indictment. But it is not so easy to believe, in the absence of clear language requiring such a construction, that in prescribing a revenue tax upon the manufacture of opium for smoking purposes, it intended to subject the same substance more than once to the tax, or to require surveillance over opium-smoking resorts—in which,

it would seem, such treatment of the residuum might most readily be conducted—the same as over a factory or other establishment where the primary conversion of crude opium into smoking opium is conducted." To the same effect see *Shelley v. U. S.* 198 Fed. 88, 117 C. C. A. 294, 4 Fed. St. Ann. (2d ed.) 174.

In *Marks v. U. S.* 196 Fed. 476, 116 C. C. A. 250, the question arose whether the acts of the defendant who was charged with a violation of section 36 of the Act of October 1, 1890 (repealed as heretofore noted," in converting the crude opium product into smoking opium amounted to its manufacture within the meaning of the act. The court in affirming a judgment of conviction said: "The purpose of the statute is to tax and regulate the manufacture of smoking opium and it applies, manifestly, to any process by which the crude opium is converted into a product fit for smoking. Any such process constitutes manufacture within such a limited statute even if it might not amount to manufacture under a statute of general application. The contrary is the equivalent of saying that the manufacture of smoking opium cannot be regulated because it is not a manufactured product.

. . . It is apparent here that the dry and hard crude opium product was substantially transformed in its nature by the heating and other treatment which it received before it became the molasses-like substance fit for smoking. We are of the opinion that the process of the defendant amounted to manufacture within the statute in question."

A conviction for the manufacture of opium for smoking purposes without complying with the necessary regulations required by the act, will be reversed if the government fails to show what these regulations are and the violations thereof by the defendant. *Chin Sing v. U. S.* 227 Fed. 397, 142 C. C. A. 93, wherein it was said that "the statute calls for 'the bond required by the Commissioner of Internal Revenue.' It does not appear from the indictment or in the evidence that the Commissioner had required any such bond. At the date of the offense charged, less than 60 days had elapsed since the passage of the act under which the indictment was found. The authority of the United States to prohibit or regulate the manufacture of smoking opium within a state, when that act is not otherwise unlawful, must rest upon the right to exercise its taxing power as to matters within the states. Those coming within the operation of such powers of the government are entitled to have the duties and obligations thereby imposed made so clear and certain that they can be readily complied with, and the penalties avoided. It does not appear that this

has been done in the present instance. If no such bond had been required by the Commissioner of Internal Revenue, appellant was not in default in not giving the bond set out in the indictment. The government was bound to show that the Commissioner had by regulation required a bond and what it called for. This it has not done. We are unable to see how appellant could be held for failure to comply with regulations which had never been promulgated. The offense of count 2 is the failure of appellant to give 'the bond required by law to be given by a manufacturer of opium, to wit, a bond with sureties satisfactory to the collector of internal revenue and in a penal sum of not less than \$100,000.' By the statute this bond must be such as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. No such regulation is either alleged or shown, and therefore, so far as the record discloses, there was no means whereby appellant could have complied with the statute. The offense charged in count 3 is the failure of appellant to file with the collector of internal revenue of his district the notices, inventories, and bonds and his failure to keep such books and to render such returns of material and product, and to put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as required by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, by regulations made by said Commissioner of Internal Revenue under authority of law. That any such regulations had been made was neither charged nor proven. Appellant was convicted of failure to comply with regulations which, so far as is disclosed in the record never existed. The burden was upon the government to show what these regulations were and the infraction thereof by appellant. The crime set out in the fourth count of the indictment was the failure to stamp the said opium in such a permanent manner as to denote the payment of the internal revenue tax thereon. The failure to stamp is a different offense from the failure to pay the tax. The indictment does not allege, nor does the record disclose, that there existed any stamp or that the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury had by regulation required any stamp for such purpose. Appellant could not be held for the failure to apply and cancel a stamp which never existed. If it did exist, it rested upon the government to show that fact."

On appeal from a judgment convicting the defendant of a violation of the act forbidding the manufacture of smoking opium without

having filed a bond, the fact that the defendant is an opium smoker is not a collateral matter, but is relevant to the issue. *Tam Shi Yan v. U. S.* 224 Fed. 422, 140 C. C. A. 116, 4 Fed. St. Ann. (2d ed.) 176, wherein the court said: "Objection was . . . raised to the introduction of the statement in the letter above quoted, on the ground that the smoking of opium by defendant was a collateral matter; that, having asked the defendant if he did smoke, counsel for the government was bound by his answer, and could not contradict such answer, by introduction of the letter, or in any other way. We do not think the matter inquired about was a collateral matter. An opium smoker can easily make his own mixture from crude opium or yen shee. It is a relevant circumstance, if it can be shown, that a man, in whose possession appropriate materials and utensils are found, is himself a smoker, and therefore under a temptation to supply himself with smoking opium."

ACT OF DECEMBER 17, 1914.

There is a conflict of opinion as to whether the words "any person" as used in section 8 of the Act of December 17, 1914 (4 Fed. St. Ann. 2d ed. 177), to define the persons embraced by the act, are to be construed broadly to include all persons not specially excepted by the provisions of the act or are limited to the persons mentioned in the first section of the act. In *Wilson v. U. S.* 229 Fed. 344, 143 C. C. A. 464, 4 Fed. St. Ann. (2d ed.) 185, the court said: "We do not find this contention persuasive; the words 'any person' are comprehensive; they are broad enough to cover not only the 'producers, dealers, distributors, givers away,' etc., who by section 1 are allowed to register, but also all other persons. That Congress used the words with this comprehensive meaning seems to us manifest from the exceptions which it includes in the proviso that immediately follows. A nurse may have some opium in her possession, and yet not be herself 'a dealer, distributor,' etc., nor entitled to take out a license. So too a person subject to sharp spasms of pain may have some in his possession, and yet not be himself 'a dealer, distributor,' etc., nor entitled to take out a license. Both these persons would be covered by the first clause of section 8 and their possession would be unlawful. Therefore Congress saved them in the proviso, by relieving from the application of the first clause—the nurse, if her possession was by virtue of her employment, and the invalid, if the drug had been prescribed for him by a physician. Grammatically there is nothing in the section which would so restrict the comprehensive meaning of the

words 'any person,' as to make them include only those who might take out license but have neglected to do so. There is nothing to indicate that Congress intended its proscription to be less comprehensive than the language it used requires. It has legislated quite drastically about opium in Act Feb. 9, 1909, 35 Stat. at Large, 614, c. 100 (Comp. St. 1913, § 8800), prohibiting its importation for any but medicinal purposes and making any one who imports for other purposes or who uses the drug, knowing that it has been so fraudulently imported, subject to prosecution. The eighth section of the Act of 1914 is legislation of the same sort; it prohibits any one, other than those who register and pay tax, and a few other persons, nurses, invalids, common carriers, etc., from having any opium in their possession and imposes a penalty for their doing so." To the same effect see the reported case and see U. S. v. Brown, 224 Fed. 135.

But in U. S. v. Wilson, 225 Fed. 82, the defendant was indicted for having in her possession and control a small quantity of opium for smoking purposes. The evidence was uncontradicted that she was addicted to opium smoking, but that she never sold or dealt in the drug. The court said: "Clearly, it [the phrase 'any person'] refers to, and at least includes, those doing the things specifically named in the first section. Does it refer to and include others doing things not specifically named in the act, viz., those having in their possession or under their control the drugs named for their personal consumption? It seems to me that to so hold would be for the court to enlarge the list of those whom Congress required to register and pay the special tax. To that extent it would be an amendment of the act. This is not the function of the court. If Congress had intended to require persons to register who had in their possession or under their control drugs for any purpose other than that stated in the act, it would seem that it would have been a simple matter to have said so. It is clear to my mind that the language quoted from the eighth section, supra, when read in connection with the first section of the act, refers only to those mentioned in the last-named section, and however desirable it may be to have that list enlarged, the court is without authority to do it."

In U. S. v. Carney, 228 Fed. 163, the court in criticising the conclusions reached in U. S. v. Brown, 224 Fed. 135, said: "The possession forbidden by this section is of a person 'not registered under the provisions of this act.' Plainly the person who has not so registered and paid the required tax refers only to one who is required by section 1 of the act to register and pay such tax.

No other possession is referred to by this section of which there can be a violation, other than the possession of one who is required by section 1 to register and pay the tax. The section will reasonably bear no other interpretation; and as the defendant is not charged with being a person required by the act to register, or with having engaged in any business that requires him to do so, the indictment fails to charge an offense against him under this act. It was so held by Judge McCall in U. S. v. Friedman, 224 Fed. 276, and U. S. v. Wilson, 225 Fed. 82, by Judge Bourquin in U. S. v. Woods, 224 Fed. 278, and by Judge Thompson in U. S. v. Jin Fuey Moy, 225 Fed. 1003, upon indictments quite similar to the one in question. A contrary conclusion, it is true, was reached in U. S. v. Brown, 224 Fed. 135, by Judge Neterer in the western district of Washington; but I am not satisfied that the conclusion reached by him is correct. It is by him assumed that the act in question is intended to prohibit the importation of opium for any purpose whatever, and that the drug is therefore an 'outlaw' in this country, and for that reason Congress may rightly prohibit its importation, and that this was intended by the act in question. It seems to me that this conclusion is unwarranted; for by the Act of Congress approved February 9, 1909 (35 Stat. 614, c. 100 [Comp. St. 1913, §§ 8800, 8801]), the importation of opium for other than the purpose of smoking is permitted under such rules and regulations as the Secretary of the Treasury may prescribe; and section 12 of the act in question especially provides that nothing contained therein shall be construed to impair, alter, or repeal any of the provisions of the Act of Congress approved February 9, 1909, or any amendment thereof. Opium, therefore, and its derivatives, when imported under the provisions of that act, are legitimate articles of commerce. It seems entirely clear that a purchaser of opium, or compound or derivative thereof, for medicinal use, from one authorized to sell or to dispense it, and who has it in his possession for such purpose should not be required to register or pay the special tax exacted only because of such possession. The act in question does not in plain terms so provide, and it is not within the rightful power of the courts to add such a provision thereto, either directly or impliedly, and an indictment that fails to charge facts showing the possession of one to be unlawful does not charge an offense within the terms of this act." To the same effect see U. S. v. Friedman, 224 Fed. 276.

In U. S. v. Woods, 224 Fed. 278, the indictment charged that the defendants "did unlawfully, knowingly, unlawfully, and fe-

loniously have in their possession and under control smoking opium, not having registered as required by the Act of 1914, and not having paid the special tax as therein provided." The court in sustaining a demurrer to the indictment said: "Having in mind that taxes can be imposed and statutory offenses created only by direct, clear, and apt language, it seems clear that there is nothing in the act imposing the duty of registration and payment of taxes upon mere consumers of the drugs. They are not within section 1, and section 8 does not purport to extend the registration and taxation features of the act to them, or to any one, but only to make unlawful mere possession of the drugs by any person of the classes by section 1 required to register and pay, and who have not, and to create a statutory rule of evidence."

A physician's prescription calling for an unusually and unreasonably large quantity of the drug coming within the scope of this law, is fraudulent and in violation of the Treasury Department regulation 2200, dated May 11, 1915. *U. S. v. Curtis*, 229 Fed. 288, wherein the court said: "I am of the opinion, and hold, that a physician who issues a prescription for an unusually large amount of these drugs, or of any one of them, and which prescription shows on its face that the quantity prescribed is unreasonable and unusual, is guilty of an offense under the law, unless such prescription indicates the necessity therefor; and I am also of the opinion, and hold, that the dealer who fills such a prescription or order issued by a physician is guilty of an offense under the law. If not so, then, as already stated, physicians may prescribe unlimited quantities, and druggists may fill the prescriptions with impunity, and thus many of the evils sought to be remedied by the enactment of the so-called Harrison Narcotic Law will be augmented, instead of being remedied."

In *Tucker v. Williamson*, 229 Fed. 201, the question arose whether physicians sending out a preparation containing cocaine to patients, whom the physicians have never seen, violate the Harrison Act. The court said: "The exemption authorized by the bill, as it passed the House, from the requirements of the first paragraph of section 2, extended only to instances of personal attendance on patients. That provision was rejected and in lieu thereof the exemption was extended, by the agreement of the conference committee and the approval of both branches of Congress, so as to include not only cases of personal attendance on the part of the physician, but also those cases in which there is no personal attendance, providing a record is kept in such latter instance of the drug or drugs dispensed. There was thus somewhat of an enlargement of the instances

of exemption from the requirements of the first paragraph of section 2 as to the preserving of orders and duplicates of the same, but there was added the duty of preserving a record in case of dispensing or distributing when not in personal attendance on the patient."

In *U. S. v. Johnson*, 228 Fed. 251, it was sought to hold the defendant as a principal under an indictment charging him with aiding, abetting and procuring the commission of an act in violation of the Harrison Law, by inducing one Martin to ship opium for smoking purposes, it being proved that Martin had not paid the special tax and was not duly registered as required by section 1 of the act. The court in finding defendant guilty as charged in the indictment said: "Section 332 of the Penal Code provides that: 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.' . . . The government insists, it having alleged and proved that Martin had not registered and paid the special tax as required by section 1 of the act, and that he is not one of the persons exempted under the proviso of said fourth section of said act, and that he was guilty of the offense of sending, shipping, carrying, or delivering a parcel of said drugs mentioned in said act, to wit, opium prepared for smoking, from New Orleans, in the state of Louisiana, to the defendant in Memphis, in the state of Tennessee, and it also having proven that the defendant Johnson ordered, requested, and induced Martin to ship him the opium, that under section 332 of the Penal Code he is guilty as a principal. This insistence by the government seems to me to be sound."

An indictment charging that the defendant "did unlawfully, wrongfully, and knowingly sell, dispense, and distribute . . . morphine sulphate tablets," and that he sold and dispensed the same as a dealer to a consumer, etc., is equivalent to charging that he had these drugs in his possession. *U. S. v. Curtis*, 229 Fed. 288, wherein the court said: "In *U. S. v. Wilson*, 225 Fed. 82, it was held: 'Harrison Anti-narcotic Law, Dec. 17, 1914, § 8, establishes the rule of evidence that, upon proof that a defendant was producing, importing, manufacturing, dealing in, dispensing, selling, distributing, or giving away, as mentioned in section 1, cl. 1, opium or coca leaves, and that a narcotic was found in his possession, he is presumptively guilty of violating the act, that then the burden of proof is upon defendant to show affirmatively that he is not one of the class mentioned in section 1 as being required to register, or, if so, that he had registered and

paid the special tax.' If this be good law, then this indictment charges an offense, for it clearly charges that the defendant had the drugs in his possession at the time mentioned in the indictment, else he could not have sold, dispensed, and distributed them to the person named in the indictment. If in point of fact the defendant had registered and paid the special tax, then proof of such facts on the trial of the indictment will be a complete defense, and result in the acquittal of this defendant, inasmuch as both counts charge a violation of section 1 of the act."

LITTLE CAHABA COAL COMPANY

v.

AETNA LIFE INSURANCE COMPANY.

Alabama Supreme Court—April 15, 1915.

192 Ala. 42; 68 So. 317.

Indemnity Insurance — Extent of Recovery — Interest on Judgment Pending Appeal.

A contract indemnifying an employer against loss or expense resulting from an injury or accident to its employees stipulated that the insurer's liability for loss should be limited to \$5,000; that the insurer was to pay the expenses of litigation in addition to the sum stipulated; that it should at its own cost defend injury suits in the name of assured; and that assured should not incur expenses without the consent of the insurer. While the contract was in force judgment was recovered against the employer for injuries to an employee in the sum of \$5,000, which on appeal was affirmed; the affirmation carrying with it ten per cent damages, and interest pending appeal. The defense and the appeal were conducted by the insurer in the name of the insured. It is held that the interest and damages were not "expenses of litigation" within the meaning of the contract of indemnity.

[See note at end of this case.]

Same.

Under a contract indemnifying against loss through actions brought for injuries by employees that the insurer has exercised its option to defend the suit and appealed from an adverse judgment, but was unsuccessful, and merely created an extra charge in damages and interest, does not make it liable therefor beyond the amount limited in the contract, since such contract was made in view of that contingency.

[See note at end of this case.]

Contracts — Construction — Avoiding Oppression or Inequality.

A contract will not be construed so as to render it oppressive or inequitable to either party thereto, or so as to place one of the parties at the mercy of the other, unless it is clear that such was the manifest intention.

[See 6 R. C. L. tit. *Contracts*, p. 841.]

Appeal from Birmingham City Court: SHARPE, Judge.

Action by Little Cahaba Coal Company, plaintiff, against Aetna Life Insurance Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Tillman, Bradley & Morrow and *M. M. Baldwin* for appellant.

Stokeley, Scribner & Dominick and *I. M. Engel* for appellee.

[43] SAYRE, J.—By the terms of the contract to be construed in this case defendant (appellee) indemnified plaintiff (appellant) "against loss or expense arising or resulting from claims upon the assured on account of bodily injuries or death accidentally suffered by any employee or employees of the assured by reason of the prosecution of the work and at the places" described in the contract. The contract contained the following stipulations which need to be considered, defendant being referred to as "Company:"

"A. The Company's liability for loss on account of an accident resulting in bodily injuries to or in the death of one person is limited to five thousand dollars (\$5,000.00); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident resulting in the bodily injuries to or in the death of more than one person is limited to ten thousand dollars (\$10,000.00).

"The Company will, however, as provided in the conditions D and E hereof, pay the expense of litigation in addition to the sum herein limited, provided that, if the Company shall elect to pay the assured the sum as herein limited, it shall not be liable for further expenses of litigation after such payment shall have been made."

"D. If thereafter (after the occurrence of an accident) any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the Company's home office every summons or other process as soon as the same shall have been served on him, and the Company will, at its own cost, [44] defend such suit in the name and on behalf of the assured, unless the Company shall elect to settle the same

or to pay the assured the indemnity as provided for in condition A hereof.

"E. The assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claims, except at his own cost, without the written consent of the Company previously given."

During the life of this contract one Gilbert, an employee of plaintiff, was accidentally injured, sued plaintiff, and recovered judgment for the sum of \$5,000. On appeal to this court this judgment was affirmed; the affirance carrying with it 10 per cent damages (Code, § 2893), and interest pending the appeal, and amounting on the date of its rendition to \$6,872.25, exclusive of court costs. The defense and the appeal were conducted by defendant in the name of the plaintiff in this action. Defendant paid the costs, but to the satisfaction of Gilbert's judgment would contribute no more than \$5,000, which also was paid forthwith. Plaintiff here sues to recover the overplus of \$1,872.25, interest pending the appeal, and damages, which it was required to pay to Gilbert.

(1) The single question involved is whether the interest and damages awarded to Gilbert and paid by appellant are covered by "the expense of litigation" within the meaning of the contract, or whether they are to be included in the loss as to which appellee bargained for a maximum. We are in agreement with the learned [45] trial judge who answered this question in favor of appellee.

It may not be out of place to observe that this is a contract of indemnity into which the parties entered freely to accomplish their own purposes. Such contracts, like policies of insurance, when vague, ambiguous, or inconsistent, are generally construed with favor to the party indemnified; but this rule of favor can never be carried to the point of wresting the contract from its plain meaning when reasonably construed upon an examination of the whole instrument. *Day v. Home Ins. Co.* 177 Ala. 600, 58 So. 549, 40 L.R.A. (N.S.) 652; *Continental Casualty Co. v. Ogburn*, 175 Ala. 357, 57 So. 852, Ann. Cas. 1914D 377; *Rumford Falls Paper Co. v. Fidelity*, etc. Co. 92 Me. 574, 43 Atl. 503.

Cases adjudicating this question in other jurisdictions are not in accord. Our conclusion has been reached upon consideration of the language employed in the contract and the reason of the matter as it has appeared to us after an examination of the cases on either side.

By the great weight of authority contracts of this character are contracts of indemnity against loss, and not against liability merely, and the liability of the indemnitor is deemed fixed only upon the payment of the judgment by the assured. See cases cited in the note to Ann. Cas. 1914D 1095, *infra*. Now, this much seems clear upon the language employed by the parties: Appellee company contracted in some sort, not only for a maximum liability of \$5,000 in respect of loss to be incurred by assured, but for the right, without interference on the part of assured, to negotiate a settlement or to litigate with the person claiming damages for an injury, and, at its own discretion, to prosecute an appeal from an adverse judgment, and [46] thus reserved the right to postpone the fixing of the liability of assured to the person injured and by the same token of its own liability to assured, until the date of affirance, in advance of which assured could not settle with the injured without forfeiting the protection of the contract.

The company having determined to litigate, the effect of the contract, to state it in general terms, was to bind it to indemnify, to make good, and save assured from loss by reason of any judgment not in excess of \$5,000 it might in the end be compelled to pay. In addition, the company was to pay the expense of litigation. We put aside any question as to officers' fees, taxable court costs, which have been paid, for as to them the parties are agreed that the company was liable, whether as loss or expense is immaterial, and they are not in dispute. As for the items in dispute, and claimed by the assured to be items of expense, the reference in stipulation E shows that the "expense of litigation" mentioned in the former was the "expense" mentioned in the latter. As regards other expenses included in stipulation E, the contract was not truly one of indemnity, for that stipulation was, not that assured should defend and look to the company for protection against the liability or reimbursement, but that the company should defend in its own way, at its own cost, and assured was not to "incur any expense . . . except at its own cost without the written consent of the company previously given." At this point then, evidently, expense meant, not any liability the assured might incur and be compelled by the judgment to pay, but such expense as was under the control of the party actually conducting the defense, as the expense of employing attorneys and preparing the case for trial in [47] the court below or on appeal. Presumptively, nothing appearing to the contrary, "expense" meant the same thing in both places, and, if "expense," in stipulation E, did not include interest and damages, as manifestly it did not,

these items were not included in the expenses mentioned in stipulation A. They were therefore included in "loss," and this was their natural place; for they were nothing more or less than part and parcel of the judgment that assured was required to pay. But in respect of "loss" the company's liability was limited to \$5,000 in case of injury to any one employee.

In the present case, the original judgment being for the sum of \$5,000, the precise maximum bargained for, the construction which the language of the contract seems to require imposes on the assured the loss of interest pending the appeal in the employee's case and damages awarded on affirmance. Such would be the result in any case where the judgment exceeded the maximum indemnity. If, however, the judgment were for a smaller amount, the loss of these items would fall upon the indemnifying company in whole or in part, as the sum of these items might be less or greater than the difference between the judgment and the maximum of indemnity provided by the contract. The effect of this construction is to divide the risk in the long run of cases between the company and assured, as a sound policy of preventing negligence on the part of assured would seem to indicate as proper, while the other, to state its effect concretely, would lead to this result: If Gilbert's judgment had been reversed, and on a second trial, brought about by the company's appeal, an irreversible judgment for a much greater sum had been recovered, as not infrequently happens in cases where damages are to be liquidated in the unstandardized [48] judgment and discretion of a jury, the company would be required to respond in the full amount of such judgment. But such a result could only be reached by an elimination from the contract of the stipulations for a right to litigate and for a maximum of loss indemnified against. The company is as much entitled under the contract to the full protection of these agreed limitations upon the right of assured as assured is to the protection of the agreement of indemnity. This conclusion is sustained also by the numerical and intrinsic authority of the cases decided by other courts. See notes to *Cannon Mfg. Co. v. Employers' Indemnity Co.* 161 N. C. 19, 76 S. E. 536, Ann. Cas. 1914D 1095, and *Ætna L. Ins. Co. v. Bowling Green Gas-light Co.* 150 Ky. 732, 150 S. W. 994, 43 L.R.A. (N.S.) 1128, where the cases are collected.

(2, 3) It is true that a contract will not be construed so as to render it oppressive or inequitable as to either party, or so as to place one of the parties at the mercy of the other, unless it is clear that such was their manifest intention at the time the agreement was made. *Elliott on Contracts*, § 1521. It

Ann. Cas. 1917D.—55.

is also true that: "All words, whether they be in deeds, or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and person."

(4) And on these principles assured bases its argument that the company, by exercising the right to litigate and to appeal, and by superseding the execution of the judgment pending appeal, caused the accumulation of interest and the imposition of the penalty of 10 per cent. damages, thereby creating an additional charge against the assured, and eating away its indemnity, for which it should be held responsible. The connection [49] between premise and conclusion is not satisfactory. The case is to be determined on the answer to this question: What did the parties, contracting at arm's length, and with their eyes open, contracting with reference to all cases that could arise under the policy, in terms fairly applicable to every such case, mean by the terms "loss" and "expense of litigation?" It scarcely seems debatable that, if the judgment, including interest and damages, had been less than the maximum indemnity provided, assured would have been entitled to reimbursement of interest and damages as an integral part of the judgment. On what just principal, then can we construe this agreement, on consideration of advantage to one of the parties, as operating in one case differently from its operation in another, both cases falling equally within its express and fit language? Such a course is manifestly impossible. The appeal is to an extrajudicial sense of equity which would be of doubtful force even as such in the hardest case to be imagined as falling within the field of the provision the parties intended to make. The company, for a consideration presumably bearing just and reasonable relation to the obligation assumed, beyond per-adventure contracted for the right to litigate and to appeal, and at the same time for a maximum of indemnity. The contract made a politic prudent division between the parties of the risk of negligence on the part of assured, and this, it cannot be doubted, was a material part of the consideration for the obligation assumed. We are unable to see that this contract, even though construed as if intended for the emergency of this case alone, is oppressive or inequitable, or how on principle assured can be relieved of express limitations upon its right which the company exacted as a condition of the indemnity afforded.

[50] We think the judgment of the trial court should be affirmed.

Affirmed.

Anderson, C. J., and McClellan and Gardner, JJ., concur.

NOTE.

The reported case holds in accord with the weight of authority that where a policy of indemnity insurance limits the liability of the insurer for one accident to a fixed sum and the costs and expenses of litigation and a judgment exceeding that sum is recovered against the insured, interest on that judgment pending an appeal is not part of the costs and expenses of the litigation and the insurer is not liable therefor in excess of the stipulated indemnity. The cases discussing the liability of the insurer in an indemnity policy for interest on the judgment against the insured are reviewed in the note to *Cannon Mfg. Co. v. Employers' Indemnity Co.* Ann. Cas. 1914D 1095.

STATE EX REL CITY OF NORTHFIELD

v.

**DISTRICT COURT OF RICE COUNTY
ET AL.**

Minnesota Supreme Court—December 10, 1915.

131 Minn. 352; 155 N. W. 103.

Workmen's Compensation Acts — Notice of Injury — Necessity.

The Workmen's Compensation Law is remedial in its nature and must be given a liberal construction to accomplish the purpose intended. Relator's mayor and street commissioner had actual knowledge of the injury to the respondent immediately after the occurrence thereof. The knowledge of the mayor is the knowledge of the city. Held that where the employer has actual knowledge of the occurrence of the injury, the injured employee is not required to give a written notice thereof.

[See note at end of this case.]

Who Is Workman — Casual Labor for Municipality.

An employee of the city of Northfield was injured while loading gravel used by the city for improving and repairing its streets. Though the employment may have been casual, it was in the usual course of the business of the city, and the Workmen's Compensation Law applies.

[See Ann. Cas. 1913C 28; Ann. Cas. 1916B 793.]

(Syllabus by court.)

Certiorari to District Court, Rice county: CHILDRESS, Judge.

Claim for compensation under workmen's compensation act. Christ Johnson, claimant, and City of Northfield, defendant. Claim allowed by District Court. Defendant brings certiorari. The facts are stated in the opinion. **AFFIRMED.**

Charles R. Pye for relator.

Mohn & Mohn for respondents.

[353] SCHALLER, J.—On July 17, 1914, Christ Johnson, a laboring man, was working for the city of Northfield, Minnesota. He was loading wagons with gravel for use in improving and repairing the streets of the city. His wages were two dollars per day, payable every Saturday. He had resided in Northfield more than 30 years, had worked for the city off and on during a great part of that time; he began work the last time on July 13, 1914.

On July 17, 1914, he was injured in a cave-in, the result being a compound fracture of the left leg. He was immediately taken to the mayor's place of business. The mayor and the street commissioner saw his injuries, ascertained when and how he was injured and caused him to be taken to his home. Both officials did all in their power to relieve and assist the injured man. The street commissioner accompanied him to his home, and a doctor was promptly called to attend him. The bill for the doctor's services was subsequently paid by the municipality.

No written notice of the injury was ever served upon the city. On April 10, 1915, Johnson instituted proceedings against the city in the district court of Rice county to recover compensation under the provisions of chapter 467, p. 675, Laws 1913,¹ generally known as the "Workmen's Compensation Act." The city denied liability. The proceedings resulted in a judgment against the city, which brings the matter to this court by certiorari.

The assignments of error present two questions: (1) That written notice as required by the act was not given; (2) that Johnson's employment was merely casual.

1. "The Workmen's Compensation Act is remedial in its nature and must be given a liberal construction to accomplish the purpose intended." *State v. District Ct.* 128 Minn. 43, 150 N. W. 211. With this principle as a guide we proceed to the consideration of the questions raised herein.

This is not a case in which a written notice of the injury would be of any assistance to the employer. Relator's mayor and street commissioner were informed immediately after the accident that respondent, [354] whom they knew, had received an injury

¹ [G. S. 1913, §§ 8195-8230.]

(which they saw) while in the employment of and working for the city.

The record presents a case of actual knowledge by the employer of the occurrence of the injury. The knowledge of the mayor is the knowledge of the city. The statute does not require a written notice where the employer has actual knowledge. G. S. 1913, § 8213. State v. District Ct. 129 Minn. 423, 152 N. W. 838.

2. This is not one of the cases excepted from the compensation act. Johnson was engaged to work for the city at the wage of two dollars per day, payable every Saturday. He was not hired for any specified length of time. His employment might continue a day or a week or several weeks or months. It may or may not have been casual; this we do not decide. Sabella v. Brasileiro, 86 N. J. L. 505, 91 Atl. 1032, *affirmed* 87 N. J. L. 710, 94 Atl. 1103.

Respondent, when injured, was loading gravel for use in repairing and improving the streets of his employer, the city. That part of the compensation law relating to excepted cases, so far as is here material, reads as follows: . . . "Nor shall the provisions of this act apply to actions or proceedings to recover damages or compensation for personal injuries sustained by domestic servants, farm laborers, or persons whose employment at the time of the injury is but casual and not in the usual course of the trade, business, profession or occupation of his employer." . . . (Italics ours.) G. S. 1913, § 8202 (Laws 1913, p. 677, c. 467, § 8).

The language of the statute leaves no room for construction. Though casual, if the employment is in the usual course of the business of the employer, the compensation act applies. The Minnesota act in this respect is modeled on the British Workman's Compensation Law which has been similarly construed. 1 Bradbury, Workman's Compensation Law (2d ed.) 136 et seq.

Part of the business of a municipal corporation is the improvement and repair of its public streets. Respondent, when injured, was an employee of the relator and was engaged in this work. The compensation act applies.

Judgment affirmed.

NOTE.

Notice of Injury under Workmen's Compensation Act.

Generally, 867.

Form and Contents of Notice, 868.

Time within Which Notice Must Be Given, 868.

By Whom and to Whom Notice Must Be Given, 870.

Excuse for Want of or Defect in Notice:

Mistake or Other Reasonable Cause, 870.

Want of Prejudice, 872.

Knowledge of Injury, 874.

Employer Not Misled, 876.

Absence from Jurisdiction, 876.

Waiver, 876.

Finding of Commission, 877.

Burden of Proof, 877.

Generally.

Workmen's compensation acts are considered as of a remedial character, the provisions of which should be construed broadly and liberally in order to effectuate their purpose, and this rule of liberal construction will be taken as a guide in construing the provision requiring notice of the injury to be given to the employer by or on behalf of the injured employee. Donahue v. R. A. Sherman's Sons Co. (R. I.) 98 Atl. 109; Moffat v. Crow's Nest Pass Coal Co. 7 B. W. C. C. (Eng.) 1040; Bloomfield v. November, 219 N. Y. 374, 114 N. E. 805. And see the reported case. But on the other hand the provision for notice cannot be entirely disregarded. Burvill v. Vickers [1916] 1 K. B. (Eng.) 180, 85 L. J. K. B. 256; Bloomfield v. November, 219 N. Y. 374, 114 N. E. 805. Thus in Burvill v. Vickers, *supra*, the court said: "The learned judge has held that, although no notice in writing—I think no notice at all—was given until the man died, on March 14, that is, seven or eight days after the accident, the employers were not prejudiced. That is a finding of fact of the learned county court judge; but unfortunately—with all respect to the learned county court judge—he has assigned in his judgment reasons to which it is in my opinion absolutely impossible that we should pay any attention, and which have placed his finding of fact in more or less peril. He obviously treats the absence of notice as a mere technical, formal and unimportant point. He thinks that when once it is shown that the workman has in fact sustained injury by an accident in the employers' service arising out of and in the course of that employment all other considerations ought to be disregarded and compensation given to him. That is a view upon which, in my opinion, it is impossible for the court to proceed. The very same act which gave compensation to the workman prescribed, and most reasonably prescribed, that the employer shall have notice of the accident as soon as he reasonably can. That notice and the notice of claim both have to be given. That is for the protection of the employer, and obviously it is

only in accordance with common sense that the employer should be entitled to that protection. But then there comes the provision which is for the protection of the workman or his dependent, namely, that if it can be reasonably proved that the employer has not been damaged then the notice may be dispensed with. The learned county court judge has found here that the employer was not prejudiced, and he has assigned reasons which seem to me to be plainly not admissible. He says: "To deprive the widow and the children of a man who has died serving his country by making munitions of war is unpatriotic, and it would be against public policy to allow it to be done." That is a doctrine which it is impossible for us to adopt. We are bound to administer the Act of Parliament as we find it and not to deprive the employers of the protection which the Act of Parliament plainly gives them." So in *Bloomfield v. November*, 219 N. Y. 374, 114 N. E. 805, it was said: "This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice."

The reason of the notice is to give the employer an opportunity to investigate the cause of the accident and the nature of the injury at an early stage. *Smith v. C. N. R.* 7 West. W. Rep. 596.

The notice of the injury required by the statute is separate and distinct from the claim for compensation required to be filed. A notice of the accident does not involve a claim for compensation. *Thompson v. Goold* [1910] A. C. (Eng.) 409; *Webster v. Cohen*, 108 L. T. N. S. (Eng.) 197; *Perry v. Clements*, 3 W. C. C. (Eng.) 56.

The want of notice of the injury is by force of the statute a bar to compensation unless excused. *Mercer v. Dublin Co.* 6 B. W. C. C. (Eng.) 441; *Murphy's Case*, 226 Mass. 60, 115 N. E. 40; *Purdy v. Sault ste. Marie*, reported in full post, this volume, at page 881.

Form and Contents of Notice.

It is generally provided in the workmen's compensation acts that the notice of injury "shall state in ordinary language the time, place and cause of the injury." *Murphy's Case*, 226 Mass. 60, 115 N. E. 40; *Duffy's Case*, 226 Mass. 131, 115 N. E. 248; *Purdy v. Sault ste. Marie*, reported in full, post, this volume, at page 881; *Matwiczuk v. American Car, etc. Co.* 189 Mich. 449, 155 N. W. 412; *Shafer v. Parke* (Mich.) 159 N. W. 304. In the case last cited in discussing the sufficiency of a notice of the injury, the court said: "Inasmuch as employees, as a class, are not skilled in the niceties of lan-

guage or judicial procedure, and as the law was intended to provide a speedy and inexpensive way for determining the compensation, any notice and any claim made within the time limited, ought to be considered sufficient if it fairly gives the employer such information as the law intends."

Some of the workmen's compensation acts expressly require the notice of injury to be in writing. *Brady v. Canadian Pac. R. Co.* 6 B. W. C. C. (Eng.) 680; *Schmidt v. O. K. Baking Co.* 90 Conn. 217, 96 Atl. 963; *Smith v. Solvay Process Co.* (Kan.) 163 Pac. 645; *Murphy's Case*, 226 Mass. 60, 115 N. E. 40; *Purdy v. Sault Ste. Marie*, reported in full post, this volume, at page 881.

Although the British workman's compensation act does not expressly require a written notice, it is uniformly held that a written notice is necessary. *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. (Eng.) 957, 2 B. W. C. C. 159; *Griffiths v. Atkinson*, 106 L. T. N. S. (Eng.) 852, 5 B. W. C. C. 345; *Coltman v. Morrison* [1914] W. C. & Ins. Rep. 44, 7 B. W. C. C. 194; *Webster v. Cohen*, 108 L. T. N. S. (Eng.) 197; *Miller v. Richardson* [1915] 3 K. B. (Eng.) 76; *Potter v. Welch* [1914] 3 K. B. (Eng.) 1020, 7 B. W. C. C. 738. Hence a verbal notice to the fireman and the manager of a colliery is not a good notice. *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. (Eng.) 957, 78 L. J. K. B. 539, 100 L. T. N. S. 555. But in *Stevens v. Insoles* [1912] 1 K. B. (Eng.) 36, 5 B. W. C. C. 164, it appeared that a boy while working in a colliery was injured. The colliery rules provided that any person receiving an injury should report it to the manager, under manager, or fireman. The accident was reported by the boy and his father to the proper official and by him noted together with the particulars in a book kept for the purpose. It was held that the notice was sufficient.

Time within Which Notice Must Be Given.

Several of the workmen's compensation acts require notice of the injury to be given within ten days after the happening thereof. *Smith v. Solvay Process Co.* (Kan.) 163 Pac. 645; *Matter of Sicardi*, 176 App. Div. 13, 162 N. Y. S. 337.

And a number of the statutes require notice of the injury to be given "as soon as practicable" after the happening of the accident. *Bloom's Case*, 222 Mass. 434, 111 N. E. 45; *Duffy's Case*, 226 Mass. 131, 115 N. E. 248; *Petschett v. Preis*, 31 Times L. Rep. (Eng.) 156, 8 B. W. C. C. 44; *Powell v. Main Colliery Co.* [1900] A. C. (Eng.) 360; *Rendall v. Hill's Dry Docks, etc. Co.* [1900] 2 Q. B. (Eng.) 245; *Leach v. Hick-*

son, 4 B. W. C. C. (Eng.) 153. The words "as soon as practicable" as used in the statute import action according to the circumstances of each particular case. *Duffy's Case*, 226 Mass. 131, 115 N. E. 248. See also *Smith v. C. N. R.* 7 West. W. Rep. 596. In *Snelling v. Norton Hill Colliery Co.* 109 L. T. N. S. (Eng.) 81, the rule as to the time within which notice of the injury must be given under a statute requiring it to be given "as soon as practicable" was well stated, the court saying: "If the workman has reason to believe, and does honestly believe, that, although he is apparently well, the accident may be attended with serious consequences, then he must give notice to his employer as soon as practicable after the happening thereof. But, having regard to the ordinary circumstances of the population of this country, it is nothing short of monstrous to say that it is necessary for every workman in a mine or on a farm or in a factory to give notice whenever he has got a scratch on his finger." And in *Smith v. C. N. R.* 7 West. W. Rep. 596, it was said: "Where there is a possible doubt at all, the court is astute to require notice speedily, but it is different where the claim is beyond dispute."

In each of the following cases the indicated period of time elapsed between the injury and the notice thereof and it was held that the notice of injury was not given in time, there being no circumstances dispensing with notice:

—five days, *Wassell v. Russell*, 112 L. T. N. S. (Eng.) 902, 8 B. W. C. C. 230 (injury to finger; notice given two days after seriousness of injury became apparent);

—seven days, *Fox v. Barrow Haematite Steel Co.* 8 B. W. C. C. 431 (injury to eye causing workman to stop work day after accident);

—ten days, *Murphy v. Shirebrook Colliery*, 6 B. W. C. C. 237 (evidence of additional injury received otherwise than in course of employment);

—fourteen days, *Snelling v. Norton Hill Colliery Co.* 109 L. T. N. S. (Eng.) 81, 6 B. W. C. C. 506 (abrasion in palm of hand; notice not given until several days after its seriousness had become apparent);

—twenty-one days, *Hodgson v. Robins*, 7 B. W. C. C. 232 (charwoman fell and twisted her knee and next day fell at her home and fractured knee);

—twenty-three days, *Ungar v. Howell* [1914] W. C. & Ins. Rep. (Eng.) 58, 7 B. W. C. C. 36 (notice given sixteen days after injured finger became bad);

—three and one-half weeks, *Lacey v. Mowlen*, 7 B. W. C. C. 135;

—one month, *Dalgiesh v. Gartside* [1914] W. C. & Ins. Rep. (Eng.) 319, 7 B. W. C. C. 535; *Leach v. Hickson*, 4 B. W. C. C. (Eng.)

153 (finding by trial court that want of prejudice was not shown);

—five weeks, *Hunt v. Highby Min. Co.* 7 B. W. C. C. (Eng.) 716, [1914] W. C. & Ins. Rep. 402 (notice given one week after death of employee and four weeks after injury became painful; no direct evidence of accident);

—one month and twelve days, *Jones v. Arnold*, 9 B. W. C. C. 40 (notice given one month after death had resulted from blood poisoning caused by scratch);

—two months, *Burrell v. Holloway*, 4 B. W. C. C. (Eng.) 239 (sprain to ankle);

—three months, *Webster v. Cohen*, 108 L. T. N. S. (Eng.) 197, 6 B. W. C. C. 92; *Plumby v. Ewart*, 8 B. W. C. C. 464 (long delay after seriousness of injury became apparent); *Petschett v. Preis*, 31 Times L. Rep. (Eng.) 156, [1915] W. C. & Ins. Rep. 11, 8 B. W. C. C. 44 (injury caused by use of dangerous dry shampoo; no evidence of accident at definite time and place);

—four months, *Stronge v. Hazlett*, 44 Ir. L. T. (Eng.) 10, 3 B. W. C. C. 581 (injury to foot which was later amputated; employers' debtor unable to decide because of delay whether there was any connection between accident and disease necessitating amputation); *Jackson v. Vickers*, 5 B. W. C. C. (Eng.) 432; *Ing v. Higgs*, 110 L. T. N. S. (Eng.) 442, W. C. & Ins. Rep. 86, 7 B. W. C. C. 65 (strain; notice given two months after results became apparent); *Bloom's Case*, 222 Mass. 434, 111 N. E. 45;

—five months, *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. (Eng.) 957, 78 L. J. K. B. 539, 100 L. T. N. S. 555; *Pemon v. Talbot*, 7 B. W. C. C. (Eng.) 565;

—six months, *Melville v. McCarthy* [1913] W. C. & Ins. Rep. (Eng.) 353 (delay due to ignorance of statute);

—six months, *Shannon v. Banbridge Weaving Co.* 45 Ir. L. T. (Eng.) 74 (notice not given until three months after attack of lumbago which workman attributed to accident);

—twelve months, *Clapp v. Carter*, 110 L. T. N. S. (Eng.) 491, 7 B. W. C. C. 28.

In each of the following cases compensation was awarded although the indicated period of time had elapsed between the injury and the notice thereof:

—eight days, *Burville v. Vickers* [1916] 1 K. B. (Eng.) 180 (death resulting from septic poisoning caused by scratch);

—nine days, *Lockgelly Iron, etc. Co. v. Kirk*, 86 L. J. P. C. (Eng.) 61, [1916] W. C. Ins. Rep. 342 (death resulting within few hours of injury);

—twenty-one days, *Duffy's Case*, 226 Mass. 131, 115 N. E. 248 (strain in neck which resulted in loss of eye; eyesight not becoming affected until week after injury);

—twenty-three days, *Hayward v. West-leigh Colliery Co.* reported in full post, this volume, at page 877;

—three months, *Harward v. Rowsell*, 111 L. T. N. S. (Eng.) 771, 7 B. W. C. C. 552 (latent injury); *Billwood v. Winch* [1914] W. C. & Ins. Rep. 87 (rupture which did not inconvenience workman very much); *Mills v. Dunnington Main Coal Co.* 86 L. J. K. B. (Eng.) 231, 61 Sol. J. 202 (notice given two days after death, verbal report having been given two weeks before; employer gave no evidence to show prejudice);

—four months, *Thompson v. North-Eastern Marine Engineering Co.* 110 L. T. N. S. (Eng.) 441, 7 B. W. C. C. 49 (latent injury); *Flood v. Smith* [1915] Sc. Ct. Sess. (Eng.) 726, [1915] W. & Ins. Rep. 212 (apparently trifling injury);

—five months, *Powell v. Main Colliery Co.* [1900] A. C. (Eng.) 366 (sufficiency of notice not discussed);

—six months, *Eaton v. Evans*, 5 B. W. C. C. (Eng.) 82 (employer told of accident same day, but seriousness of injury not apparent until six months later);

—seven months, *Ellis v. Fairfield Ship-building, etc. Co.* [1913] Sc. Ct. Sess. (Eng.) 217, W. C. Ins. Rep. 88 (workman ignorant of serious nature of injury);

—eight months, *Hewitt v. Stanley*, 109 L. T. N. S. (Eng.) 384, [1913] W. C. & Ins. Rep. 495 (internal strain; verbal notice of accident to foreman);

—nine months, *Fry v. Cheltenham*, 105 L. T. N. S. (Eng.) 495, 5 B. W. C. C. 162 (injury to knee but workman continued to perform his duties).

By Whom and To Whom Notice Must Be Given.

Where notice of the accident has been given by the employee and he subsequently dies as a result of the injuries received, it is not necessary for his dependents who are entitled to compensation to give a further notice of the accident. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 8 B. W. C. C. 60, [1915] W. N. 43, 59 Sol. J. 233, 31 Times L. Rep. 158, 84 L. J. K. B. 847; *Moffat v. Crow's Nest Pass Coal Co.* [1913] 7 B. W. C. C. 1040. But on the other hand, where a notice of the injury has not been given by the workman and is not excused, a notice given by his dependents is not sufficient to cure the default. *Grime v. Fletcher* [1915] 1 K. B. (Eng.) 734, 8 B. W. C. C. 69.

In *Pimm v. Talbot*, 7 B. W. C. C. 565, it appeared that five days after an employee was injured he wrote a letter to his foreman relating the circumstances of his injury. There was a rule of the factory requiring all accidents to be reported to the foreman, but

the rule did not apply to notices under the compensation act. There was no evidence showing that the employee thought that the notice of injury required under the statute should be given to the foreman. A finding that the want of notice to the employer was caused by a mistake was held not to be sustained by the evidence as the foreman was not the proper person to whom the notice was to be given.

In *Matwiczuk v. American Car, etc. Co.* 189 Mich. 449, 155 N. W. 412, it appeared that after the death of an employee in the course of his employment, a written notice of the injury was sent to the employer by an attorney employed by the employee's brother-in-law. The employee's wife and children lived in Poland and were dependent on him for their support, which fact the notice referred to. It was held that the notice of injury was sufficient.

As to the effect of knowledge of the injury by the employer or his agent as excusing want of notice, see the following subdivision.

Excuse for Want of or Defect in Notice.

MISTAKE OR OTHER REASONABLE CAUSE.

It is generally provided by the workmen's compensation acts that the want of, or a defect in, the notice of injury shall not be a bar to proceedings for compensation if it is found that the want or defect is occasioned by mistake or other reasonable cause. See the cases cited throughout this subdivision. This proviso has nothing to do with the proviso (see *infra*, this subdivision, *Want of Prejudice*) excusing the want of, or defect in, the notice where it is found that the employer has not been prejudiced. *Eke v. Hart-Dyke* [1910] 2 K. B. (Eng.) 677, 3 B. W. C. C. 482. A finding that the failure to give a written notice is excused because due to an unforeseen cause is the same as a finding that the want of the notice was occasioned by a reasonable cause. *Donahue v. R. A. Sherman's Sons Co.* (R. I.) 98 Atl. 109.

An employee's ignorance of the existence of the statute and that he is entitled to compensation thereunder for injuries is not a mistake which will excuse his failure to give notice of an injury within the required time because it is only a mistake of fact and not one of law which will excuse the want of notice. *Bramley v. Evans*, 3 B. W. C. C. (Eng.) 34; *Roles v. Pascall* [1911] 1 K. B. (Eng.) 982, 4 B. W. C. C. 148; *Griffiths v. Atkinson*, 106 L. T. N. S. (Eng.) 852, [1912] W. C. Rep. 277, 5 B. W. C. C. 345; *Melville v. McCarthy* [1913] W. C. & Ins. Rep. 353; *Bruno v. International Coal, etc. Co.* 4 West. W. Rep. 888; *Smith v. C. N. R.* 7 West. W. Rep. 596; *Judd v. Metropolitan Asylums*

Board, 5 B. W. C. C. 420. See also Potter v. Welch [1914] 3 K. B. 1020, 7 B. W. C. C. 738. Nor does it affect the case that the employee is a foreigner who does not understand English. Bruno v. International Coal, etc. Co. 4 West. W. Rep. 888; Smith v. C. N. R. 7 West. W. Rep. 595.

It seems that where a workman has been receiving compensation for his injuries for a considerable period of time from his employer, written notice of the injury not having been given, the want of notice is occasioned by a reasonable cause. Griffiths v. Atkinson, 106 L. T. N. S. 852, [1912] W. C. Rep. 277, 5 B. W. C. C. 345; Turnbull v. Vickers, 7 B. W. C. C. 396. As to the effect of the payment of compensation as a waiver of the want of notice, see *infra*, this subdivision, *Waiver*.

Where a workman sustains an injury and because of its apparent triviality he does not give notice thereof as soon as practicable, the want of notice is due to a reasonable cause for which the omission is excused. Flood v. Smith [1915] Sc. Ct. Sess. (Eng.) 726, [1915] W. & Ins. Rep. 212; Tibbs v. Watts, 2 B. W. C. C. (Eng.) 164; Hoare v. Arding, 5 B. W. C. C. (Eng.) 36; Breakwell v. Clee Hill Granite Co. 5 B. W. C. C. (Eng.) 133; Fry v. Cheltenham, 5 B. W. C. C. (Eng.) 162, 105 L. T. N. S. 495; Millar v. Refuge Assur. Co. 5 B. W. C. C. 522 [1912] Sc. Ct. Sess. (Eng.) 37; Ellis v. Fairfield Shipbuilding, etc. Co. 6 B. W. C. C. 308, [1913] Sc. Ct. Sess. (Eng.) 217; Thompson v. North-Eastern Marine Engineering Co. 110 L. T. N. S. (Eng.) 441, 7 B. W. C. C. 49; Haward v. Rowell, 111 L. T. N. S. (Eng.) 771, 7 B. W. C. C. 552; Zillwood v. Winch [1914] W. C. & Ins. Rep. (Eng.) 87, 7 B. W. C. C. 60; Flood v. Smith, 8 B. W. C. C. 613, [1915] Sc. Ct. Sess. (Eng.) 726; Rankine v. Alloa Coal Co. 41 Scott L. Rep. (Eng.) 306; Brown v. Lochgelly Iron, etc. Co. [1907] Sc. Ct. Sess. (Eng.) 198; Eke v. Hart-Dyke [1910] 2 K. B. (Eng.) 677, 80 L. J. K. B. 90, 103 L. T. N. S. 174, 26 Times L. Rep. 613; Stinton v. Brandon Gas Co. [1912] W. C. Rep. (Eng.) 132, 5 B. W. C. C. 426. See also Clapp v. Carter, 110 L. T. N. S. (Eng.) 491; Moore v. Naval Colliery Co. [1912] 1 K. B. (Eng.) 28, 5 B. W. C. C. 87. Thus where it appeared that a workman had accidentally strained himself internally, but no bad effects of the injury were apparent at the time, it was held that the want of notice was due to a reasonable cause. Tibbs v. Watts, 2 B. W. C. C. (Eng.) 164; Breakwell v. Clee Hill Granite Co. 5 B. W. C. C. (Eng.) 133. So where it appeared that a workman whose foot was injured kept on working for two days after the injury and then stopped work on account of a pain in his foot which he thought was rheumatism, but which turned out to be caused by gan-

grene, it was held that the want of notice was due to a reasonable cause. Stinton v. Brandon Gas Co. 5 B. W. C. C. (Eng.) 426. And where an employee stated as his reasons for not giving earlier notice of the injury, that at first he did not regard his injury as serious as his doctor's advice should have led him to suppose, and that he did not intend to make any claim if his recovery had been as satisfactory as he had expected, it was held that the omission was due to a reasonable cause. Rankine v. Alloa Coal Co. Sc. Ct. Sess. 6 F. (Eng.) 375, 41 Scott L. Rep. 306, 11 Scott L. T. 670. Compare Webster v. Cohen, 108 L. T. N. S. (Eng.) 197. Similarly where it appeared that a female employee's nerves were affected by the alarm and shock of a fire but no outward apparent physical injury was sustained, it was held that the want of notice was due to a reasonable cause. Hoare v. Arding, 5 B. W. C. C. (Eng.) 36.

But where the injury is of a serious nature, and the employee does not give notice of it because he believes that he will soon recover, and does not intend to make a claim, the want of notice will not be excused as being due to a reasonable cause. Clapp v. Carter, 110 L. T. N. S. (Eng.) 491, 7 B. W. C. C. 28; Webster v. Cohen, 108 L. T. N. S. (Eng.) 197; Potter v. Welch [1914] 3 K. B. (Eng.) 1020, 7 B. W. C. C. 738; Fox v. Barrow Haematite Steel Co. 8 B. W. C. C. 431. And although at the time of the accident the injury is of a latent character, if its seriousness subsequently becomes apparent, and the employee does not then give notice, the want thereof will not be excused as due to a reasonable cause. Shannon v. Banbridge Weaving Co. 45 Ir. L. T. (Eng.) 74; Snelling v. Norton Hill Colliery Co. 109 L. T. N. S. (Eng.) 81, 6 B. W. C. C. 506. See also Egerton v. Moore [1912] 2 K. B. (Eng.) 308, 5 B. W. C. C. 284. Neither is the mere fact that an injury to an employee does not prevent him from working, a reasonable cause for the want of notice. Webster v. Cohen, 108 L. T. N. S. (Eng.) 197.

For a consideration of the various periods of time after the accident in which notices of injury have been held under the circumstances to have been given "as soon as practicable" or otherwise, as the case may be, see *supra*, the subdivision *Time within Which Notice Must Be Given*.

In Donahue v. R. & A. Sherman's Sons Co. (R. I.) 98 Atl. 109, it appeared that an employee failed to give notice of his injury within thirty days after its occurrence as required by the statute. During that period he was very ill, underwent a surgical operation and spent the last twenty-three days at a hospital. After his removal from the hospital he was partly confined to his bed for a

considerable period. It was held that a finding that the failure to give a written notice within the required period was excused by reason of accident, mistake or unforeseen cause was justified; and that this finding was not vitiated by a statement therein that the employee could have "sent word" from the hospital to his employer during the last two weeks or ten days of his stay there.

In *Sanderson v. Harkinson*, 6 B. W. C. C. 648, it appeared that a boy working as a painter quit work in the middle of July because he was ill. Early in August he consulted a doctor who sent him to bed and told him not to worry about business, and that he was suffering from lead poisoning. In December he went to his employer and told him all about the illness, the employer's secretary writing down the details. The boy became worse and in the following February he made a claim for compensation. It was held that the want of notice was due to a reasonable cause.

In *Griffiths v. Atkinson*, 106 L. T. N. S. (Eng.) 852, it appeared that an employee of a subcontractor was injured, of which fact the subcontractor had knowledge. Formal notice of the injury was given to the principal contractor four months after the injury. The arbitrator found that the contractor was prejudiced by the want of notice but that the subcontractor was not prejudiced. It was held that as to the contractor the want of timely notice was not occasioned by a mistake or other reasonable cause.

The *Massachusetts* statute provides that "no proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same." (St. 1911, c. 751, pt. 2, § 15.) It also provides that "the failure to make a claim within the period prescribed by section fifteen shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause" cannot be applied to the failure to give the statutory notice. (St. 1912, c. 571, § 5.) The latter provision does not apply to the failure to give notice of the injury. *Duffy's Case*, 226 Mass. 131, 115 N. E. 248.

WANT OF PREJUDICE.

It is provided by some of the workmen's compensation acts that the want of, or a defect in, the notice of injury shall not be a bar to proceedings for compensation if it is found that no prejudice has resulted there-

from. See the cases cited throughout this subdivision. Of course, if prejudice to the employer has resulted from the want of notice the employee is not entitled to compensation unless the want of notice is otherwise excused. *Bramley v. Evans*, 3 B. W. C. C. (Eng.) 34; *Coltman v. Morrison* [1914] W. C. & Ins. Rep. (Eng.) 43.

The fact that owing to delay on the part of a workman in giving notice of an injury, the employers lost their rights against their insurers through not giving them notice according to their policy, has been held not to constitute "prejudice" within the meaning of the statute. *Butt v. Gellyceidrim Colliery Co.* 3 B. W. C. C. (Eng.) 44. Compare *Barker v. Holmes*, 6 W. C. C. 52. But under a statute requiring a written notice of injury to the employer within ten days and barring a claim for compensation for failure to give the notice unless it is excused by the commission on the ground that "the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby," it has been held that the word "employer" in the quoted part of the statute meant a self-insurer; and that when no notice had been given and there was an insurance carrier, the question was not whether the employer but whether the insurance carrier had been prejudiced. *Matter of Sicardi*, 176 App. Div. 13, 162 N. Y. S. 337.

Where the injury to the employee is of a latent character because of which fact no notice of the injury is given shortly after the occurrence of the accident, but notice is given when its seriousness begins to develop, the employer will be held not to have been prejudiced. *Fry v. Cheltenham Corp.* 5 B. W. C. C. 164; *Eaton v. Evans*, 5 B. W. C. C. (Eng.) 82; *Haward v. Rowsell*, 111 L. T. N. S. (Eng.) 771, 7 B. W. C. C. 552; *Taylor v. Nicholson* [1915] W. C. & Ins. Rep. 42, 8 B. W. C. C. 114; *Plumley v. Ewart*, 8 B. W. C. C. 464; *Mills v. Dunningham Main Coal Co.* 86 L. J. K. B. (Eng.) 231, 61 Sol. J. 202; *Murphy's Case*, 226 Mass. 60, 115 N. E. 40. But a delay in giving notice after the seriousness of the injury has become apparent will generally be held to prejudice the employer in his defense. *Ing v. Higgs*, 110 L. T. N. S. (Eng.) 442, W. C. & Ins. Rep. 86, 7 B. W. C. C. 665; *Hunt v. Highley Minn. Co.* 7 B. W. C. C. 716; *Taylor v. Nicholson*, 8 B. W. C. C. 114; *Plumley v. Ewart*, 8 B. W. C. C. 464; *Jones v. Richard Thomas & Co.* 9 B. W. C. C. 237; *Ungar v. Howell* [1914] W. C. & Ins. Rep. (Eng.) 58, 7 B. W. C. C. 36. See also *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308. And so where the employer has been prevented from making the proper inquiries as to the circumstances of the injury by the delay in giving notice, a finding of prejudice to the

employer will be sustained. *Ungar v. Howell* [1914] W. C. & Ins. Rep. (Eng.) 58, 7 B. W. C. C. (Eng.) 36; *Jones v. Arnold*, 9 B. W. C. C. 40; *Ford v. Gaiety Theatre* [1914] W. C. & Ins. Rep. 53, 7 B. W. C. C. 197. See also *Murphy v. Shirebrook Colliery* [1913] W. C. & Ins. Rep. 184, 6 B. W. C. C. 237.

Where because of the want of notice the employer has been prevented from sending medical aid so as to reduce or perhaps take away any claim for compensation the employer is "prejudiced in his defense" so as to prevent the recovery of compensation by the employee. *Wassell v. Russell*, 112 L. T. N. S. (Eng.) 902, 8 B. W. C. C. 230, citing *Snelling v. Norton Hill Colliery Co.* 109 L. T. R. 81; *Stronge v. Hazlett*, 44 Ir. L. T. (Eng.) 10, 3 B. W. C. C. 581; *Dalgiesh Gartside* [1914] W. C. & Ins. Rep. (Eng.) 319, 7 B. W. C. C. 535; *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. (Eng.) 957, 78 L. J. K. B. 539, 100 L. T. N. S. 555; *Hancock v. British Westinghouse Electric Co.* 3 W. C. C. (Eng.) 210; *Ford v. Gaiety Theatre Co.* [1914] W. C. & Ins. Rep. 53, 7 B. W. C. C. 197; *Nicholls v. Borton Ferry*, 8 B. W. C. C. 42; *Pimon v. Talbot*, 7 B. W. C. C. 565; *Jones v. Richard Thomas & Co.* 9 B. W. C. C. 237. Thus in *Hughes v. Coed Talon Colliery Co.* *supra*, it appeared that an employee did not give written notice of an injury until nearly five months after it happened. Two days after the accident he reported it to the under manager and a fireman. His physician testified that the employee came to be treated for rheumatism shortly after the time of the accident but said nothing about the accident. A certificate from another doctor to the effect that the employee was suffering from an injury which was consistent with one caused by an accident, was obtained five months after the accident under peculiar circumstances. It was held that the employee failed to establish that the employer was not prejudiced by the failure to give notice of the injury as soon as practicable.

In *Hancock v. British Westinghouse Electric Co.* 3 B. W. C. C. (Eng.) 210, the plaintiff claimed to have been injured by a rupture while carrying an iron box. The court was of the opinion that if the doctors had been consulted earlier they would have been able to say whether the man's condition arose from an accident of that date, and consequently held that the employers were prejudiced in their defense by the fact that they did not receive notice at an earlier date.

But where the workman has received full medical attendance from the time of his injury, it seems that a finding that the employer has not been prejudiced by the want of a notice of the injury will be sustained.

Barrie v. Diamond Coal Co. 7 B. W. C. C. 1061; *Burvill v. Vickers* [1916] 1 K. B. (Eng.) 180. See also *Marinaccio v. Flinn-O'Rourke Co.* 172 App. Div. 378, 158 N. Y. S. 715, wherein it appeared that an employee received an injury to one of his eyes during the course of his employment while working for a subway contractor, the injury being caused by a chip which flew from paving blocks being unloaded from a wagon. He went to his own physician immediately after the accident and received treatment and testified that he gave prompt notice of his injury to one of the employer's physicians who was employed for the purpose of treating injured employees. Twenty days after the injury occurred he told another one of the employer's physicians of his injury and the latter examined his eye and sent the employee to a hospital for treatment, sending a report of all that happened to the employee that day. It was held that the evidence was sufficient to sustain a finding that the employer was not prejudiced by the failure to give a written notice of injury within ten days from the date of disability.

In *Burrell v. Holloway*, 4 B. W. C. C. (Eng.) 239, it appeared that the plaintiff, a carpenter, had sprained his ankle. He informed the foreman carpenter the next day of the accident. Formal notice of the injury was given two months later. It was held that the foreman was not the proper person to be notified; that the workman had not discharged the onus of showing that the employers were not prejudiced by the delay; that the opportunity of challenging or testifying the statement as to the source of the accident, the place where it happened and the circumstances under which it happened, had been lost to the employers by the delay; and that even if the men who were working with the plaintiff could be found it could not be expected that they could remember all the circumstances after two months as well as when the facts were fresh in their minds.

In *Leach v. Hickson*, 4 B. W. C. C. (Eng.) 153, it appeared that notice of the injury was given one month after the accident, and a finding that the want of prejudice was not shown was sustained.

So in *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308, 81 L. J. K. B. 696, 106 L. T. N. S. 663, [1912] W. C. Rep. 250, [1912] W. N. 89, 5 B. W. C. C. 284, it appeared that the plaintiff slipped and fell while working for the defendant and struck his breast with the handle of his pick. He stopped working for a few days and then went to work for another employer. He suffered pain in his breast off and on for twelve months after the accident. Six months after the accident he noticed a swelling in the breast which he attributed to the injury. A month later a

tubercular abscess formed, and he went to a hospital. Two months later he gave notice. The notice was given three days before the expiration of a year after the accident. It was held that there was no evidence that the employer was not prejudiced.

Likewise in *Jackson v. Vickers*, 5 B. W. C. C. (Eng.) 433, it appeared that an employee gave verbal notice of an injury to him to the storekeeper of the employer. Formal notice of the injury was not given until four months afterwards. It was held that there was no evidence to support a finding that no prejudice had resulted from the want of earlier notice.

It has been held in a number of cases that a want of prejudice to the employer for the want of notice of the injury was shown where it appeared that he had full knowledge of the accident shortly after the happening thereof. *Stevens v. Insoles* [1912] 1 K. B. (Eng.) 36, [1911] W. N. 205, 81 L. J. K. B. 447, 105 L. T. N. S. 617; *Thompson v. Goold* [1910] A. C. (Eng.) 409, 79 L. J. K. B. 905, 103 L. T. N. S. 81, 26 Times L. Rep. 526, 54 Sol. J. 579, 3 B. W. C. C. 392; *Beadle v. Milton*, 5 B. W. C. C. (Eng.) 55; *Roberts v. Charles Wolff Packing Co.* 95 Kan. 723, 149 Pac. 413; *Knoll v. Salina*, 98 Kan. 428, 157 Pac. 1167; *Smith v. Solvay Process Co.* (Kan.) 163 Pac. 645. See also *Ralph v. Michell*, 6 B. W. C. C. 78; *Mills v. Dunnington Main Coal Co.* 86 L. J. K. B. (Eng.) 231, 61 Sol. J. 202. And a knowledge of the injury by the foreman of the employee is sufficient to effect the employer with knowledge so as to show a want of prejudice from a failure to give written notice of the injury. *Ackerson v. National Zinc Co.* 96 Kan. 781, 153 Pac. 530; *Smith v. Solvay Process Co.* (Kan.) 163 Pac. 645. See also *Murphy's Case*, 226 Mass. 60, 115 N. E. 40. Compare *Penn v. Clement Talbot*, 7 B. W. C. C. 565; *Matter of Prokopiak*, 176 App. Div. 128, 162 N. Y. S. 288. The same has been held where the clerk and cashier of an employer had knowledge of the injury, *Butt v. Gellyceidrim Colliery Co.* 3 B. W. C. C. (Eng.) 45; and where it appeared that the workman injured was employed as a helper by another workman, with authority, and a knowledge of the injury was had by the latter, *McClelland v. Todd*, 2 B. W. C. C. (Eng.) 472. Compare *Jackson v. Vickers*, 5 B. W. C. C. (Eng.) 432 (injury known to "measurer").

As to the knowledge by the employer of the injury as dispensing with a written notice thereof by virtue of a direct statutory provision, see *infra*, this subdivision, *Knowledge of Injury*.

A finding of the want of prejudice to the employer has been sustained where there was no evidence showing any prejudice from the failure to give notice. *Lochgelly Iron, etc. Co. v. Kirk*, 86 L. J. P. C. (Eng.) 61, [1916]

W. C. & Ins. Rep. 342, 61 L. J. 41, 33 Times L. Rep. 31; *Smith v. C. N. R.* (Eng.) 7 West. W. Rep. 596; *Burvill v. Vickers* [1916] 1 K. B. (Eng.) 180; *Hayward v. Westleigh Colliery Co.* reported in full, post, this volume, at page 877. Compare *Miller v. Richardson* [1915] 3 K. B. (Eng.) 76, 8 B. W. C. C. 439. Thus in *Burville v. Vickers*, *supra*, it appeared that an employee sustained a scratch which ultimately led to his death by blood poisoning about seven or eight days after the accident. The notice of injury was not given until the employee had died. There was no evidence showing that the medical treatment received was otherwise than proper. It was held that the evidence justified a finding that the employer was not prejudiced by the failure of the employee to give notice as soon as he reasonably could. In *Smith v. C. N. R.* *supra*, it appeared that an employee was found with his head crushed and stuck in the spokes of a wheel of the coal dock where he was working. A solicitor acting on behalf of his dependent family sent an informal letter to the employer a month later informing the latter of the death of the employee. Two months later a regular notice of the accident was given. It was held that the employer was not prejudiced by the want of a notice of the injury within fourteen days as required by the statute.

In *Prokopiak v. Buffalo Gas Co.* 176 App. Div. 128, 162 N. Y. S. 288, the state industrial commission made a finding that an employer was not prejudiced by the want of a written notice of the injury to an employee. The commission also found that at the time of the accident the employee told the employer's foreman that he had been hurt and did not want to work any more. No other notice, written or verbal, was given of the injury. The award was reversed and the case sent back for further consideration not because the finding was unsupported by the evidence but because the commission had fallen into the habit of excusing failures to give written notice of injuries.

Under the *Connecticut Act of 1913* (ch. 138, Laws 1913, approved May 29, 1913) the want of notice does not bar a recovery but only makes the amount of recovery commensurate with the prejudice suffered by the employer because of a want of notice. *Schmidt v. O. K. Baking Co.* 90 Conn. 217, 96 Atl. 963.

KNOWLEDGE OF INJURY.

Several of the American workmen's compensation acts provide that the want of a written notice of the injury shall be excused where the employer or his agent has knowledge of the accident. *Matwiczuk v. American Car, etc. Co.* 189 Mich. 449, 155 N. W. 412;

State v. District Ct. 129 Minn. 423, 152 N. W. 838. And see the cases cited throughout this subdivision.

The actual knowledge which dispenses with notice of an injury is what would be called knowledge in common parlance and does not mean the first-hand knowledge of an eyewitness. *Allen v. Millville*, 87 N. J. L. 356, 95 Atl. 130, *affirmed* 88 N. J. L. 693, 96 Atl. 1101. And a finding of the trial court that the employer had "actual notice" of the injury is equivalent to a finding that he had actual knowledge of the injury where the only notice shown was a notice in fact as distinguished from a notice imputed from a knowledge of facts sufficient to put a person on inquiry. *State v. Pennington County Dist. Ct.* 132 Minn. 251, 156 N. W. 278.

An employer may have such knowledge of an injury to one of his employees as to dispense with the giving of a written notice, although he did not know of the occurrence of the injury at the time, if he receives proper information which amounts to knowledge, within the time with which the written notice is required to be given. *Murphy's Case*, 226 Mass. 60, 115 N. E. 40, wherein it was held that the knowledge by the employer of the injury which dispensed with the necessity of a written notice under the statute was not the same thing as notice. The court said: "In no case can the injured workman recover compensation unless such a notice is given within the time required, except where the employer or insurer had knowledge of the injury. Knowledge may dispense with the necessity of notice, but the statutory notice and the 'knowledge' are not one and the same thing. While information given orally under some circumstances may be sufficient to establish knowledge and permit recovery, an oral notice does not fulfill the requirements of the statute directing that in all cases the notice must be in writing; the oral notice does not take the place of the written notice, nor is such an oral notice necessarily the equivalent of the knowledge of the injury which excuses the written notice. Since no notice was given by the employee, and because the board apparently considered this question as one of defense and did not distinguish between knowledge on the part of the employer and the notice required by the statute, the decree must be reversed."

The fact that a corporation as a legal entity cannot itself have knowledge of an injury does not prevent it from obtaining knowledge in legal effect through its corporate officers so as to dispense with a formal written notice. *Troth v. Millville Bottle Works*, 86 N. J. L. 558, 91 Atl. 1031, *affirmed* 89 N. J. L. 219, 98 Atl. 435.

It is generally held that a knowledge by a foreman of the accident is the knowledge of

the employer so as to dispense with a formal notice. *Bloom's Case*, 222 Mass. 434, 111 N. E. 45; *McLean's Case*, 223 Mass. 342, 111 N. E. 783; *Murphy's Case*, 226 Mass. 60, 115 N. E. 40; *Johansen v. Union Stock Yards Co.* 99 Neb. 328, 156 N. W. 511; *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976.

The general superintendent of a contractor is a vice-principal, whose knowledge of an injury to the employee of a sub-contractor is sufficient to charge the principal contractor with knowledge of the injury. *Parker-Washington Co. v. Industrial Board*, 274 Ill. 298, 113 N. E. 976.

Knowledge of the injury by a camp clerk has been held to be sufficient to charge the employer with knowledge of the injury. *State v. Remington County District Court*, 132 Minn. 251, 156 N. W. 278.

So a knowledge of the accident by a director of streets and public improvements has been held to be sufficient to charge a city with knowledge of the injury. *Allen v. Millville*, 87 N. J. L. 356, 95 Atl. 130, *affirmed* 88 N. J. L. 693, 96 Atl. 1101. See also *Purdy v. Sault Ste. Marie*, reported in full, post, this volume, at page 881. The same has been held with respect to a knowledge of the accident by the mayor of a city. See the reported case.

But whether the knowledge of the injury by a timekeeper is sufficient to charge the employer with knowledge has expressly been left undecided. *Bloom's Case*, 222 Mass. 434, 111 N. E. 45.

The fact that a report of the injury has been filed with the state industrial commission is sufficient to justify a finding that the employer had knowledge of the injury. In *re Mathewson* (Mass.) 116 N. E. 831; *McLean's Case*, 223 Mass. 342, 111 N. E. 783. And a similar finding is justified by the fact that the employer has filed an agreement for compensation for the injury and a settlement receipt with the state accident board. *Curtis v. Slater Constr. Co.* (Mich.) 160 N. W. 659.

In *Purdy v. Sault Ste. Marie*, reported in full, post, this volume at page 881, it appeared that an employee of a municipal corporation was injured while working in the streets. The superintendent of public works saw the employee at a hospital the second or third day after the injury and was told how it had been received. The superintendent mentioned the matter to the board of public works, consisting of the mayor and two members appointed by the council. An alderman of the city heard of the injury, called at the employee's house and told him he would take the matter up with the council. He referred to the case in the council, but made no motion in regard to it. It was held that the employer had knowledge of the injury so as to dispense with a notice of the injury.

In *Allen v. Millville*, 87 N. J. L. 356, 95 Atl. 130, *affirmed* 88 N. J. L. 693, 96 Atl. 1101, testimony of a director of streets and public improvements of a city that he was notified by one of the drivers that an injury had occurred to another employee the day before and that he went to see how badly the employee was hurt and took the wages due was held to be sufficient to show actual knowledge of the injury.

But in *Bushnell v. Industrial Board*, 276 Ill. 262, 114 N. E. 496, it appeared that the plaintiff while at work in a building tearing up a floor therein, slipped and twisted his leg. The injury was but slight at first, and while he was a little lame for the next few days it did not prevent him from continuing at his work for some weeks after the accident. The day following the accident the employer's foreman saw him limping and asked him what was the matter and was told by him that he had hurt his leg in tearing up the floor, and some days later the foreman saw him still limping and asked what the matter was and was told by him that he had a "game leg." In holding that the employer did not have a sufficient knowledge of the facts and circumstances to dispense with a formal notice of the accident the court said: "It is not claimed that in either of the conversations it was intimated to the foreman of plaintiff in error that the injury was serious, or that Stewart had any cause for or intention of making a claim for compensation under this act on account of such injury, or that the foreman had any knowledge of the facts and circumstances of such injury other than that obtained from the conversations just related. While the statute is very liberal in its provisions as to the character of the notice to be given and provides that no defect or inaccuracy therein shall bar the proceedings unless the employer proves that he is unduly prejudiced by such defect or inaccuracy, and that the failure to give such notice shall not relieve the employer from liability when the facts and circumstances of such accident are known to the employer or his agent or vice-principal, still we think it is both the spirit and intention of the act that the employer shall have notice, either by formal notice or knowledge of such facts and circumstances of the accident as will apprise him that his employee has sustained injuries of such a character as to entitle him to compensation under the act and that he may reasonably expect that such claim will be made. . . . The mere fact that Stewart told the foreman, in response to the question as to what caused him to limp, that he had wrenched his leg in attempting to tear up the floor, without making any claim for compensation for such injury or suffering any interruption of his work, was not sufficient notice of the facts and circumstances of the

accident to entitle him to compensation under the provision of section 24 of that act without the giving of any other notice."

As to knowledge by the employer of the injury as affecting prejudice resulting from the want of notice see *supra*, this subdivision, *Want of Prejudice*.

EMPLOYER NOT MISLED.

The Wisconsin act (Sec. 2394-11, *Stats.*) provides that the failure to give notice of the injury shall not bar a recovery where it is found that there was no intent to mislead the employer and he was in fact not misled. A finding to that effect is supported where the employer admits that there was no intent to mislead and it does not appear that the employer was in fact misled by the failure to give notice. *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247.

ABSENCE FROM JURISDICTION.

The British workmen's compensation act of 1906 provides that the want of notice of the injury shall not be a bar to compensation if it shall be found that the want of notice was caused by absence from the United Kingdom. In *Smith v. Pearson*, 2 B. W. C. C. (Eng.) 468, it appeared that a person entitled to compensation as the dependent of a workman who had died as the result of an injury, was abroad at the time of the workman's death. The applicant returned as soon as possible, but after returning was wrongfully advised as to his legal rights. It was held that the want of notice within the required time was excused.

WAIVER.

The want of a written notice of the injury may be waived at the hearing of the proceeding for compensation. *Halverhout v. Southwestern Milling Co.* 97 Kan. 484, 155 Pac. 916; *Coulson v. South Moor Colliery Co.* 112 L. T. N. S. (Eng.) 901, [1915] W. C. & Ins. Rep. 161, 84 L. J. K. B. 508. See also *Burvill v. Vickers* [1915] W. N. (Eng.) 360. And it has been held that a notice of the injury is waived by the admission of liability and an offer to confess judgment. *Roberts v. Charles Wolff Packing Co.* 95 Kan. 723, 149 Pac. 413.

The want of a written notice of the injury is waived by the payment of compensation. *Davies v. Point of Ayr Collieries*, 2 B. W. C. C. (Eng.) 157; *Turnbull v. Vickers*, 7 B. W. C. C. 396; *Pellett v. State Industrial Com.* reported in full, post, this volume, at page 884. And it is immaterial that the employer states that the payment was intended only as a loan. *Ralph v. Mitchell*, 6 B. W. C. C. 678. Under at least one statute, it is expressly provided that the payment of compensation for

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the injury within the time within which notice thereof must be given to the employer, waives the want of notice. *Pellett v. State Industrial Com.* reported in full, post, this volume, at page 884.

FINDING OF COMMISSION.

In the case of *Bloomfield v. November*, 219 N. Y. 374, 114 N. E. 805, there was a finding by the industrial commission in a proceeding for compensation that the "failure to give the written notice of injury to employer is hereby excused." In holding the finding to be insufficient the court said: "The legislature has enumerated reasonable conditions under which failure to serve the notice may be excused and we think that the attention of the commission should be fastened upon the question whether upon the proofs in a given case the circumstances do exist which are sufficient to justify such failure, and that if they do exist that fact should be properly stated as one of the facts which constitute the basis of the award. We do not think that it is good practice that the service of such notice should be excused without any finding of the existence of conditions which justify such action on the part of the commission or statement even of the theory on which the excuse has been granted. In this case, for instance, it is doubtless important as bearing upon this subject whether the claimant did promptly notify the employer, although verbally, of the features of her alleged injury which form the basis for a claim. As I have indicated, I think that on the most favorable version to claimant this was a question of fact and if the commission were influenced in excusing the failure to serve a written notice on the ground that prompt and full verbal notice had been given and, therefore, no harm had been suffered, it ought to have passed fairly and explicitly on this question of fact and have made apparent the ground upon which it excused the failure to serve notice. In accordance with these views we think that the award and order of affirmance should be reversed and the claim remitted to the industrial commission to pass upon this subject."

Burden of Proof.

The burden of proving that notice of the injury was given within the proper time is on the applicant. *Murphy's Case*, 226 Mass. 60, 115 N. E. 40; *Smith v. C. N. R.* 7 West. W. Rep. 596.

The burden is also on him in case of a want of or delay in the notice to show that it was due to a mistake or other reasonable cause. *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308, 5 B. W. C. C. 284; *Webster v. Cohen*, 108 L. T. N. S. (Eng.) 197; *Snelling Norton Hill Colliery Co.* 109 L. T. N. S.

(Eng.) 81, 6 B. W. C. C. 506; *Smith v. C. N. R.* 7 West. W. Rep. 596.

And the burden is on the applicant to show that the want of a notice of the injury has not prejudiced the employer in his defense. *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. (Eng.) 957, 78 L. J. K. B. 539, 100 L. T. N. S. 555; *Egerton v. Moore* [1912] 2 K. B. (Eng.) 308, 5 B. W. C. C. 284; *Webster v. Cohen*, 108 L. T. N. S. (Eng.) 197; *Snelling v. Norton Hill Colliery Co.* 109 L. T. N. S. (Eng.) 81; *Ing v. Higga*, 110 L. T. N. S. (Eng.) 442; 7 B. W. C. C. 65; *Haward v. Rowsell*, 111 L. T. N. S. (Eng.) 771; *Bruno v. International Coal, etc. Coke Co.* 4 West. W. Rep. 888, 7 B. W. C. C. 1033; *Hodgson v. Robins* [1914] W. C. & Ins. Rep. (Eng.) 65, [1914] W. N. 47, 7 B. W. C. C. 232; *Lacey v. Mowlem* [1914] W. C. & Ins. Rep. (Eng.) 63, 7 B. W. C. C. 135; *Dalgiesh v. Gartside*, 7 B. W. C. C. 535; *Shearer v. Miller*, Sc. Ct. Sess. 2 F. (Eng.) 114, 37 Scott. L. Rep. 80, 7 Scott. L. T. 231; *Bruno v. International Coal, etc. Coke Co.* 4 West. W. Rep. 888; *Smith v. C. N. R.* 7 West. W. Rep. 596.

But this burden is satisfied where it can be reasonably inferred from the evidence of the applicant that the employer has not been prejudiced by the want of notice of the injury. In such a case the burden is then on the employer to give evidence to show that he has been prejudiced by the want of notice. *Hayward v. Westleigh Colliery Co.* reported in full, post, this volume, at page 877; *Burvill v. Vickers* [1916] 1 K. B. (Eng.) 180; *Eydmann v. Premier Accumulation Co.* 9 B. W. C. C. 384, reversing 8 B. W. C. C. 121. See also *Pellett v. State Industrial Com.* reported in full, post, this volume, at page 884.

By the Connecticut Act of 1913 (ch. 138, Laws 1913, approved May 29, 1913) the burden of furnishing a basis for estimating the allowance by reason of the prejudice suffered by the want of notice is cast on the employer. *Schmidt v. O. K. Baking Co.* 90 Conn. 217, 96 Atl. 983.

HAYWARD

v.

**WESTLEIGH COLLIERY COMPANY,
LIMITED.**

England—House of Lords—February 8, 1915.

[1915] A. C. 540.

**Workmen's Compensation Acts—Proof
of Accidental Injury—Sufficiency.**

Proof that a workman engaged in an employment wherein accidental bruises and abra-

sions were of frequent occurrence came to work apparently without injury and later in the day he was seen to limp and to complain of a bruised knee which on a subsequent day showed abrasion, is sufficient, after the death of the workman from blood poisoning, to sustain a finding that the injury was received accidentally in the course of the employment.

Notice of Injury — Failure to Give — Want of Prejudice — Burden of Proof.

Though the burden is on an employee who fails to give timely written notice of an injury as required by the workmen's compensation act, to show that no prejudice resulted to the employer, if it is shown that when the employer learned of the accident he made a full inquiry and there is no evidence suggesting that an earlier inquiry would have been more fruitful, it is sufficient to cast on the employer the burden of showing prejudice, or to sustain a finding of want of prejudice in case of his failure so to do.

[See note at end of this case.]

[541] Appeal from a decision of the Court of Appeal reversing an award of the county court judge of Lancashire under the Workmen's Compensation Act. The appellant, who was the widow of Enoch Hayward, applied on behalf of herself and her three infant children for compensation from the respondents in respect of the death of her husband. The deceased was employed as a drawer at the respondents' colliery. The respondents disputed liability on the grounds (1.) that the death of the deceased was not the result of injury caused by accident arising out of and in the course of his employment and (2.) that notice of the alleged accident was not given to the respondents as required by the Act.

The facts proved at the arbitration were as follows: On the morning of April 1, 1913, the deceased when he left home to go to his work was apparently in his normal state of health, and on his return home he had a slight bruise and a slight breakage of the skin on his knee. The colliery was more than half an hour's walk from his home. The work of the deceased at the colliery was to take full tubs from the working place to the shunt. When he went down the mine he seemed all right, but later in the morning two boys who worked near him saw him sit down and rub his knee, and when he walked he seemed to limp a little. He complained to one of the boys that his knee hurt him and the boys helped him to shove the tubs. On the next day, which was a Wednesday, he did not go to work; his knee was sore and swollen. On the two following days he went to work as usual. On the next day, Saturday, the appellant called in a doctor, and the deceased was very poorly all night. On Tuesday, April 8, [542] the appellant saw

Pollitt, the fireman at the respondents' colliery, and told him that the deceased had got hurt in his knee with the tub in the pit and that that was the reason he was staying away from work. On receiving this information Pollitt made inquiries at the mine, but could find out nothing about the accident. On the 9th the deceased was taken to the Wigan infirmary, and he died on the 10th from blood poisoning set up by injury to the right knee. Notice in writing of the accident was given to the respondents on April 24. At the hearing before the county court judge the respondents adduced no evidence on the question of prejudice, but after he had made his award they suggested that if proper notice had been given there might have been a conflict of medical testimony. The county court judge, however, refused at that stage to allow the medical evidence given at the trial to be challenged.

The county court judge inferred from the evidence that the accident occurred in the course of the deceased's work at the pit on the morning of April 1 and arose out of and in the course of his employment. On the question whether the employers were prejudiced in their defence by the absence of notice, treating the question as one of fact on which the burden lay on the applicant, he came to the conclusion in all the circumstances of the case that the employers had not been prejudiced. He therefore made an award in favour of the applicant.

The Court of Appeal (Cozens-Hardy, M.R., the President of the Probate, Divorce and Admiralty Division, and Eve, J.), without expressing any opinion on the question whether the death resulted from injury caused by accident arising out of and in the course of the employment, held that there was no evidence to support the finding of the county court judge that the employers had not been prejudiced by the want of notice.

Compston, K.C., Cyril Atkinson, K.C., and Stuart Bevan for appellant.

Rigby Swift, K.C., and J. E. Singleton for respondents.

J. Woodhouse, for T. R. Dootson, Leigh, Lancashire, solicitor for appellant.

W. Pingree Ellen, for Peace & Darlington, Liverpool, solicitor for respondents.

[543] EARL LOREBURN.—My Lords, in this case I regret that I cannot agree with the opinion expressed by the Court of Appeal.

There are two questions. The first is, was there evidence which warranted the learned county court judge in finding that the injury was an injury by an accident arising out of and in the course of his employment? The deceased was a man who worked at a colliery bringing full tubs from the working place

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to the shunt, and it was proved that scratches are very common on the arm or the leg when men in this employment come into contact with the tub or with the coal face or with stones. On April 1 the deceased went to work, his knee being perfectly sound, at 5 o'clock in the morning; at 7 o'clock he was seen working in the colliery and seemed all right; an hour or two after that he was not all right, but required help in pushing his tub, which is not usually required. He was seen to rub his knee and he limped a little. He complained that his leg was hurt twice on that morning in the colliery and he came home just before 3 o'clock and did not walk as usual. After dinner he set to and bathed his knee; [544] there was a slight bruise on the knee which his wife saw and a slight breakage of the skin, "not much to complain of you would think," she said, but he complained that it hurt him. On April 2 his knee was sore and swollen and he did not go to work; on April 3 he went to work and came back again much worse; on April 4 he went to work and his leg was swollen and red; on April 5 he sent for the doctor, who said he had a septic knee—that was on the Saturday; on the Wednesday following he was taken to the hospital, and on the Thursday he died, and it is admitted by the learned counsel in the case that he died from the injury caused to his knee. My Lords, when the doctor saw him he said he had a septic knee, that there was a small abrasion, and that it was consistent with the injury on April 1 by contact with the tub.

Now, my Lords, is not this evidence upon which a reasonable man is permitted to act and to say that this man hurt his knee in the colliery on the morning of April 1 in the course of his employment and that the injury arose out of his employment? Is it necessary to bring some one who saw the accident? Surely not. If circumstantial evidence is of any value, surely there was ample circumstantial evidence here.

The Court of Appeal did not find upon that, but they said that it was a case very near the line and that they would decide upon the other point. It was submitted that no reasonable man could act in the way in which the arbitrator did act. My Lords, if any jury were told this story they would say, Why of course he hurt his knee when he was working in the colliery that morning. They would say that it was not demonstrated,—and few things ever are demonstrated in this world,—but that this was the most probable view, the view upon which they were entitled to act.

My Lords, I now pass to the second point, which prevailed in the Court of Appeal, and that is whether sufficient notice was given of

this accident. Notice admittedly was not given in the form required by the statute, that is to say, a written notice; but then the Act says that that is not to be a bar to the maintenance of proceedings if it is found that the respondent is not prejudiced in his defence by the want of such notice. My Lords, I think the statute really means that looking [545] at all the matters before him the arbitrator must find that the employer was not prejudiced by want of notice. I do not think it means there is to be a presumption one way or another, but simply if upon all the facts before him the arbitrator is not satisfied that there was no prejudice, then the applicant fails. The arbitrator in this case found that the employer was not prejudiced. What were the facts before him on that point? That the injury was caused on April 1, that it was slight, that it was evident that the wife thought the man Pollitt had been told; but we cannot find and it is not proved at all that Pollitt was told of this accident verbally. On April 8, however, he was told, and on the 9th he made full inquiries. He learned nothing. He does not say that he could have learned more if he had made inquiries earlier, and no one at the hearing suggested that if proper notice had been given any further evidence could have been called or any further information could have been as a fact acquired by the company. At the hearing no one was called to show that more information could have been obtained if notice had been given sooner or to show that in point of fact the employers were prejudiced in any way by the absence of notice. The employers were the people who knew best whether they had been prejudiced and they gave no evidence upon the subject. It comes therefore to this, that there being no inherent probability that I can see from the facts that the company would be prejudiced by the absence of notice for a few days, those who knew best whether they had been prejudiced, namely, the respondents, gave no evidence to say that they had been prejudiced. If they had said that they had been prejudiced they would have had to give reasons and to state how and why the prejudice had arisen to them and give the appellant the opportunity of showing that it could not have arisen. The learned county court judge came to the conclusion that there had been no prejudice. It may be—I think it is—that this is a case somewhat near the line, but I think the learned county court judge when he heard the facts of the case themselves was warranted in coming to the conclusion that no prejudice had occurred at all.

Under those circumstances, my Lords, I am of opinion that the award made by the learned arbitrator ought to be confirmed.

[546] LORD ATKINSON.—My Lords, I concur. With regard to this matter of prejudice I only wish to say a word. The statute requires that notice should be served, and if it is not served the party who should have served it is in default; he must excuse that default, and I think the burden of proof in the first instance rests upon him. But if he gives evidence from which it may be reasonably inferred that the employer has not been prejudiced, I think then the burden of proof is shifted from his shoulders on to the shoulders of his employer, and if the employer is in a position to prove notwithstanding this evidence that he is prejudiced in some particular matter he is bound to do so. If he omits to do that,—as he has omitted to do it in this case,—then my impression is that it is not open to him to conjecture, as he has endeavoured to do through his counsel here, that he might have done this, or he might have done that, or he might have done something else that would have rebutted the evidence which has been given on behalf of the workman. He abstained from doing that, and then he says “By reason of those conjectures which I have not supported you are to come to the conclusion that I was prejudiced.”

My Lords, I think there was ample proof in the absence of all evidence in this case other than that tendered upon which the learned county court judge might fairly, justly, rightly, and reasonably conclude that the employer was not prejudiced.

LORD PARKER OF WADDINGTON.—My Lords, I concur. I will only say that I think this is one of those cases in which it is important to bear in mind the distinction between questions of law which may possibly be decided by the arbitrator and questions of fact. In this particular case the question is whether as a matter of fact there was any prejudice arising to the company by reason of notice not having been given at the time and in the manner mentioned by the Act. The arbitrator found that there was no such prejudice. In acting as a Court of Appeals from that decision it is absolutely impossible to set it aside unless the circumstances be such that no reasonable man could from the evidence before the arbitrator have come to that conclusion, and it appears to me for the grounds stated by my noble friend on the [547] *woolsack* that there was evidence which in this case would justify a reasonable man in coming to the conclusion that the learned arbitrator came to.

My Lords, the same principle really applies to the question whether the accident arose out of and in the course of the employment, and on that part of the case it does not seem to me that I can usefully add anything.

LORD SUMNER.—My Lords, I concur. On the question whether there was any evidence which supports the learned county court judge's finding that the accident arose out of and in the course of the employment I need add nothing; no ground is made out for interfering with it. Had he found the other way it may well be that there would have been evidence before him sufficient to support such a finding; but the matter was for him, because there was evidence upon the question and the decision is upon a matter of fact.

The other question is whether there was evidence sufficient to warrant the finding that the employer was not prejudiced in his defence. Notice was not given as early as notice should have been given. A written notice was given eventually, but it was too late to be relied upon. His Honour had to say at what time notice should have been given and whether the delay in giving notice did in fact prejudice the employer in his defence.

The finding that has to be arrived at is, of course, a finding upon all the facts proved. I do not think those facts include the mere matter of observation that the defendant does not give evidence or does not call certain witnesses whose absence is not accounted for. The learned arbitrator has to take the facts as they have been proved before him, and if it be a case in which facts are proved on both sides he has to take the totality of the facts as he finds them and then come to his conclusion. The question for the Court of Appeal upon that is whether the totality of such facts contains evidence upon which he could without error in law come to his actual finding of fact.

My Lords, I think there was evidence upon which the learned judge could find that in the various directions in which prejudice [548] to the employer in his defence might have occurred no prejudice actually was experienced. It is suggested that other inquiries might have been made if earlier notice had been given; but in fact all the witnesses of the accident were examined on one side or the other, and, as the learned county court judge believed the two witnesses who were called for the applicant, it cannot be assumed that, had they been questioned by the employer earlier, they would have told any different tale. It is not suggested that anybody else was present in the pit at the time when, under the first finding that the accident arose out of and in the course of the employment, the accident must have occurred.

It is then suggested that something might have been done if a doctor had been instructed by the employer to examine the workman; but as to that, upon the facts which are proved and the estimate which the learned

county court judge formed of the good faith of the case, the only substantial suggestion that can be made, as it appears to me, is that such a doctor might have furnished the employer's solicitor with materials upon which he could have instructed his counsel to cross-examine the doctor for the applicant more extensively than was done. That is a speculative and unsubstantial suggestion of prejudice.

My Lords, the third way in which it is suggested that prejudice may have occurred is that the deceased man might have been asked what had happened to him while he was still able to give his own account. As the case is found to be raised in good faith, one cannot assume that such an investigation would have yielded any other result than that which the applicant's evidence gave. It is always competent to the employer to suggest in argument, without necessarily calling witnesses to prove it, that this, that, or the other might have been done, but when one comes to examine the things suggested here they have little substance and do not so far balance the evidence which was given by the applicant to the effect that no prejudice in the defence was caused as to make it possible to interfere with the learned county court judge's finding, that in fact no prejudice in the defence was caused.

[549] LORD PARMOOR.—My Lords, I concur. I propose to say a few words only on the second point, that is the question of notice. I gather from the judgment of the learned county court judge that he found that the notice was not given in fact as soon as practicable. It is for that reason that importance arises on the construction of the proviso to s. 2 of the Act. The question is what is the character of a defect or inaccuracy which would be a bar to the maintenance of proceedings under the Workmen's Compensation Act. The words are these: "The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy." Now it has been found in this case in the proceedings for settling the claim that the employer has not been prejudiced in his defence by the want or defect or inaccuracy. Therefore, my Lords, I apprehend the only question to be whether in coming to that conclusion there is any error in law on which the learned county court judge can be put right in the Court of Appeal or in this House. In my opinion there is no error in law of that kind. There is evidence upon which it

Ann. Cas. 1917D—56.

was competent for him to come to the conclusion which he did, and so long as there is competent evidence the weight of that evidence is wholly for him and not for any other Court at all.

Order of the Court of Appeal reversed and award of the county court judge restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

NOTE.

The reported case contains a discussion of the burden of proof as to prejudice resulting from the failure of an injured employee to give notice of the injury and the conclusion reached is that where the applicant for compensation under the workmen's compensation act has given evidence from which it may be reasonably inferred that the employer has not been prejudiced, the burden of proof to show prejudice is thrown on the employer and in the absence of a showing by him in what manner prejudice has resulted, a finding of the want of prejudice should be sustained. The note to *State v. District Court* reported ante, this volume, at page 866 treats fully the question of notice of injury under a workmen's compensation act.

PURDY

v.

CITY OF SAULT STE. MARIE.

Michigan Supreme Court—December 21, 1915.

188 Mich. 573; 155 N. W. 597.

Workmen's Compensation Acts — Employers within Act — Municipal Corporation.

The workmen's compensation act (Pub. Acts Ex. Sess. 1912, No. 10) is entitled "An act to promote the welfare of the people of this state, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for accidental injury to or death of employees and methods for the payment of . . . same, establishing an Industrial Accident Board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided (for) by this act," and provides, in part 6, § 5, that it expressly repeals "all

acts and parts of acts inconsistent with this act," and "replaced by this act." It is held that the charter provisions of cities with respect to claims which may be made under the compensation act are superseded by its provisions, the title of the act being broad enough to include municipal corporations that are employers.

Notice of Injury — Excuse for Failure to Give — Actual Notice.

Under workmen's compensation act, pt. 2, § 18, providing that want of written notice shall not be a bar to proceedings under the act, if it be shown that the employer had notice or knowledge of the injury. where a street employee was injured and informed the superintendent of public works of the city, who had charge of work on the streets, the latter mentioning the matter to the board of public works, so that all city officials had notice of the injury, the employee is not barred from obtaining compensation under the act by his failure to give written notice within three months.

[See note at end of this case.]

Certiorari to Industrial Accident Board.

Claim for compensation under workmen's compensation act. William Purdy, claimant, and City of Sault Ste. Marie, defendant. Claim allowed by Industrial Accident Board. Defendant brings certiorari. The facts are stated in the opinion. **AFFIRMED.**

Larson C. Holden and John A. McMahon for claimant.

F. T. McDonald for defendant.

[574] **OSTRANDER, J.**—The claimant, Purdy, was employed by the city of Sault Ste. Marie as a street sweeper. He was run down and injured by a conveyance using the street. An award by arbitrators, approved by the Industrial Accident Board, is questioned in this proceeding, the contentions of the city being:

[575] "I. Act No. 10, Pub. Acts 1912, Extra Session, does not apply to municipalities, and appellant is not subject to its provisions.

"II. Said Act No. 10 is compulsory as applied to municipalities and therefore in violation of article II section I of the Constitution of Michigan.

"III. To compel payment of compensation under said act would deprive appellant of its property without due process of law.

"IV. Said act makes municipalities insurers of its employees and compels payment of compensation whether or not the injury is the result of any negligence on the part of the municipality.

"V. The legislature is without constitutional power to enact such a compensation act as applying to municipalities.

"VI. The award cannot be sustained because no claim for compensation or notice

of injury was presented to or filed with the appellant as required by Act No. 10, Pub. Acts 1912."

In argument it is said that the city is governed by a charter granted by the legislature, and, pointing out its provisions relating to the presenting, allowance and payment of claims against it, no authority is to be found for the payment of the award; that the compensation act, so called, contains no provision for paying the award; that the title to the said compensation act does not give notice of any intention to supersede the charter.

In *Wood v. Detroit*, 188 Mich. 547, 155 N. W. 592, decided herewith, this point was not presented, and is not referred to in the opinion. However, in considering that case we had the advantage of the briefs in the case at bar and are of opinion that the charter provisions of cities with respect to claims which may be made under the act here in question are superseded by the provisions of the act. Section 5 of part 6 of that act expressly repeals "all acts and parts of acts inconsistent with the act" and "replaced by this [576] act." The title of the act mentions and indicates that its provisions relate to "liability of employers for injuries or death sustained by their employees." It is general, as titles of acts must be, and is broad enough to include municipal corporations if they are employers. Our view of the act, as expressed in the opinion in *Wood v. Detroit*, answers the contention that the plaintiff in certiorari may not provide the funds necessary to pay awards made under the act. The other points, except the last, are answered in the earlier opinion.

Upon the last point we have reviewed the testimony. The claimant was hired by Patrick Brady, who was superintendent of public works of the city. He had charge of work on streets. Mr. Brady saw claimant the second or third day after the injury at the hospital and was told by claimant that while sweeping the street a "rig" ran over him. Mr. Brady mentioned the matter to the board of public works, consisting of the mayor and two members appointed by the council, and in a general way the matter was discussed. An alderman of the city heard of the injury, called at claimant's house and told claimant he would take the matter up with the council. He referred to the case in the council, but made no motion. The first written notice of a claim for compensation was addressed to Mr. Brady as "City Commissioner," is dated April 22, 1913, was served upon Mr. Brady on or about that date, and recites that the injury occurred September 25, 1912. It was brought into the office of the city recorder by some woman May 5, 1913, and left there without any oral statement. It was laid before the council the

evening of that day and referred to the city attorney for a report. On May 19th the attorney filed his report. It is conceded that he reported nonliability of the city. Later, on December 1, 1913, a copy of a notice of application to the Industrial Accident Board [577] was served upon the city. Objection was duly made by the city before the arbitration committee to arbitrating the claim. Upon an appeal from the award of the committee the board, upon a transcript of the testimony and the objections thereto made by the city, affirmed the award. To the arbitration committee the city objected to the arbitration "on the ground that no notice of injury was served on" it. The committee disposed of the point, as appears by a written opinion, in the following manner:

"The act in question provides for notice being served upon the city within three months after the happening of the injury, and notice of a claim for damages under the act within six months after death or the removal of physical or mental incapacity. Section 18 of the act provides: 'Want of written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury.' The testimony discloses that the city officers and members of the common council generally had notice of the injury, in ample time. That no specific notice was officially served upon them until after the expiration of three months must, I think, also be determined from the evidence. However, the object of a notice is to prevent fraud and to permit the city authorities to collect its evidence before the parties having knowledge of the same are scattered and this knowledge lost. I think that it has been sufficiently shown that the city, in its official capacity, and nearly all of the city officers (including the board of public works), had knowledge of the injury, and more or less desultory consultation and conferences had respecting it. I believe this notice to be sufficient. The claim for injury was filed, or left with the recorder, within six months from the date of the injury."

Upon the subject of notice of injury the statute, in part II, provides:

"Sec. 15. No proceedings for compensation for an injury under this act shall be maintained, unless a [578] notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

"Sec. 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf.

"Sec. 17. The notice shall be served upon the employer or an agent thereof. Such service may be made by delivering said notice to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, as his last known residence or place of business.

"Sec. 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury."

The notice referred to in section 16 is, clearly, the notice required by section 15 to be given. The word "within" must be supplied in section 15, making the section read:

"Unless a written notice of the injury shall have been given to the employer within three months after the happening thereof."

No such notice was given. It is apparent, however, that the employer had notice and knowledge of the injury within the shortest period named in the act and, giving effect to section 18 in accord with the evident [579] legislative intent, the claimant was not barred this proceeding.

It follows that there is no error, and that the award must be affirmed.

Brooke, C. J., and Kuhn, Stone, Bird, Moore, and Steere, JJ., concurred.

The late Justice McAlvay took no part in this decision.

NOTE.

In the reported case it appears that a person employed by a municipal corporation as a street sweeper was injured during the performance of his duties. No written notice of the injury was served within the time required by the Michigan workmen's compensation act, but nearly all of the city officials, including the board of public works, had knowledge of the injury. It is held that the knowledge of the employer was sufficient to dispense with the statutory notice of the

injury. For a complete discussion of notice of injury under a workmen's compensation act, see the note to *State v. District Court*, reported ante, this volume, at page 866.

PELLETT ET AL.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.

Wisconsin Supreme Court—March 14, 1916.

162 Wis. 596; 156 N. W. 956.

Workmen's Compensation Acts — Notice of Injury — Effect of Failure to Give.

Evidence in an employer's action to set aside an award in favor of an injured employee is held to sustain a finding that the employer was not prejudiced by the claimant's failure to give the statutory notice of injury.

[See note at end of this case.]

Same.

Under the express provision of St. 1915, § 2394—11, notice of injury is waived by the employer's payment within thirty days of the injury of the sum of \$2 for loss of time thereby caused.

[See note at end of this case.]

Same.

In an employee's action to set aside an award in favor of an injured employee, evidence that the employee the day after his injury told one of his employers how he fell, and that he was hurt, places upon the employer the burden of showing that he was, in fact, misled by the failure to receive written notice of the injury.

[See note at end of this case.]

Notice of Hearing — Form and Requisites.

Under St. 1915, § 2394—16, providing that the industrial commission shall cause notice of the hearing embracing a general statement of the claim to be given to each party interested, either a copy of the application for compensation should be attached to the notice, or else it should contain a statement of the time, place, and general nature of the injury claimed to have been received.

Reopening of Hearing — Procedure — Evidence Previously Taken.

Where a proceeding for compensation under the workmen's compensation act (St. 1915, § 2394—1 et seq.) is opened to allow the employer to cross-examine the claimant and to introduce evidence in chief, no error is committed by not compelling the claimant to put in his evidence anew, as the commis-

sion may let such evidence stand and supplement it by that taken on the second hearing, having in such matter of procedure a wide field of discretion.

Vacation of Award — What Constitutes Fraud — False Testimony by Claimant.

Under St. 1915, § 2394—19, providing that an award of the industrial commission may be set aside on the ground that it was procured by fraud, construed with reference to the report of and the discussions before the committee drafting the workmen's compensation act, false testimony on the part of the claimant and his concealment of facts material to the issue before the commission is no ground for setting aside an award.

Statutes — Aids to Construction — Report of Legislative Committee.

Reference may be had to the report of a legislative drafting committee to ascertain the correct construction of the language used in a statute.

[See 19 Ann. Cas. 1031.]

Appeal from Circuit Court, Dane county: STEVENS, Judge.

Action by Walter E. Pellett et al., plaintiffs, against Industrial Commission of Wisconsin et al., defendants. Judgment for defendants. Plaintiffs appeal. **AFFIRMED.**

[597] Action to set aside an award against the plaintiffs made by the Industrial Commission in favor of James Suffern, who on July 29, 1914, sustained an injury while in their employ. Upon notice a hearing was had before the Commission in Manitowoc on August 28, 1914, and an award made. Subsequently the matter was opened up at the request of plaintiffs, who had not received the notices of the hearing mailed them, due to their absence from home, and a further hearing was had November 4, 1914, at which time all parties appeared, and the Commission made an award of \$441.81 in favor of Suffern. Thereupon plaintiffs brought an action in the circuit court for Dane county to set aside the award. The court made findings of fact and conclusions of law sustaining the award, and from a judgment entered accordingly the plaintiffs appealed.

Nash & Nash for appellants.

The Attorney General and Winfield W. Gilman for respondent Industrial Commission.

VINJE, J.—Plaintiffs complain of the finding that they were not misled to their prejudice by the failure of the claimant to give them written notice of his injury as required by [598] statute. There is evidence that the next day after claimant fell and was hurt he told one of his employers how he fell and that he was hurt and had gone to a doctor;

that the employer told him he would pay the doctor's bill, and some time later did pay \$5; that within thirty days his employers paid him \$2 for loss of time caused by the injury. Such evidence, in the absence of any evidence to show that they were misled, was alone sufficient upon which to base a finding that the employers were not prejudiced by the claimant's failure to give the statutory notice of injury. But if this were not so, the notice would, by virtue of sec. 2394—11, Stats., be waived by the payment within thirty days of compensation. That section provides for written notice of injury within thirty days and then says: "Provided, however, that any payment of compensation under sections 2394—3 to 2394—31, inclusive, in whole or in part, made by the employer before the expiration of said thirty days, shall be equivalent to the notice herein required."

Even assuming there had been no payment of the \$2 within thirty days, the Commission properly held that upon the evidence adduced by claimant as to the knowledge plaintiffs had of his injury the burden rested upon them to show that they were in fact misled by a failure to receive written notice of injury.

The sufficiency of the notice of hearing is challenged. Sec. 2394—16 provides: "The commission shall cause notice of such hearing, embracing a general statement of such claim, to be given to each party interested." The notice in question stated that a hearing was to be had "to determine and adjust the difference in dispute as set forth in the application on file," and it is claimed that such notice does not comply with the statute in that it does not embrace a general statement of the claim. We express no opinion as to the merits of this assignment of error, since it appears that before the second hearing was held plaintiffs had received a copy of the award [599] and were otherwise acquainted with the nature of the claim, so they could not be prejudiced by the notice received even if it were defective. Without intimating that it does or does not comply with the statute, we suggest that in justice to employers either a copy of the application for compensation should be attached to the notice or else it should contain a statement of the time, place, and general nature of the injury claimed to have been received.

The claim that plaintiffs were denied a copy of the evidence taken upon the first hearing does not seem to be sustained by the record. It shows they complained because they did not have it, but they proceeded with the hearing. No formal request for it and refusal is shown by the record so far as we have been able to discover.

Since the proceeding was opened up for the purpose of permitting plaintiffs to cross-

examine the claimant and introduce evidence in chief, no error was committed by not compelling the claimant to put in anew his evidence. That was put in upon the first hearing, and the matter was opened up to allow plaintiffs to put in their evidence and to cross-examine the claimant. The Commission did not act without jurisdiction on the first hearing and was therefore under no obligation to annul what was then done. It could, as it did, let such evidence stand and supplement it by that taken on the second hearing. No doubt it was also within its discretion to set aside what had been done and begin anew had it seen fit to do so. In such matters of mere procedure a wide field of discretion must be given the Commission in the absence of statutory regulations as to how it should proceed.

Plaintiffs also seek to set aside the award because it was procured by fraud. The allegations as to fraud on claimant's part are substantially these: (a) that Suffern testified before the Commission that he was totally disabled for six months, when in fact he was not, and that he settled with a casualty company in which he was insured for only one month of total [600] disability; (b) that he concealed from the Commission that he was subsequently and within six months of his injury injured while in the employ of one Kennedy, resulting in total disability for ten days and partial disability for one week more. Plaintiffs also allege they first learned of Suffern's representations to the casualty company January 11, 1915, and that the Commission refused to set aside the award because more than ten days had elapsed since it was made. Sec. 2394—17, Stats. 1915.

It will be seen the fraud complained of consisted of false testimony on the part of the claimant and of concealment by him of facts material to the issue before the Commission. Sec. 2394—19, Stats. 1915, provides that an award may be set aside on the following grounds: "(1) That the commission acted without or in excess of its powers. (2) That the order or award was procured by fraud. (3) That the findings of fact by the commission do not support the order or award." The question, therefore, presented is whether the fraud alleged, assuming it to be sustained by proof, constitutes a ground for setting aside the award. It may be conceded that the language of the statute upon an original construction, regardless of principles guiding equity in granting relief from judgments obtained by fraud as announced in *Boring v. Ott*, 138 Wis. 260, 119 N. W. 865, 19 L.R.A.(N.S.) 1080; *Uecker v. Thiedt*, 137 Wis. 634, 119 N. W. 878; and *Laun v. Kipp*, 155 Wis. 347, 145 N. W. 193, and regardless of the intent of the legislature as

expressed in the report of and discussions before the committee that drafted the Workmen's Compensation Act, is susceptible of the construction that the fraud meant by the act includes perjury or the concealment of material facts upon the hearing. It is also susceptible of the construction that it includes neither; that it was not contemplated that trial after trial should be had upon the question of whether a witness testified falsely, for if one award could be set aside upon that ground a subsequent one could also, and [601] so on indefinitely. Happily there is as to this statute no doubt upon the subject. The report of the committee referred to and the discussions had before it conclusively show that it was the legitimate intent that prejured testimony or concealment of material facts were not such fraud as the statute contemplates. In their report the committee said: "The fraud alluded to in the second ground will be only such as was perpetrated in securing the award, and will not include false testimony of any party, because such questions all will be decided by the board" (commission). This view is reinforced by the discussions before the committee, too lengthy to be here inserted. Such being the express legislative construction given the language used; and such construction being repugnant neither to the language used nor to judicial principles, must control. That reference may be had to the report for the purpose of ascertaining the correct construction of the language used was held in Minneapolis, etc. R. Co. v. Wisconsin Industrial Commission, 153 Wis. 552, 558, 141 N. W. 1119; Hoenig v. Industrial Commission, 159 Wis. 646, 648, 150 N. W. 996, L.R.A. 1916A 339. The court therefore properly refused to receive evidence of the fraud alleged, since if established it could not affect the validity of the award.

By THE COURT.—Judgment affirmed.

NOTE.

In the reported case evidence that an employee the day after he sustained an injury told one of his employers of the injury and that the employer promised to pay the doctor's bill and later made a payment to the employee on account of lost time, is held to be sufficient to sustain a finding that the employer was not prejudiced by the want of a written notice of injury, as required by the Wisconsin workmen's compensation act. It is also held, by virtue of an express statutory provision, that the want of written notice of the injury was waived by the payment of compensation. The entire subject of notice of injury under a workmen's compensation act is discussed in the note to

State v. District Court, reported ante, this volume, at page 866.

GORDON

v.

GORDON'S ADMINISTRATOR.

Kentucky Court of Appeals—February 10, 1916.

168 Ky. 409; 182 S. W. 220.

Contracts — Validity — Violation of Statute.

Any agreement involving the doing of an act positively prohibited by common law or statute is illegal and void.

[See 1 Ann. Cas. 333; 11 Ann. Cas. 664.]

Contract against Public Policy.

Many things which the law does not prohibit in the sense of attaching penalties to punish their commission cannot be admitted as the subject of a valid contract, as being so mischievous in their nature and tendency that to permit them to be the subject-matter of a contract would be violative of "public policy;" the principle declaring that no one can lawfully do that which has a tendency to be injurious to the public welfare.

[See 6 R. C. L. tit. Contracts, p. 707.]

Same.

A contract is against public policy if injurious to some established public interest, contravenes some public statute, is against good morals, or tends to interfere with the public welfare or safety.

Validity of Contract to Procure Pardon or Parole.

A contract whereby one agrees to use his personal influence with the pardoning authority to procure a pardon is void as against public policy, being in contravention of Ky. St. § 1370, denouncing as unlawful contracts to procure a pardon from the governor, only in cases in which the party whose pardon is sought to be obtained has been convicted of crime by a legally constituted tribunal having the constitutional right to try and punish him.

[See note at end of this case.]

Same.

Ky. St. § 3828 requires that the board of prison commissioners base its action in paroling a prisoner upon his record while confined, his record previous to confinement, and upon his securing, before parole, a contract for employment for six months. Section 1370 denounces the offense of assisting in procuring the granting or refusal of a pardon by the governor for fee or reward. It is held that a contract of a son with his father whereby

the son agreed to prepare an application and to do what was necessary to secure the parole of his brother from prison in return for the father's promise to reimburse him for expenses incurred, necessary in view of the requirements of the paroling statute, was not void as in contravention of public policy, the case not coming within section 1370.

[See note at end of this case.]

Bills of Particulars — When Required — Action for Reimbursement of Expenses.

In an action by a son against his father's estate for reimbursement for expenses in procuring his brother's parole from prison, plaintiff may be required to file a bill of particulars showing his claim in detail.

Appeal from Circuit Court, Boyle county.

Action by William M. Gordon, plaintiff, against J. L. Gordon's Administrator, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

Jay W. Harlan and Henry Jackson for appellant.

J. W. Rawlings for appellee.

[410] **MILLER, C. J.**—The appellant, Wm. M. Gordon, is a son of J. L. Gordon, who died in January, 1914. J. L. Gordon was the father of another son, George Gordon, who was confined in the State penitentiary, at Frankfort, in 1909, under a judgment of the Boyle circuit court.

The petition alleges that in 1909 J. L. Gordon employed the appellant to prepare an application and to do what was necessary toward securing the parole of said George Gordon, and agreed and promised to reimburse and pay plaintiff for all the expense that he might incur in that work; that pursuant to said employment, the plaintiff prepared the application for the parole; and, in doing so made many trips to Frankfort, Danville, Harrodsburg and over the entire county of Boyle, at his own expense.

The petition further alleges that by reason of the plaintiff being required to be absent from home in this work, he was forced to hire a man to work in his place on his farm; that the time consumed in this work and effort to get the parole was the greater part of five years; that he was required to pay for said substituted hand at least \$1,000.00; and that his father agreed to pay the plaintiff his expenses, including the hire of the substituted hand.

The plaintiff also alleges that no unlawful means were used by him in said employment and none were contemplated at the time of the agreement: that said services so rendered were purely ministerial: that he did not use his personal influence with the paroling pow-

ers, and that it was never contemplated that he should do so.

[411] It is further alleged that the agreement did not contemplate and did not include any reward or compensation to plaintiff whatever, but only included and provided for the plaintiff having returned to him his expenses, as above indicated; and that J. L. Gordon, by reason of his age and physical condition, was unable to personally make said trips in the preparation of said petition for a parole.

Upon the death of J. L. Gordon, his son, J. T. Gordon, qualified as his administrator; and, J. T. Gordon having subsequently died, George Gordon was appointed administrator of his father's estate.

In December, 1914, Wm. M. Gordon brought this action to recover his expenses aggregating \$1,000.00, and the court having sustained a demurrer to his petition, upon the ground that the contract was against public policy and void, the plaintiff prosecutes this appeal.

By way of defense, the administrator relies upon section 1370 of the Kentucky Statutes, which reads as follows:

"If any person shall, for fee or reward, or the promise thereof, aid or assist in procuring the Governor to grant or refuse a pardon, remission or respite of any punishment or fine, he shall be fined not less than twenty nor more than five hundred dollars."

Appellant, however, denies the applicability of the statute, *supra*, or the doctrine that the contract relied on is against public policy, because, as he contends, (1) the work performed by the plaintiff was to secure a parole, and not a pardon; (2) it was clerical or ministerial, and under the contract the plaintiff was not to be paid for his personal influence; and, (3) the money sought to be recovered is not a reward, remuneration or profit to the plaintiff for his personal services, but is only for money expended and pecuniary loss suffered by reason of expenses and time lost from his own business, by reason of the contract.

It is contended by appellant that there is a radical difference between a contract to procure a pardon from the Governor, which is denounced by the statute, and a contract to prepare an application to the Board of Prison Commissioners, for a parole; that a contract to procure a parole is in no respect against public policy; and, that the reason which makes a contract to procure a pardon [412] invalid has no application whatever to a contract to prepare and present an application for a parole.

Since the enactment of section 1370 of the Kentucky Statutes, the power of parole has been vested in the State Board of Prison Commissioners, subject to the approval of the Governor. Ky. Sta. sec. 3828. By the terms

of that statute, the Board of Prison Commissioners must base its action upon the record of the prisoner while confined; the record of his life previous to his confinement, which requires the ascertainment of the sentiment of the people where he formerly resided; and upon his securing, before his parole, a contract for some respectable employment for a period of six months after being liberated. Of course, much of this information can be furnished only through the efforts of some outside person in behalf of the man confined in the penitentiary.

Moreover, the parole does not pardon the prisoner; he still remains in the legal control and custody of the Board of Prison Commissioners. The pardoning power remains vested in the Governor.

It will thus be seen that the action of the paroling board must be based upon the facts specified in the statute, and that many of those facts necessarily must be gathered from outside sources.

There are many acts which the law positively forbids, and for the doing of which some penalty is attached. Whether the prohibition is by the common law or by statute is immaterial. Any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute, is illegal and void.

There are also many things which the law does not prohibit, in the sense of attaching penalties, but which are so mischievous in their nature and tendency that on grounds of public policy, they cannot be admitted as the subject of a valid contract.

It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of public policy, as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.

But the notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. Public policy, therefore, is variable; [413] and that which is contrary to the policy of the public at one time may become public policy at another time. No hard and fast rule can be given by which to determine what is public policy.

It has been said that a contract is against public policy if it is injurious to the interests of the public, or contravenes some established interest of society, or if it contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society, and is in conflict with the morals of the time. *Pueblo, etc. R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep.

512; *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355.

The rule must not be understood to mean that in order that a contract may be declared to be against public policy, it must be inimical to morality. Many contracts which are not immoral, are, nevertheless, void on the ground that they are against public policy. *Kohn v. Milcher*, 43 Fed. 641, 10 L.R.A. 439.

In applying this rule, it has been said that contracts are against public policy when they tend to injustice or oppression, restraint of liberty, and natural or legal right, or the obstruction of justice, or the violation of a statute, or to interfere with or control executive, legislative, or other official action, or to prevent competition whenever a statute or any known rule of law requires it.

In many jurisdictions statutes have been passed similar to section 1370 of the Kentucky Statutes, denouncing as unlawful, contracts to procure a pardon from the Governor; and, if the contract in the case at bar employed the appellant, for a fee or reward, to procure a pardon from the Governor, it would be against the public policy of the State, and consequently void.

The reason for the rule, and the exceptions thereto, are stated in 9 Cyc. 493, as follows:

"The exercise of the pardoning power committed to the executive should be as free from any improper bias or influence as the trial of the convict before the court; consequently the law will not enforce a contract to pay money for soliciting petitions, signing petitions, using influence to obtain a pardon, or the remission of a forfeiture. But as in the case of lobbying contracts many courts have held that the reason for holding such agreements void fails when no unlawful means of attaining the desired object are contemplated by the contract itself [414] or in fact employed; and such services, when performed at defendant's request, are a good consideration for a subsequent promise to pay. Such agreements would clearly seem to be lawful, where the services contracted for are publicly rendered by advocates disclosing their true relation to the subject, and not by private individuals keeping secret the character in which they solicit; but where the compensation is contingent on success, this is a strong circumstance against the validity of the agreement."

In *McGill v. Burnett*, 7 J. J. Marsh. (Ky.) 640, a contract by which McGill's intestate agreed to pay Burnett \$100.00 in consideration of his services and labor to be performed in and about the management of a petition to the Governor, in case of a certain forfeiture, this court said the contract was, in effect, to pay the plaintiff for his management, whether fair or foul, in inducing the

Governor to remit a forfeiture, and that such contracts tended to obstruct a correct administration of the government, and were void as against public policy.

A similar ruling was made in *Brown v. Young*, 7 Ky. L. Rep. (Abstract) 664. See also *Averbeck v. Hall*, 14 Bush (Ky.) 505, for a ruling similar in principle.

But, under the exception to the general rule, as above stated, the contract will not be held invalid when no unlawful means of attaining the desired object are contemplated by the contract itself, or in fact employed.

Thus, the general rule which makes contracts of this character void, does not apply in cases in which the party whose pardon is sought to be obtained, has not been convicted of crime by a legally constituted tribunal having the constitutional right to try and punish the offender, as where the trial of a prisoner by a military court is unauthorized by law, and forbidden by the constitution, and its sentence is, consequently, a nullity.

Where, under such circumstances, a person undertakes by the use of his personal influence with the military commander to save the unfortunate man from the impending danger of threatened execution, or unauthorized and illegal imprisonment, his act cannot be regarded as an agreement to obstruct the proper administration of the government, or to defeat the ends of public justice. 6 R. C. L. 767.

The reasons which sustain the general rule and the statute, *supra*, apply only in cases in which the party [415] whose pardon is sought to be obtained has been convicted of crime by a legally constituted tribunal, having the constitutional right to try and punish the offender.

Thus, in *Thompson v. Wharton*, 7 Bush (Ky.) 563, 3 Am. Rep. 306, Solon Thompson was arrested in 1865 by the federal military authorities. In the following June he was tried by a military court upon the charge of being a guerrilla, and was convicted and sentenced to suffer death. Wharton, a Louisville lawyer, has been employed prior to the trial to defend Thompson, for an agreed fee; and, on the day fixed for Thompson's execution, a new contract was made with Wharton, he agreeing, by proper proceedings before the commanding general, without whose approval the sentence of the military court could not be carried into execution, to prevent the infliction of the adjudged punishment; and, if possible, to procure the discharge of Thompson, in consideration of a further fee of \$300.00, to be paid only in event of his success.

In March, 1866, Thompson was discharged from custody, and Wharton sued to collect his fee. Upon the trial the court was asked to instruct the jury that if they believed from the evidence that the sole consideration

for the execution of the note sued on was the agreement of Wharton to use his personal influence with the commanding general to secure the pardon of Thompson, or to have his punishment commuted, the agreement was contrary to public policy, and void.

But the court, speaking through Judge Lindsay, cited *McGill v. Burnett*, *supra*, and held that the rule there announced did not apply, and should not control in cases where the conviction was unauthorized by law, and forbidden by the Constitution, as in Thompson's case.

In the course of the opinion, Judge Lindsay said:

"Under these circumstances the appellee undertook, by the use of his personal influence with the military commander, to save the unfortunate man from the impending danger of threatened execution or unauthorized and illegal imprisonment. Such an act cannot be regarded as an agreement to obstruct the proper administration of the government nor to defeat the ends of public justice.

"The object sought to be accomplished, as well as the means to be resorted to, were entirely defensible, whether regarded from a legal or moral standpoint; and, [416] such being the case, it is difficult to perceive how the contract constituting the consideration of the note can be regarded as contravening public policy."

Again, in *Rau v. Boyle*, 5 Bush (Ky.) 254, Rau & Rieke, who were Confederate sympathizers, had purchased a quantity of tobacco in western Kentucky which had been seized by General Payne, the federal military commander, at Paducah, under pretense of military authority. While their tobacco was thus wrongfully withheld from them, Rau & Rieke made a written contract with John Boyle, by which the latter undertook to procure the release of the tobacco, Boyle to have one-half of it for his services.

By a subsequent contract with John and J. T. Boyle, Rau & Rieke were to buy tobacco and cotton on speculation and ship the same under a permit then held by Boyle from Major General Burbridge, of the U. S. Army, or under other points which he might thereafter obtain, and the profits realized from said purchases were to be equally divided between Rau & Rieke and the Boyles. Boyle succeeded in procuring the release of the tobacco which had been seized by General Payne, and other tobacco was bought and shipped under the second contract, above referred to. The Boyles were Union men and had held positions in the U. S. Army, which they resigned before John Boyle undertook this agency to get the tobacco released.

In answer to the suit of Boyle & Boyle upon the contracts, Rau & Rieke contended that their agreements with Boyle & Boyle

were mere promises to pay them for their loyalty, and for the exercise of their influence with officers of the United States Government, and consequently were illegal as against public policy.

But the court overruled this defense, holding that since Rau & Rieke had been unlawfully deprived of their tobacco, and their only remedy seemed to be the use of moral means, the court could not say that the employment of Boyle & Boyle to effectuate the purpose was either contrary to law or against public policy.

It will thus be seen that the strict rule of the statute has not been applied by this court in similar cases when the reason for the rule has ceased to exist.

Furthermore, the case before us does not come within the scope of the statute; and it has none of the features which would render it immoral, or against public policy. [417] The contract sued on was for the procurement of a parole, not a pardon; it is for reimbursement of expenses incurred, not for a fee or compensation; and the petition expressly states that the contract did not contemplate the use of any personal influence with any officers of the State in procuring the parole.

While we would uphold the integrity of the statute wherever it is applicable, under the authorities cited there is nothing in the contract before us which violates any rule of public policy. *Deering v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 54 L.R.A. 410; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L.R.A. (N.S.) 212, 121 Am. St. Rep. 713; *Denison v. Crawford County*, 48 Ia. 211; *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659; *Trist v. Child*, 21 Wall. 441, 22 U. S. (L. ed.) 623, and *Wright v. Tebbitts*, 91 U. S. 252, 23 U. S. (L. ed.) 320, contain interesting and valuable discussions of the question, and support the conclusion here reached.

The plaintiff might have been required, upon motion, to file a bill of particulars, showing his claim in detail; but that defect in the petition did not go to the merits of the plaintiff's claim; and a bill of particulars may yet be required.

Judgment reversed, with instructions to overrule the demurrer to the petition, and for further proceedings.

NOTE.

Validity of Contract to Procure Pardon or Parole.

Generally.

In the majority of the earlier cases a contract whereby a person undertook for com-

pensation to assist in any manner in procuring a pardon was deemed to be contrary to public policy. The earliest reported decision was *Norman v. Cole*, 3 Esp. (Eng.) 253, wherein Lord Eldon said: "Where a person interposes his interest and good offices to procure a pardon it ought to be done gratuitously, and not for money; the doing of an act of that description should proceed from pure motives not from pecuniary ones." Several American cases uphold that view. *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Kribben v. Hayercraft*, 26 Mo. 396. And see *Adams Express Co. v. Reno*, 48 Mo. 264; *O'Reilly v. Cleary*, 8 Mo. App. 186. See also the cases cited *infra* in the subdivision *Rule in Kentucky*. In *Willey v. Collier*, *supra*, it was said: "There is no doctrine better settled than that agreements to obtain executive clemency by means of pardons or writs of *nolle prosequi*, cannot be enforced. The reasons are obvious. They are designed to protect the exercise of this power from abuse through the intervention of designing persons, and although in the particular instance no improper influences may have been resorted to, the public interest in such questions requires that the principle should be enforced in all cases. It may, sometimes, as between the parties, be unjust to a claimant who has rendered valuable services for another in his distress, but rules of law, founded on public policy and the safety of society, will not be set aside to sustain such individual demand."

In *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 31 Am. Dec. 750, an agreement to pay for services in procuring signatures to a petition for a pardon was held to be invalid, the court saying: "The power to pardon is a constitutional power; to alleviate or remit punishment where perhaps there is doubt of guilt; or where the offense was committed under circumstances extenuating the crime, etc., etc. The general and spontaneous expression of opinion has had, and ought to have, weight with the governor. But if undue means are used to obtain petitioners, it may be a great imposition on the governor."

An agreement whereby compensation is to be paid for withdrawing opposition to the grant of a pardon is invalid. *Deering v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 54 L.R.A. 410; *Buck v. Paw Paw First Nat. Bank*, 27 Mich. 293, 15 Am. Rep. 189. In the case first cited it was said: "The consideration of the notes in this instance was personal influence and lobby services, not by any one skilled in such work, but because they had been instrumental in securing the conviction and of their opposition to the granting of the pardon which had been applied for. The purchase of personal influence to obtain a pardon or to control the operations of any department of the gov-

ernment is immoral and pernicious in tendency, and cannot receive the sanction of courts. Aside from the fact that the Sherills agreed to use their personal influence, and had hired out their services to influence the action of the governor, there was a purchase of the withdrawal of their opposition, a sinister act for which no excuse can be given, and which is clearly inconsistent with public policy and sound morality." So in *Haines v. Lewis*, 54 Ia. 301, 6 N. W. 495, 37 Am. Rep. 202, it was held that notes deposited with the prosecuting witness under an agreement that they should be payable to her on the grant of a pardon were unenforceable.

By the weight of modern authority, however, it is held that an agreement to perform services in procuring a pardon is not of itself contrary to public policy and that such a contract is valid and enforceable if the compensation is to be paid for services as distinguished from influence, and no fraudulent or illegal act is contemplated. *Formby v. Pryor*, 15 Ga. 258; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Bremsen v. Engler*, 49 Super. Ct. (N. Y.) 172; *Newbold v. McCrorey*, 103 S. C. 299, 87 S. E. 542, 1103. And see *Deering v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 54 L.R.A. 410. The reason for the foregoing view was aptly stated in *Chadwick v. Knox*, supra, wherein the court said: "A person in prison can do little to aid himself in bringing his case to the consideration of the executive. For everything that must be done without the walls of the prison the convict is compelled to rely on the assistance of those who have their liberty. Such assistance may be afforded from motives of charity and compassion, or the motive may be in part kindness and in part an expectation that the party relieved will be ready to afford a suitable compensation for the services and expenses; or the party in prison may employ another to do such acts as may be rightfully and properly done for his relief, and contract to pay him for his services and to repay him for his expenses. Such a contract, if the parties contemplate only a resort to legal and proper measures, is free from any just exception, and binding upon the parties."

In *Formby v. Pryor*, 15 Ga. 258, it was said: "Was the contract such a one as a court would not enforce? So far from it, we see no objection to the course pursued by counsel in this case, viz.: to appear before the governor, and convince him, either that the prisoner was the dupe of a foul conspiracy, or that, by reason of his mental imbecility, he was mislead, to commit the act; and that he was influenced by no felonious intent. And that, consequently, he was a fit subject for the interposition of executive clemency."

In *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060, the foregoing view was applied to a contract for compensation contingent on success, the court saying: "The grounds upon which the constitutional power to pardon may be exercised are not defined in the constitution; but among the considerations which might properly be brought to the attention of the governor, and influence his action, are some which suggest the propriety of employing the professional services of an attorney for this purpose, and from the mere fact of an attorney being employed to solicit the pardon of a convict it is not to be legally inferred that an unlawful course of conduct was intended. For instance, it would be proper, and often expedient, that an attorney-at-law examine the case upon which the conviction was based, to see whether, notwithstanding the final judgment of the law, the case may not be of such a nature as to justify the exercise of the extraordinary power of pardon. He may direct investigations to the discovery of facts bearing upon the question of guilt, not discoverable at the time of the trial. The attention of prosecuting officers and of the judge who tried the cause may be directed to newly discovered facts, or to any of the circumstances of the case, and their recommendation in favor of a pardon may be sought. Whatever considerations may properly affect the action of the executive may be urged upon his attention. Even if there was any evidence in this case which would have justified the conclusion, as a matter of fact, that political influence, or any unlawful means, were expected to be exerted for the accomplishment of the end in view, no case was presented justifying the court in so declaring as a matter of law."

In *Deering v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 54 L.R.A. 410, it was said: "A person may have been wrongfully convicted. Subsequent developments may show that another than he committed the offense, or that there were mitigating circumstances not known when sentence was pronounced which require a mitigation of the penalty; or it may be that the conduct of the prisoner or his condition warrant the interposition of the pardoning power and the lightening of the punishment imposed. A person may, therefore, be legally employed to prepare a petition, collect evidence showing the right to a pardon, and submit the same, together with proper arguments, either oral or in writing, to the governor or other authority granting pardons. So it has been frequently held that contracts for the performance of legitimate professional services, such as have been mentioned, and which are openly presented and appeal directly to the judgment and reason of the authorities to whom they are presented, are valid."

While in most of the cases sustaining an agreement for services in procuring a pardon it appeared that the person employed was an attorney, a similar contract with a person who is not is equally valid. *Bird v. Breedlove*, 24 Ga. 623; *Bird v. Meadows*, 25 Ga. 251.

Rule in Kentucky.

In Kentucky a statute (Ky. St. § 1370) makes it a criminal offense to aid or assist for a fee or reward or the promise thereof in procuring the governor to grant or refuse a pardon, remission or respite of any punishment. A contract in violation of that act is of course invalid. See the reported case wherein it is however held that an agreement to secure a parole is not within the act, and that an agreement to reimburse a person for his expenses in procuring a parole is valid.

Prior to the statute heretofore referred to contracts to assist in procuring a pardon were held to be invalid at common law. *Thompson v. Wharton*, 7 Bush 563, 3 Am. Rep. 306; *Brown v. Young*, 7 Ky. L. Rep. (Abstract) 664. And see *McGill v. Burnett*, 7 J. J. Marsh. 640. An exception was, however, asserted with respect to a contract to procure the release of a person unlawfully imprisoned by military authority. *Thompson v. Wharton*, 7 Bush 563, 3 Am. Rep. 306; And see *Rau v. Boyle*, 5 Bush 253.

SOUTHERN RAILWAY COMPANY

v.

VESSELL.

Alabama Supreme Court—April 22, 1915.

192 Ala. 440; 68 So. 336.

Master and Servant — Federal Employers' Liability Act — Who Is "Dependent."

Under the federal employers' liability act (April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]) giving a right of action for wrongful death for the benefit of the dependent next of kin, an elder sister of a deceased employee, suing as his administratrix who is married and in comfortable circumstances, and who boarded deceased, in return for which he made monthly contributions for about two years prior to his death, was not "dependent" upon deceased, and cannot recover.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county: CROW, Judge.

Action by Mary Alice Vessell, administratrix, plaintiff, against Southern Railway Company, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[441] The tenth count alleges that plaintiff's intestate was employed by the Southern Railway Company, and, while actively engaged in the performance of his duties under said employment, was killed in Jefferson county by the collision of an engine upon which plaintiff's intestate was then and there riding with another engine at a crossing of two railroads. Plaintiff avers that at the time of the infliction of the injuries her intestate was employed in interstate commerce, and plaintiff avers that at the time of intestate's death he was an unmarried man without children or parents, and said intestate was contributing to the support of Mary Alice Vessell, his sister, and his nephew, L. R. Lott, who were dependent upon said intestate, the sum of \$300 per year; that both plaintiff and the nephew are now living, and have been deprived of said support by the wrongful death of intestate. Plaintiff avers that the death of intestate was proximately caused by the negligence of one Sam Bowers, an employee of defendant who was acting within the line and scope of his said employment as an engineer having control of the operating of said engine on which intestate was riding at the time said collision occurred, which negligence consisted in this, said Bowers negligently caused said engine to collide. The following is charge 6 refused to defendant:

I charge you that, under the undisputed evidence in this case, you cannot award plaintiff any damages for the benefit of Mary Alice Vessell.

Stokely, Scrivner & Dominick for appellant.

Hundley, Howard & Hunt and *Denson & Denson* for appellee.

[442] Mr. Chief Justice Anderson delivered the opinion of the court, this case having been submitted under new rule 46, and considered and decided thereunder.

This suit was brought under the Federal Employers' Liability Act, and there was a judgment for the benefit of Mary Alice Vessell, a sister of the deceased employee, who was alleged to have been killed through the negligence of the defendant's servants in the operating of one of its trains, and it was admitted that the defendant was at the time engaged in interstate commerce.

The case was tried upon the tenth count alone, which proceeded under the original act of 1908, and not under section 9, amended by the act of 1910 (Act April 5, 1910, c. 143, § 2, 36 Stat. 291 [U. S. Comp. St. 1913, § 8665]) providing for a survival of the right of action by the personal representative, for the benefit of the classes dependent upon the deceased.

The federal act gives a right of action for the unlawful death of an employee to his personal representative: (1) For the benefit of the surviving husband or wife and children of such employee; (2) if no surviving wife or husband or children, then to the parents of such employee; (3) if there are none belonging to the first or the second class, then for the benefit of the next of kin "dependent" upon such employee.

As an original proposition, we might, if the question was involved, be inclined to hold that the right of action in favor of those of the first and second classes did not hinge upon the fact that they were dependent upon the employee at the time of his death, but we are now precluded from doing so, even if the question was involved upon this appeal, as the United States Supreme Court, in the case of *Gulf, etc. R. Co. v. McGinnis*, 228 U. S. 173, 33 S. Ct. 426, 57 U. S. (L. ed.) 785, held that for persons belonging to either class to get the benefit of the [443] statute he or she must have been a dependent upon the deceased. Regardless, however, of this holding, there can be no doubt of the fact that, in order for a member of the third class to come within the influence of the statute, he or she must have been a "dependent" upon the deceased employee. The result is we must decide whether or not Mrs. Vessell, the beneficiary under the judgment in the case at bar, was dependent upon the deceased at the time of his death; and in order to do so we must define or interpret the word "dependent," as used in the federal statute, and which seems not to have been defined by the United States Supreme Court, though held to be a condition precedent to recovery in the *McGinnis* Case, *supra*, and notwithstanding the purpose of the statute and the recoverable damages was discussed in the case of *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417, Ann. Cas. 1914C 176. The word "dependent," as used in insurance policies and statutes, as well as in statutes providing for a right or survival of action in case of the death of an employee, has been differently defined and applied by different courts; some holding that, in order to come within the statute, the beneficiary must have been solely dependent upon the deceased for support; others, not solely but substantially or materially so; a few holding that it includes those to whom

the deceased made contributions and who were partially dependent upon him; and others seem to hold that in order for one to have been a dependent the deceased must have been under a legal, rather than a moral, obligation to help and support him. For a full discussion of this question, see note to the case of *Bortle v. Northern Pac. R. Co.* Ann. Cas. 1912B 731; Words and Phrases (2d Ser.) vol. 1, p. 1298. We are much impressed with the holding and decision of the Washington court in the case of *Bortle* [444] v. Northern Pac. R. Co. *supra*, 60 Wash. 554, 111 Pac. 789, Ann. Cas. 1912B 732, and from which we take the following: "This evidence does not, in our opinion, establish such a support or dependency as is contemplated by the statute. It shows nothing more than such gifts as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity. Our statute means something more; while we would not give it such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh, and not in accordance with the humane purpose of the act, nevertheless, there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child. Such we believe to be the general interpretation of like statutes. 8 Am. & Eng. Enc. of Law (2d ed.) 904 in speaking of like statutes, defines the correct rule as [555]: 'There must be an actual dependency on the deceased on the part of the party claiming the right of action. The mere fact that the deceased occasionally contributed to the support of such party, in an irregular way, is not sufficient. where the fact of dependency alone confers the right of action' citing *Hodnett v. Boston, etc. R. Co.* 156 Mass. 86. 30 N. E. 224; *Houlihan v. Connecticut River R. Co.* 164 Mass. 555, 42 N. E. 108, and *Duval v. Hunt*, 34 Fla. 85, 15 So. 876.

"In *Daniels v. Savannah, etc. R. Co.* 86 Ga. 236, 12 S. E. 365, the court construes the word 'dependent' as meaning substantially, and not wholly, dependent. and says: 'The contribution to the father or mother by the child need not be wholly sufficient, but only such as is in part sufficient for such support, and that the word "dependent" [445] means wholly or in part dependent materially upon such child for support.'

"In *Duval v. Hunt, supra*, it is said: 'We think that, when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict

legal right to such support, that he or she was either from the disability of age, or non-age, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support or with some reasonable claim to support from deceased.'

"The evidence here does not bring respondents within the statute. They were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and, if his earnings only resulted in an average income of \$40 per month, that was the result of his inability to sell more goods, and his inability to solicit the sale. His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort. Neither does an occasional contribution from a son [556] to a parent establish a condition of dependency. There must be a substantial need on one side and a substantial . . . recognition of that need on the other side, to make out a dependency within the meaning of this statute."

See also the cases of *Hodnett v. Boston*, etc. R. Co. 156 Mass. 86, 30 N. E. 224; *McCarthy v. Supreme Lodge*, etc. 153 Mass. 314, 26 N. E. 866, 11 L.R.A. 144, 25 Am. St. Rep. 637; *Daly v. New Jersey Steel*, etc. Co. 155 Mass. 1, 29 N. E. 507.

[446] In the case of *Morey v. Monk*, 145 Ala. 301, 40 So. 411, while a majority of the court held that Monk was entitled to the insurance, the decision was based upon the fact that a subsequent statute of Massachusetts made him eligible to take, and it seems to have been generally agreed that he was not a dependent upon Morey as defined by the policy; and the opinion is in line with the present holding, as to who is a dependent, and quotes from the case of *McCarthy v. Supreme Lodge*, etc. *supra*.

We do not think the evidence in this case shows such a substantial or material dependence of Mrs. Vessell upon the deceased as to bring the case within the influence of the federal statute. It, at most, shows that he made monthly contributions for about two years prior to his death for the benefit of the said Mrs. Vessell and a minor nephew. It also appears that the deceased was getting, in return, his board and lodging, and which was approximately worth the amount contributed to Mrs. Vessell. Mrs. Vessell, instead of being in a necessitous condition, was, as far as the proof shows, in as good financial condition as when she was supporting the deceased. Her husband had employ-

ment, they had a home, and he seems to have been able to take care of the family, including the deceased, up to two years prior to his death, and there is no proof that there was such a shrinkage or diminution in his earnings, or ability to earn, as to render his wife dependent upon the deceased or any one else. Mrs. Vessell had been like a mother to the deceased, her younger brother; and it was not only natural, but he was under a high moral duty, to aid and assist her financially and otherwise, and it may be that she lost a prospective help and support, in case she came to need and want, as time and age made their impress upon herself and husband; [447] but she was not at the time of the death of the deceased dependent upon him for a support. Had the statute intended to provide for a relative who had moral claims upon the deceased or one whom he was merely assisting, as distinguished from a "dependent," it would no doubt have been framed so as to include such persons as beneficiaries, but, worded as it is, it can include no one in the third class who was not a "dependent" upon the deceased at the time of his death for a substantial, if not an entire, support, and we must construe the statute as it is, and not as we should like to see it, or so as to cover worthy and deserving claimants who do not come within the protection of same.

It is sufficient to say that the trial court erred in refusing to give the defendant's requested charge 6, and it is therefore unnecessary for us to discuss the other assignments of error.

The judgment of the circuit court is reversed, and the cause is remanded.

McClellan, Sayre, and Gardner, JJ., concur.

NOTE.

The reported case construes the term "dependent" as used in the federal employers' liability act of 1908 (Fed. St. Ann. 1909 Supp. p. 584) as amended in 1910 (Fed. St. Ann. 1912 Supp. p. 335) giving a right of action for the death by wrongful act of an employee engaged in interstate commerce to the next of kin dependent on the employee. It is held that a married sister of an employee, who is in comfortable circumstances and with whom he boards, making to her contributions approximating in value the regular price of his board and lodging, is not a dependent within the statute. The cases passing on the question who is a dependent within a statute giving a right of action for death by wrongful act are collated in the note to *Bortle v. Northern Pac. R. Co.* Ann. Cas. 1912B 731.

KLOTZ

v.

**PAN-AMERICAN MATCH COMPANY
ET AL.**

Massachusetts Supreme Judicial Court—
April 24, 1915.

221 Mass. 38; 108 N. E. 764.

**Corporations — Rights of Stockholder
— Inspection of Corporate Books.**

A stockholder has a common-law right to inspect the books of a corporation at seasonable times and for proper purposes; but this is a qualified and not an absolute right, especially as the remedy in this commonwealth is by mandamus, which is a discretionary writ.

[See note at end of this case.]

Same.

A stockholder will be permitted to examine the books and accounts of the corporation, when he is seeking information as to its condition in good faith and for the purpose of protecting his own rights or advancing the interests of the corporation; but the rights of the corporation, especially in the protection of trade secrets and the interests of other stockholders, will not be disregarded.

[See note at end of this case.]

Same.

The courts of this state will enforce the common-law right of a stockholder to examine the books of a foreign corporation, whose manufacturing plant, principal office, and books are in this state, and whose officers reside there; this involving no investigation of the internal affairs of the corporation or order affecting the management of its business.

[See note at end of this case.]

Same.

A by-law of a corporation, providing that the directors should determine whether, when, and under what conditions the accounts and books of the corporation, except such as might by statute be specifically open to inspection, should be open to the inspection of stockholders, was invalid, and did not deprive a stockholder of his common-law right to inspect the corporate books and records; there being no provision of the law of the state where the corporation was organized, or provision of its charter, authorizing it to bind the stockholders by such a by-law.

[See note at end of this case.]

**Evidence — Presumptions — Common
Law of Another State.**

In the absence of evidence, the common law of Delaware will be presumed to be the same as that of Massachusetts.

Scope of Examination by Stockholder.

A stockholder, who is acting in good faith, will be permitted to inspect and make copies of the minutes of the corporation and of the directors, the stock ledger, the stock certifi-

cate books, the ledger showing the corporation's assets and liabilities, a statement of an auditor or accountant showing a complete inventory and all expenditures and receipts, and the contracts for the purchase of the property and assets of another corporation.

Same.

A stockholder's request to the corporation that he be permitted to inspect its books and records is too broad and indefinite, so far as it demands an inspection of all contracts of subscription and other instruments in writing with the various stockholders, the agreement containing the terms of the purchase of assets of a corporation other than those specified, any contracts for the sale of machinery to persons, corporations, and subsidiary companies other than those specified, all papers, records, and other instruments showing, referring to, or relating to commissions on sales of stock paid to certain persons, or relating to any other commissions to be paid for the sale of stock, and any and all other books, papers, and records referring or in any way relating to the affairs of the company.

Same.

A stockholder is not entitled to inspect the books and papers of other corporations not shown to be in the possession of the corporation of which he is a stockholder.

On report from Supreme Judicial Court, Suffolk county.

Petition for writ of mandamus. James P. Klotz, petitioner, and Pan-American Match Company et al., respondents. Case reported by single justice for determination by full court. WRIT ISSUED.

Paragraphs of the petition was as follows:

5. On the 26th day of June, 1914, your petitioner made an oral and written demand upon said corporation, and upon the respondents Willard W. Sterling and Asbro L. D. Buxton, president and treasurer as aforesaid, of said respondent corporation, respectively, for an inspection and a copy, or permission to take a copy, of the following books, papers, and records, to wit:

[39] (1.) The minutes of organization and of all proceedings of the board of directors and of the stockholders of the Pan-American Match Company since the incorporation of the company, and including the by-laws and corporate charter.

(2.) The stock ledger, showing the amount and kind of capital stock issued, and to whom issued, and the consideration paid therefor.

(3.) The stock certificate books, including the stub record of all certificates issued.

(4.) All contracts of subscription and other instruments in writing, showing the

relation between the respective stockholders of the company.

(5.) All contracts made in the name or in behalf of the Pan-American Match Company, under which it purchased, or agreed to purchase, the property and assets of the United States Match Company, and of the Colonial Match Company, or either of them.

[40] (6.) The agreement containing the terms of the purchase of any other assets of the Pan-American Match Company.

(7.) Contracts setting forth the terms of the merger or consolidation of the Pan-American Match Company with the United State Match Company of Indiana.

(8.) Ledger of the Pan-American Match Company containing complete record of assets and liabilities.

(9.) The books, ledger, and other corporate records of the United States Match Company of Indiana.

(10.) The books, ledger, and other corporate records of the Colonial Match Company, provided said company has consolidated or entered into an agreement for consolidation with the Pan-American Match Company.

(11.) All instruments, papers, and other records of the Pan-American Match Company referring or in any way relating to its purchase from Henry Stair or W. W. Sterling, or either of them, of the match machinery formerly owned by the Indiana Match Corporation.

(12.) The contract of purchase wherein the Colonial Match Company agreed to buy eighteen or more match machines from the United States Match Company, and the records showing amounts paid under said contract.

(13.) Any other contracts for the sale of match machinery to other persons, corporations, and subsidiary companies.

(14.) All papers, records, and other instruments in writing showing, referring, or relating to any commissions on the sale of stock paid to the respondents Charles T. Tatman, W. W. Sterling, and A. L. D. Buxton, and to one A. A. Buxton, or to either of said gentlemen, or relating to any other commissions to be paid for the sale of the stock of said Pan-American Match Company.

(15.) The contract containing the terms of purchase of the manufacturing plant and property of the Pan-American Match Company.

(16.) All papers, books, and writings of the Star Match Company, and particularly such as relate or refer to the patent rights in the "Lundgren or Sterling Automatic Match Machine."

(17.) A statement of the auditor or accountant showing complete inventory, and of all expenditures and receipts to date.

[41] (18.) Any and all other books, papers, and records referring or in any way relating to the affairs of the company.

Eugene Rheinfrank and John S. Graham for petitioner.

Chas. T. Tatman for respondents.

DE COURCY, J.—The common law right of a stockholder to inspect the books of a corporation at seasonable times and for proper purposes is well established. See cases cited in notes, 45 L.R.A. 446; 20 L.R.A. (N.S.) 185; Ann. Cas. 1913E 173. The right is based on the stockholder's interest in the assets and business of the corporation. It was said by Knowlton, C. J., in *Varney v. Baker*, 194 Mass. 239, 240, 10 Ann. Cas. 989, 80 N. E. 524: "The stockholders of a corporation are the equitable owners of its assets, and the officers act in a fiduciary relation as agents of the corporation and of the stockholders. They should be ready to account to the stockholders for their doings at all reasonable times, and the stockholders have a right to inspect their records and accounts, and to ascertain whether they are faithful, honest and intelligent in the performance of their duties."

This common law right, however, is a qualified and not an absolute one; and further, the remedy in this Commonwealth is by mandamus, which is a discretionary writ. A Stockholder ordinarily will be permitted to examine the books and accounts when he is seeking information as to the condition of the corporation in [42] good faith and for the purpose of protecting his own rights or advancing the interests of the corporation. But the rights of the corporation itself, especially in the protection of trade secrets, and the interests of the other stockholders, will not be disregarded by the court in acting upon the application. *Varney v. Baker*, *ubi supra*. *Butler v. Martin*, 220 Mass. 224, 107 N. E. 999.

The statutory right of inspection, given to stockholders by St. 1903, c. 437, § 30, need not be considered in the case at bar, as presumably it is applicable only to domestic corporations. See *Powelson v. Tennessee Eastern Electric Co.* 220 Mass. 380, Ann. Cas. 1917A 102, 107 N. E. 997.

The respondent company is a foreign corporation, incorporated under the laws of Delaware. Its manufacturing plant and its principal office and books are in the city of Worcester in this Commonwealth, and the respondent officers reside there. That our courts will enforce the common law right of a stockholder to examine the books of a foreign corporation in these circumstances was settled in *Andrews v. Mines Corp.* 205 Mass. 121, 91 N. E. 122, 137 Am. St. Rep.

437. As was said in that case, in order to enforce this right of inspection "the court is not called upon to investigate the internal affairs of the corporation or to make any order that affects it in the management of its business, or in the relations of stockholders to one another."

As justification for their refusal to permit an inspection the respondents rely on article 42 of the by-laws of the corporation, and the action of the directors thereunder. The by-law is as follows: "The directors shall determine from time to time whether, and, if allowed, when and under what conditions and regulations the accounts and books of the corporation (except such as may by statute be specifically open to inspection) or any of them shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted and limited accordingly." The resolution of the directors, after the preliminary recitals, was: "Be it resolved, that action upon the demand of James P. Klotz be deferred until such time as the directors in their discretion see fit to grant the required inspection and information in whole or in part."

The apparent purpose and practical effect of this by-law is to defeat the common law right of a stockholder to inspect the books of the corporation in which he is financially interested. [43] The determination of the exercise and extent of that right is taken from the court and delegated to the discretion of the very men whose conduct in carrying on the business the petitioner properly desires to investigate. No provision of the general law of Delaware or of the corporation's charter authorizing the corporation to bind the stockholders by such a by-law has been shown. And, as no evidence of the common law of that State applicable to the case was introduced at the trial, we must presume that it is the same as that of Massachusetts. *Lemieux v. Boston, etc. R. Co.* 219 Mass. 399, 106 N. E. 992.

The power of a corporation to prescribe rules for its government and to regulate the conduct and define the duties of its members is not an unlimited one. Among the recognized conditions to the validity of such internal regulations, one is that such by-laws must be reasonable, and another that they must not contravene the established principles of right guaranteed by the common law. Familiar instances of by-laws held to be invalid, especially in business corporations, where property rights are involved, are those attempting to impair the right of stockholders to sue in the courts; to absolve shareholders from their statutory liability to creditors; or to impose upon shareholders a liability to pay the corporate debts when not

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within the powers conferred on the corporation. *Nute v. Hamilton Mut. Ins. Co.* 6 Gray (Mass.) 174. *Andover Free Schools v. Flint*, 13 Metc. (Mass.) 539; *Traders', etc. Ins. Co. v. Brown*, 142 Mass. 403, 8 N. E. 134; *Greene v. Fitchburg*, 219 Mass. 121, 106 N. E. 573; 10 Cyc. 356, 357, and cases cited. Undoubtedly a corporation may make reasonable regulations as to the time and manner of the inspection of its books by stockholders. But it cannot make a by-law which denies or unreasonably obstructs their common law right. *Hodgens v. United Copper Co.* (N. J.) 67 Atl. 756; *State v. Citizens' Bank*, 51 La. Ann. 426; *State v. Jessup, etc. Paper Co.* 1 Boyce (Del.) 379, 77 Atl. 16, 30 L.R.A.(N.S.) 290.

The respondent corporation has accepted the provisions of our statutes enabling it to do business in Massachusetts. In fact its property and officers, its books and their custodians are within this State; and it carries on its business here. Our courts have jurisdiction of the parties and practical means of enforcing a decree for inspection of the corporate books, thereby doing substantial justice to all parties interested. The by-law relied upon [44] is invalid in our opinion, and cannot deprive the petitioner of his legal rights, nor this court of the power to enforce them. *Andrews v. Mines Corp. ubi supra*. See *Richardson v. Clinton Wall Trunk Mfg. Co.* 181 Mass. 580, 64 N. E. 400; *Harding v. American Glucose Co.* 182 Ill. 551, 633, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L.R.A. 738; *Ernst v. Rutherford, etc. Springs Gas Co.* 38 App. Div. 388, 56 N. Y. S. 403.

It remains to determine the scope of the examination to which the petitioner is entitled. He seeks to examine all the books, records and papers specified in the petition under eighteen heads, and to take copies and abstracts therefrom. Before considering the requests in detail some of the material facts found by the auditor should be stated. There is outstanding \$530,800 of the common stock and \$215,975 of the preferred stock of the respondent company. It is engaged in the business of manufacturing and selling matches and match machinery, and acquired its property by purchase from the Colonial Match Company, the United States Match Company, the Pan-American Match Company of Ohio, and the Star Match Company,—paying in stock and money. At the time when the plant of the Colonial Match Company was bought, the respondents Sterling and Buxton, and the latter's brother, A. A. Buxton, constituted a majority of the board of directors of the Colonial Company; Sterling was one of the directors of the respondent company; and the other six directors of the respondent company were closely associated, in one way or another, with Sterling and later with Buxton.

The petitioner owns one hundred and seventy-six shares of the common stock of the respondent company, was formerly interested in the Pan-American Match Company of Ohio, and is thoroughly familiar with the manufacturing of matches. Before bringing this petition he sought employment from the respondents and attempted to sell them his stock. The auditor found that the petitioner is acting in good faith in seeking the information he demands. The report of the single justice states that in so far as the issuance of the writ is discretionary, he would exercise his discretion in favor of the petitioner.

We are of opinion that the petitioner is entitled to relief as follows: He may inspect and make copies of or extracts from those books and papers specified in the fifth paragraph of his petition, numbered 1, 2 and 3, embracing the records of the corporation [45] and of the directors, the stock certificate books and stock ledger; also the ledger of the respondent company (No. 8); the statement of the auditor or accountant (No. 17); and the contracts for the purchase of the property and assets of the Colonial Match Company (included in No. 5). The other requests are denied. As to these it may be said generally that those numbered 4, 6, 13, 14 and 18 are too broad and indefinite; others, such as 9, 10, 12 and 16, call for the books and papers of other corporations not shown to be in the possession of the respondents; it does not appear that there is any such contract as that suggested in No. 15; and the remaining ones are not material so far as the record shows. The time and manner of inspection will be settled by a single justice.

Writ to issue.

NOTE.

Right of Stockholder to Inspect Books of Corporation as Absolute or Qualified.

Introductory, 898.

At Common Law, 898.

Under Statute, 899.

Introductory.

The purpose of this note is to collect the recent cases dealing with the question whether the right of a stockholder to inspect the books of a corporation is absolute or qualified. For a discussion of the earlier cases on this point see the notes to *Varney v. Baker*, 10 Ann. Cas. 989; *Venner v. Chicago City R. Co.* 20 Ann. Cas. 607; *Kimball v. Deorn*, Ann. Cas. 1913E 166; and *Harkness v. Guthrie*, 107 Am. St. Rep. 674.

At Common Law.

At common law, while a stockholder of a corporation has the right to inspect its books and records that right must be exercised at reasonable times and for proper purposes and a court will not grant an examination except on a showing of the purposes for which it is sought. *State v. Jessup, etc.* Paper Co. 4 Boyce (Del.) 248, 88 Atl. 449; *Martin v. D. B. Martin Co.* (Del.) 88 Atl. 612; *In re De Vengoechea*, 86 N. J. L. 35, 91 Atl. 314. And see *G. W. Jones Lumber Co. v. Wisarkana Lumber Co.* 125 Ark. 65, 187 S. W. 1068. See also *Davidson v. Almeda Consol. Mines Co.* 66 Ore. 412, 134 Pac. 782, wherein the court said: "A stockholder in a private corporation may by a writ of mandamus obtain an inspection of the corporate books, if such privilege is denied him. In order to be entitled to such relief, he must show that he requests such examination for some just purpose or to prevent some injury which he might sustain if not permitted to inspect them. *Merrill, Mandamus*, § 161. The return herein does not make any averment as to the necessity for an examination of the books, and hence mandamus will not issue on that ground."

In *State v. Jessup, etc.* Paper Co. 4 Boyce (Del.) 248, 88 Atl. 449, it appeared that the plaintiff, who had become a stockholder in the defendant corporation, sought to obtain an inspection of its books and papers for the purpose of ascertaining the market value of its stock. The defendant set up the defense that the plaintiff was acting in bad faith and that it wanted the information for an improper purpose. The court said: "In the case of *State v. Jessup, etc.* Paper Co. 1 Boyce (Del.) 379, 77 Atl. 16, 30 L.R.A. (N.S.) 290, the supreme court, in passing upon a question identical in principle and similar in fact with the one now under consideration, was cautious to limit the right of inspection of corporate books by a stockholder to one who discloses the good faith of his application and the lawfulness of his purpose, and to withhold the right from one whose motive is not good and whose purpose is not proper. As affecting this requisite qualification of the relator for the relief it seeks, the defendant in its amended return charges that 'the allegations in the said petition (respecting good faith and the purposes for which the information is sought) are not made in good faith, but are mere pretenses and made to involve the defendant in harassing and annoying litigation concerning its business and affairs to such an extent that it, or persons heavily interested in its welfare as stockholders, may be compelled to purchase from the petitioner the shares of stock of the defendant company held by it as the price of peace; that throughout the con-

duet and pendency of the litigation initiated by the filing of the petition in this cause, the petitioner has shown, as herein set out bad faith and a lack of any genuine desire to obtain the information, or any part thereof, which it alleges it seeks through the order of this honorable court, and has failed, refused, and neglected from the first, although alleging the desire so to do, to obtain any information which has always been open to it in a proper and reasonable way and at reasonable times.' Bad faith and improper motive of the kind alleged, would, if true, deprive the relator of any right to inspect the books of the corporation of which it is a stockholder; but such an allegation of bad faith and improper motive, without something to show how and in what respect it exists, is alone insufficient as a denial of the plaintiff's good faith and proper motive, just as a bald averment of the relator as to its good faith and proper purpose, without something to show the real or probable existence of the one and the other, would be an insufficient averment in the petition upon which to ask for and obtain the inspection of corporate books."

In *Martin v. D. B. Martin Co.* (Del.) 88 Atl. 612, it appeared that the plaintiffs, two stockholders of the defendant corporation, which was allied with eight other corporations, sought to have an examination of its books for the purpose of obtaining evidence in a pending suit. The defense was set up that the plaintiffs had no right to inspect the books of the defendant because they contained information relating to the other corporations. The court held that under the common-law rule the plaintiffs had the right to inspect the defendant's books and records, saying: "The interests of justice require that in order that the injuries alleged to be done to stockholders of the defendant company by the treatment of the property and business of the subsidiary companies may be righted, the legal fiction of distinct corporate entities should be disregarded, inasmuch as the subsidiary corporations were so organized and controlled and their affairs are so conducted as to make them adjuncts or instrumentalities of the defendant company. It is but a step further to regard the books, etc., of these allied companies as the books of the defendant company, or at least to be under its control to such an extent as that they will be ordered to produce them for the purpose of discovery."

In *re De Vengoechea*, 86 N. J. L. 35, 91 Atl. 314, it appeared that the petitioner, a stockholder of the defendant corporation, sought to obtain an inspection of its books and records. His petition was denied on the ground that he acted in bad faith. The court said: "I have reached the conclusion that

the application is not made in good faith for the purpose of ascertaining the true status of the company, or of taking measures to protect the interests of the applicant as a stockholder, but rather for the purpose of annoying the company and perhaps assisting the applicant in his pending litigation against it, which is aside from his interest as a stockholder. . . . The attempt to have the examination conducted by counsel who were employed by the applicant in litigation adverse to the company is an indication of hostility, and leads me to believe that threats were in fact made by the applicant against the company as testified to in the counter affidavits. The threat to use against the company letters which seem to have been stolen from its files, instead of calling the attention of the company to the theft, and revealing the source from which he obtained the copies, lead me to believe that he is inimical to the company. His relations with the Atlantic Fruit & Steamship Company evince a willingness to help a competitor, not consistent with the interests of the United Fruit Company. . . . It is the duty of the courts in a proper case to protect minority stockholders; but the power to order an inspection of books is so great, its exercise may affect unfavorably so many innocent stockholders, and may cause such inconvenience or perhaps such ruinous results to a corporation whose operations are so extensive in two continents, that the court ought to exercise the power with the greatest care, and only when a case is presented which indicates, not only a bona fide desire to safeguard the interests of all stockholders, but a probability that the interests of all will be served by the proposed investigation. . . . The applicant fails to make out a case which would justify me in allowing the writ. The application is therefore denied, with costs."

Under Statute.

In some jurisdictions a stockholder in a corporation has, by virtue of statutory enactments, an absolute right to inspect the books and records of the corporation. *Cummings v. Lake Torpedo Boat Co.* 90 Conn. 639, 98 Atl. 580; *Pfirman v. Success Min. Co.* (Idaho) 166 Pac. 216; *Baumrucker v. Jones*, 172 Ill. App. 188; *Laughlin v. Chicago R. Equipment Co.* 185 Ill. App. 132; *Maremont v. Old Colony L. Ins. Co.* 189 Ill. App. 231; *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871; *State v. Bucklin*, 83 Wash. 23, 145 Pac. 58, L.R.A.1915D 285; In *re Citizens' Sav. etc. Co.* 156 Wis. 277, 145 N. W. 646. See also *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 385.

In *Cummings v. Lake Torpedo Boat Co.* 90 Conn. 639, 98 Atl. 580, it appeared that the

plaintiffs were stockholders in the defendant company, a foreign corporation. They sought to obtain an inspection of its stock books and records. The court said: "Under the statutes of this state the relators would be entitled to make the inspection demanded if the respondent corporation were organized under the laws of this state." Public Acts 1911, c. 215, § 1; Costello v. Middlesex Banking Co. 87 Conn. 483, 485, 88 Atl. 861. And they would have a qualified right to such inspection at common law. . . . The purpose of the proceeding is to compel an officer of the corporation having its books and papers in this state, where the corporation has its office and chief place of business, to do what the laws of the state under which it exists require to be done. The courts of this state have jurisdiction of the parties. The books sought to be inspected are within their jurisdiction, so that the order asked for can be enforced by them. Had the purpose of the application been to enforce the common-law right of inspection, it is not claimed that the order asked for would be denied. Such orders have frequently been made in other jurisdictions. *Andrews v. Mines Corp.* 205 Mass. 121, 91 N. E. 122, 137 Am. St. Rep. 428; *Swift v. State*, 7 Houst. (Del.) 338, 6 Atl. 856; 32 Atl. 143, 40 Am. St. Rep. 127; *Hobbs v. Tom Reed Gold Mines Co.* 164 Cal. 497, 129 Pac. 781, 43 L.R.A.(N.S.) 1112. The respondent corporation was organized under a statute of Maine, and the section here in question is a portion of those statutes and is a part of the charter under which the corporation exists. It gives to the plaintiff stockholders the right of inspection which they seek in this proceeding. The corporation brought its charter with it when it qualified to do business in this state. This imposes upon the secretary of the corporation the same duty to permit an inspection of the books in this state which it imposed upon him in the state of Maine. The courts of this state will enforce by mandamus the performance of that duty the same as they would if imposed by our own statutes."

In *Pfirman v. Success Min. Co.* (Idaho) 166 Pac. 216, it appeared that the plaintiff, a stockholder of the defendant corporation, sought to inspect, through his agent, all the records of the company. The secretary of the defendant refused to allow the agent to examine the records. It was held that under the statutes of Idaho the plaintiff had an absolute right to examine the records, the court saying: "At common law one of the privileges incident to the ownership of stock in a corporation is that of inspection of the books and records of the company. This privilege, however, was limited to cases where an inspection was sought at proper times

and in good faith for the purpose of protecting the interests of the corporation and his own interests as a stockholder. *Varney v. Baker*, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524; *Venner v. Chicago City R. Co.* 246 Ill. 170, 20 Ann. Cas. 607, 92 N. E. 643, 138 Am. St. Rep. 229; *White v. Manter*, 109 Me. 408, 84 Atl. 890, 42 L.R.A.(N.S.) 332. This common law rule has been adopted and extended by Rev. Codes, §§ 2775 and 2776. . . . These sections must be read in connection with section 7122, Rev. Codes. . . . It is the decided weight of authority that such statutes have not only adopted the common-law rule, but have extended the same, and that the statutes make the right absolute."

In *Baumrucker v. Jones*, 172 Ill. App. 188, the court said: "The statute of this state gives an unlimited right to stockholders to inspect the books and papers of the corporation. It is no defense that he is influenced by improper motives or purposes to procure the information."

In *Laughlin v. Chicago R. Equipment Co.* 185 Ill. App. 132, it appeared that the plaintiff, a stockholder in the defendant corporation, sought to obtain an inspection of its books and records. The defendant set up the defense that the plaintiff wanted the information for unlawful purposes. It was held that under the Illinois statutes the plaintiff had an absolute right to examine the books of the corporation and that his object in doing so was immaterial. The court said: "While it is conceded that the right of a stockholder under our statute to an examination and inspection of the books and records of a corporation is generally an absolute one, yet counsel for appellants contend that it is not unlimited, and cite the language in *Foster v. White*, 86 Ala. 467, approved by our supreme court in *Stone v. Kellogg*, 165 Ill. 192, that there is an implied limitation in the statute that the right 'shall not be exercised from idle curiosity or for improper or unlawful purposes.' (p. 205.) In the *Stone* case, supra, a demurrer to the answer was sustained because there was nothing therein to show 'that the object and purpose of the petitioner were not legitimate or were to injure the corporation.' (p. 206.) The court said: 'It is no sufficient answer to such a petition to impugn the motives of the petitioner.' (Id.) Later in the case of *Venner v. Chicago City R. Co.* 246 Ill. 170, the court, referring to the right given by the statute as an absolute and unlimited one, said: 'It is no defense under a statute granting the absolute right to inspection to allege improper purposes or that the petitioner desires the information for the purpose of injuring the business of the corporation. A clear legal right given by a statute cannot be defeated

by showing an improper motive.' (p. 174.)" To the same effect see *Maremont v. Old Colony L. Ins. Co.* 189 Ill. App. 231, wherein the court said: "We do not see how the court could have done otherwise under the doctrine distinctly laid down by our supreme court in *Venner v. Chicago City R. Co.* 246 Ill. 170, in construing section 13 of 'The Corporation Act,' approved April 18, 1872, that every stockholder in a stock corporation 'shall have the right at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation.' The policy of the state, as expressed in the statute and in the opinion, is in favor of the widest publicity among stockholders concerning corporation affairs."

In *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871, it appeared that the plaintiffs, who were stockholders of the Equity Co-operative Exchange of which the defendants were president and secretary-treasurer respectively, sought to obtain an examination of the corporation's books. The defendants refused to permit the plaintiffs to complete an examination of the books, which the latter had already begun. They asserted that the plaintiffs wanted the information for the purpose of helping a competitor of the Exchange in its business. The court held that this was no defense and that under the statute the motive of the plaintiffs was immaterial, saying: "At common law the rule is that a stockholder has the right of inspection, when he desires to do so for proper purposes and with proper motives. It appears that this rule resulted in the officers or stockholders sitting in trial on the motives of the applicant for desiring to make the examination, and in the case of minority stockholders it frequently resulted in their being deprived of their lawful rights to inspect or examine property in which they owned an interest. The statutory provisions were undoubtedly enacted for the protection of minority stockholders, and to prevent the delays incident to determining, through legal proceedings, the motives of those desiring to examine the corporate records. It is not for courts to read, into a plain statute, qualifications which would destroy the meaning of its plain language. . . . That the motives of defendant may have been commendable in denying inspection of its books, while the right of inspection may have been sought to further oppression and abuse, yet motives are insufficient to warrant a denial of inspection, when to do so is to jeopardize the rights of every minority stockholder, as it is indisputable that the right to question the motive of any stockholder, desiring inspection of corporate books, carries with it the power to pass judgment on his motives, and on that right of judgment, however erroneous or wrongfully

asserted, virtually deny a right of inspection altogether by compelling resort to the courts whenever a majority of stockholders may elect to force the minority to get their rights only at the end of a lawsuit. The legislature, entirely familiar with the exigencies of this and other similar situations, has declared the policy to be pursued by its mandate that minority rights shall be respected and enforced, even under a situation identical with that of the majority stockholders, the defendants."

In *State v. Bucklin*, 83 Wash. 23, 145 Pac. 58, L.R.A.1915D 285, it appeared that the plaintiffs were stockholders of the defendant corporation. A by-law of the corporation provided that each stockholder should have an absolute right to inspect its books. It was held that this by-law had the same force and effect of a statute. The court said: "Counsel for appellants contend that they have the absolute right to examine the books and records of the company without such right being impaired in the least by respondents' claim of right to inquire into relators' motive and purpose in making such examination. We are not here concerned with the mere common-law right of stockholders to examine the books and records of the corporation in which they hold stock, which right is not absolute, but subject to restrictions governed largely by the circumstances of each particular controversy. . . . We have no statute in this state bearing upon this subject, but the *Kitsay Title Abstract Company* has a by-law reading as follows: 'Each stockholder shall have the right to inspect the books and records of the company at any time during regular business hours of said company.' This by-law, we think, has all the force and effect of a statute containing such a provision. . . . It is apparent that the fact that such stockholder is interested in a rival concern which is in competition with the corporation and might by the examination of the books of the corporation acquire and use knowledge in aid of the other concern to the detriment of the corporation by way of competition, his right to the inspection of the books would not thereby be affected in the least."

In *Massachusetts* a stockholder of a domestic corporation has an absolute right by statute to inspect the records, stock and transfer books of the corporation. *Powelson v. Tennessee Eastern Electric Co.* 220 Mass. 380, Ann. Cas. 1917A 102, 107 N. E. 997. But as regards foreign corporations the common-law rule governs. *Butler v. Martin Mfg. Co.* 220 Mass. 224, 107 N. E. 999. And see the reported case.

In *New York* a stockholder has, by virtue of a statute (*Stock Corporation Law*, § 33), not only an absolute right to inspect the

books of the corporation but may recover a penalty imposed on the corporation for failure to allow him to examine the stock books. *McAuliff v. United Fruit Co.* 162 N. Y. S. 980; *Sutton v. MacBride*, 176 App. Div. 362, 162 N. Y. S. 1023. See also *Theile v. Merlis*, 85 Misc. 351, 147 N. Y. S. 405.

But in some of the jurisdictions where a stockholder has an absolute right, by statute, to inspect the books and records of the corporation, the courts will not enforce the right if it is shown that the stockholder is acting in derogation of the corporate interests. *State v. Middlesex Banking Co.* 87 Conn. 483, 88 Atl. 861; *State v. Doe Run Lead Co. (Mo.)* 178 S. W. 298.

And, while under statutes, a stockholder has an absolute right to inspect the books of the corporation in which he holds stock, it has been held that he has no such unlimited right to make and take copies of books and records. *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201. In that case it was held that as a stockholder, the plaintiff had under the statute an absolute right to make an inspection of the books but only a conditional right to make and take copies thereof. The court said: "The interest being granted, has the stockholder the statutory right to take such copy irrespective of his motive or purpose? Here again we must say, following the analogy of *White v. Manter*, 'the statute does not make the purpose material and we cannot.' In that case it was held that, under the statute, access to the records and stock book was conditional only upon being a party interested, that a stockholder was such an interested party, and, therefore, had the absolute right to such inspection without regard to his motive or purpose. In the case at bar, where the taking of copies is requested, the statute imposes two conditions, first that the applicant shall be a party interested and second, that he shall take copies of such parts only as concern his interests. The petitioner fulfils both conditions. He is a stockholder and the taking of a list of stockholders does concern his interest. It therefore follows that, in this case as in the other, the motive or purpose of the petitioner does not affect his statutory right. The restraint imposed by statute is, as the single justice aptly stated in his decree, a restraint 'upon the parts to be taken and not upon the use that may be made of them.' If the door is thereby opened too wide, additional restraint upon the statutory right should be made by the legislature and not by the court." But see *Powelson v. Tennessee Eastern Electric Co.* 220 Mass. 380, Ann. Cas. 1917A 102, 107 N. E. 997, wherein the court said: "The ruling of the single justice authorizing the plaintiff to make written memoranda or copies of the stock and transfer books is in

accord with sound reason and authority." And see the reported case.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY

v.

ANDERSON.

Tennessee Supreme Court—May 2, 1916.

134 Tenn. 666; 185 S. W. 677.

Death by Wrongful Act — Parties — Amendment — Limitation of Actions.

In an action against a railroad for death of its employee, a change from the widow as party plaintiff to the administrator as such was no change of the cause of action within the statute of limitations, though the purpose of the amendment was to bring the case within the federal employer's liability act (*Fed. St. Ann. 1909 Supp. 584*) under which the widow cannot recover.

[See note at end of this case.]

Amendment Omitting Reference to State Statute.

In a widow's action against a railroad for death of its employee, where plaintiff's original pleadings referred to the Georgia statutes, the amendment of such pleadings to omit all reference to such statute and to show that decedent was employed in interstate commerce when killed, defendant's plea having shown such fact originally, upon substitution of decedent's administrator as plaintiff under the federal employers' liability act, was not a change of cause of action within the statute of limitations, since the reference to the Georgia statute could be disregarded as surplusage.

Pleading — Omission in Declaration Cured by Plea.

Matters of substance omitted from a declaration may be cured by plea.

Instructions — Manner of Stating Issues — Reading Pleadings.

In an action for death of a railroad employee, where the trial court, instead of stating the issues of fact to the jury, reads a portion of the declaration of the plaintiff, and directs the jury to find in favor of the plaintiff if the greater weight of the evidence is on that side on any one or more of the five counts, such charge is error, certain averments of negligence not being supported by the proof, and no proof being offered as to some of the matters charged.

Same.

It is not desirable for the trial judge to read the pleadings to the jury.

Death by Wrongful Act — Measure of Damages — Federal Employers' Liability Act.

In an action under the federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]), the widow and minor child of decedent being beneficiaries, the measure of damages is such sum as the widow might reasonably have expected to receive from her husband for support, and such sum as such child would have expected for support during minority, plus compensation for the loss of care, counsel, training, and education which, under the evidence, it might have reasonably received from the parent.

[See Ann. Cas. 1914C 181.]

Instructions — Elements of Damages — Testimony to Support.

In an action under the federal employers' liability act of April 22, 1908 (Fed. St. Ann. 1909 Supp. p. 584), for death of a railroad employee, where there was no proof as to what portion of decedent's earnings his widow and child might have reasonably expected to receive, charge telling the jury that they might find as damages a sum equal to the entire amount of the probable earnings of decedent is erroneous.

Same.

In such action, where there is no proof as to what portion of decedent's earnings his widow and child might reasonably have expected to receive, it is error to instruct that the jury may find damages to be the net value of his earnings after payment of his personal expenses.

Necessity of Proving Damage.

In such action there must be evidence of pecuniary damage to his beneficiaries before such damage can be allowed.

Same.

Where there is no proof as to the value of decedent's customary contributions to the support of his widow and minor child, and nothing to indicate what they might reasonably have expected from him for support, there being no evidence as to proof of his personal qualities and the interest he took in his family, the submission to the jury of such matters as a basis of damages is improper.

Computation of Damage — Life Expectancy of Beneficiary.

In such action damages to the widow should be calculated on the basis of her expectancy of life as well as her husband's.

Proof of Damage — Loss of Support — Amount.

Where there is proof of the earning capacity of decedent and his expectancy of life, but nothing to show what his beneficiaries, his widow and minor child, might reasonably have expected to receive from him for their support, only a recovery for nominal damages can stand.

Pleading Damage.

In such action there should be pleadings averring the pecuniary losses which plaintiffs expect to prove.

Certiorari to Court of Civil Appeals.

Action by W. B. Anderson, administrator, plaintiff, against Nashville, Chattanooga and St. Louis Railway, defendant. Judgment for plaintiff in Circuit Court. Judgment reversed by Court of Civil Appeals. Both parties bring certiorari. The facts are stated in the opinion. **REVERSED.**

W. H. Washington for plaintiff.

Claude Waller and *Frank Siemons* for defendant.

[669] **GREEN, J.**—W. M. Richardson, an employee of the plaintiff in error, was killed while in its service in the Atlanta yards June 9, 1908.

On June 23, 1908, W. B. Anderson, who had qualified as administrator of the deceased, brought suit for his death in the circuit court of Davidson county, Tenn. The deceased left a widow and an infant child.

[670] The declaration as originally filed was founded on the Georgia statutes regulating the right of recovery for wrongful death. It was alleged in the declaration that the deceased was an inexperienced employee put to do dangerous work without any training or instruction, and it was further alleged that the car on which he was riding when killed was being moved at an excessive rate of speed, and that said car was not equipped with proper brakes. The deceased was engaged as a switchman when killed and was thrown from a car by the force of a coupling made with another car. In the declaration and amendments thereto a number of sections of the Georgia Code supposed to control this suit were set out.

Various pleas were interposed by the railway company, to all of which it is not necessary to refer.

As stated above, the suit was originally brought in the name of W. B. Anderson, administrator of the deceased, but later, it appearing that under the Georgia statutes the widow was the proper person to bring the suit, she was made a party plaintiff, and an order was entered which, in effect, dismissed the case as to the administrator, Anderson, and directed that the suit be prosecuted in the name of Mary E. Richardson, the widow, by next friend, she being under age.

Among other pleas filed by the railway company was one setting out that it was a common carrier engaged in interstate commerce, and that the deceased was a servant employed in operating a car engaged in interstate commerce when he met his death.

[671] A demurrer was interposed to this plea, which was sustained by the circuit judge, the scope and effect of the federal statute with reference to interstate employees

not being at that time fully appreciated by the bench and bar, and the court thinking the plea injected an immaterial issue.

The case proceeded to trial, and a judgment was had in favor of the plaintiff. The railway company took the case to the court of civil appeals, and that court reversed the judgment below and remanded the case on account of the error of the trial judge in sustaining the demurrer to the railway company's plea setting out the interstate character of the service of deceased.

When the case was remanded a stipulation was entered into between counsel to the effect that the car from which deceased fell was then being used in interstate commerce, and that the deceased was employed in interstate commerce at that time.

Amendments were offered by which W. B. Anderson, administrator, was again made the party plaintiff instead of the widow, and by which all reference to the Georgia statutes was eliminated from the declaration, and an averment incorporated into the declaration that deceased was engaged in the service of the railway company in interstate commerce at the time of the accident.

These amendments were resisted by the railway company on the ground that such procedure was, in effect, the bringing of a new suit, and at the time such amendments [672] were made more than two years had elapsed since the death of Richardson.

These objections of the railway company were overruled by the trial judge, and the case again proceeded to judgment. The railway company again appealed in error to the court of civil appeals.

A number of assignments of error were interposed by the railway company in the court of civil appeals. That court was of opinion that the amendments to the former declaration, or rather the amended declaration eliminating reference to the Georgia statute, and undertaking to proceed under the act of Congress in the name of the administrator, was a change of the cause of action and substantially a new suit. The court of civil appeals held that such new suit was barred by the two-year limitation prescribed in the act of Congress, and accordingly that court concluded that the trial judge improperly overruled the motion of the railway company for a directed verdict. That court passed on other assignments of error interposed by the railway company, and held that three of these assignments were well made, and that the case, upon these three assignments, would have been reversed, if the motion for peremptory instructions had not been deemed sufficient.

A petition for *certiorari* was filed by the administrator of the deceased to review the action of the court of civil appeals upon the

matters just mentioned. The railway company likewise filed a petition for *certiorari* in which it is maintained that, regardless of the bar of [673] the statute of two years, there is no evidence to sustain the verdict below, and the railway company accordingly insists that its motion for a directed verdict was good on this additional ground.

Both of these petitions for *certiorari* have been granted, and the case has been argued and fully considered.

We are of opinion that the court of civil appeals erred in holding this suit was barred by the two-year period of limitations prescribed in the act of Congress.

So far as the change from the widow as a party plaintiff to the administrator as a party plaintiff is concerned, such a change is not a change of the cause of action. Likewise the reference made in the original pleadings of the widow to the Georgia statute may be disregarded as surplusage and of no effect.

These propositions have been established by the supreme court in the case of *Missouri, etc. R. Co. v. Wulf*, 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355, Ann. Cas. 1914B 134.

That case is quite recent and is familiar to the profession, and a bare reference thereto in this opinion is all that is necessary. Suit was brought by the mother of an employee killed in interstate commerce, and was apparently founded on the Kansas statute. Later there was an amendment to the proceeding by which the administrator of deceased was introduced as party plaintiff. This amendment came more than two years after the death of the employee, and an inspection [674] of this case discloses that practically the same argument was made in behalf of the railroad company there which is here made in behalf of the plaintiff in error.

The supreme court, however, held that there was no change of the cause of action, that the reference to the Kansas statute "no more vitiated the pleading than a reference to any other repealed statute would have done," and the court distinguished *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 S. Ct. 877, 39 U. S. (L. ed.) 983, also relied on by the plaintiff in error here.

It must be conceded that *Missouri, etc. R. Co. v. Wulf*, supra, destroys much of the argument made in behalf of plaintiff in error. Certainly this case establishes the proposition that such a change of parties—that is, from the beneficiary to the representative of the beneficiary—is no change in the cause of action.

This case, however, differs from *Missouri, etc. R. Co. v. Wulf* in that plaintiff's pleading in the former case showed that the deceased servant was employed in interstate commerce

when injured, while nothing of this kind appears in the original pleadings filed by the widow in this case.

It is therefore insisted that the amendment to the declaration showing the deceased to have been employed in interstate commerce at the time of his death stated a new cause of action. Here again *Union Pac. R. Co. v. Wyler* is invoked, and it is insisted that this amendment showing the interstate character of the service of deceased is, in effect, a departure from fact [675] to fact and from law to law, and is therefore a new suit.

We think it obvious under the reasoning of *Missouri, etc. R. Co. v. Wulf* that there was no departure from law to law. The federal statute repealed the Georgia statute. The Georgia statute was ineffective for any purpose, and the reference to it did not help or hurt the declaration, unless, indeed, the deceased was engaged in intrastate commerce.

That deceased was not engaged in intrastate commerce, but interstate commerce, was fully made to appear by the aforesaid plea interposed to the declaration by the defendant below, and we agree with counsel for the administrator that this plea of the railway company supplied the omission in the declaration and made the interstate character of deceased's service obvious in the pleadings. No issue was ever made on the facts alleged in said plea.

This plea of the railway company was filed seven months after the accident occurred. The declaration stated acts of negligence cognizable under the federal Employers' Liability Statute (Fed. St. Ann. 1909 Supp. p. 584). The only point of the plea was that the suit was not brought in the name of the administrator. The suit was not barred at that time. The Georgia statute had been repealed as to employees engaged in interstate service, and the declaration stated a good cause of action under the act of Congress, except that it failed to aver the interstate character of deceased's service. This was admitted by the plea. The sole effect of the special plea referred to was to bar the prosecution of the suit in the name of [676] the widow. This plea set out, as a fact, that deceased was employed in interstate commerce at the time of his death, and challenged the suit in the name of the widow. The plea would not have been good unless such fact had been made to appear. Such fact having been admitted by the demurrer, and the railway company having obtained the benefit of this admission, and having procured a reversal of the former judgment against it on the strength of the plea, it would be inadmissible at this time to hold that the interstate nature of deceased's employment was not sufficiently brought out in the pleadings prior to the running of the two-year statute.

This court long ago announced the rule that matters of substance omitted from a declaration might be cured by a plea.

In *Harmon v. Crook*, 2 Yerg. (Tenn.) 127, the defendant had entered into a covenant to convey certain land if the plaintiff liked it or desired it. The declaration should have averred that the covenantee had notified the covenantor of his desire for the land or of his willingness to accept a conveyance thereof. No such averment, however, was contained in the declaration. The defendant in his plea, instead of making any point of the absence of this averment, stated that he had offered to make the conveyance. It was held that such a plea cured the omission in the demurrer. The court said:

"The plea says that the defendants offered to convey these two tracts; hence is inferred an admission [677] on their part that they were bound to do so, which obligation could not otherwise be fixed upon them but by a previous notice given to them by the plaintiff that he was willing to accept of the same two tracts. Plaintiff complains that they did not convey these two tracts, which they were not bound to convey, unless by his previous consent to accept them, made known to the covenantors. Both the plaintiff and the covenantors agree, in fact, that the defendant ought to have conveyed these two tracts. The pleadings, it is argued, show upon their face, when taken altogether, that the fact of notice to the covenantors is sufficiently apparent, though not stated in the declaration. The old rule was that matters of form, such as time, place, and circumstances, which might be taken advantage of by special demurrer, can be cured by the plea of the defendant, but that matters of substance, which can be taken advantage of by general demurrer, cannot be cured by the plea of the defendant. [Citing authorities.] But certainly it has often been extended so as to cure the omission of matters of substance which must have been taken advantage of on general demurrer. Matters of substance are cured by pleading over. [Citing authorities.] And not only material things imperfectly alleged have been cured, but also material things not alleged at all. [Citing authorities.] The willingness of the plaintiff to take the tracts of one hundred and of fifty-two acres is so plainly apparent upon the record that there seems to be no risk in making the inference that it was so understood by both the covenantors [678] and covenantee, and that therefore the want of notice alleged in the declaration is cured by the pleas of the defendants." *Harmon v. Crook*, supra:

This rule has been expressly approved by the supreme court of the United States in *U. S. v. Morris*, 10 Wheat. 246, 6 U. S. (L. ed.) 314.

In that case the supreme court held that a defective plea might be aided by a replication just as a defective declaration might be aided by a plea. The court said:

"And this rule is not confined to matters of form merely, but extends to matters of substance. Thus, in an action of trespass for taking goods, not stating them to be the property of the plaintiff, this defect will be aided if the defendant by his plea admits the plaintiff's property. So, where several acts are to be performed by the plaintiff, as a condition precedent, and he does not aver performance of all, if it appear by the plea that the act omitted to be stated was, in fact, performed, the defect is cured." U. S. v. Morris, *supra*.

"If a necessary allegation is omitted from a pleading, and the missing allegation is either alleged or admitted by the pleading of the adverse party, the defect is cured." 31 Cyc. 714.

Many authorities to the same effect are cited in 16 Ency. Pl. & Prac. 580. Although the decisions are not altogether uniform on this question, it certainly appears that this court and the supreme court of the United States are committed to the rule that material [679] allegations omitted in a declaration may be supplied by a plea.

Aside, however, from the rule just announced, it is manifest from reading the opinions of the supreme court in Missouri, etc. R. Co. v. Wulf, *supra*, and in St. Louis, etc. R. Co. v. Seale, 229 U. S. 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129, Ann. Cas. 1914C 156, that the court is committed to a liberal policy with respect to allowing amendments which will save for injured employees and their beneficiaries the rights conferred upon them by the act of Congress.

In the latter case the supreme court reversed and dismissed a suit prosecuted without an administrator, but the dismissal was made without prejudice to any rights the administrator might have. The court would not have done a vain thing. This dismissal without prejudice would scarcely have been ordered unless it was in contemplation that the suit might be again prosecuted in the name of the administrator, although naturally more than two years must have elapsed since the inception of the action.

The Kentucky court of appeals, referring to the cases decided by the United States supreme court, observed:

"On the authority of these cases, we think it is clear that, when the cause of action arises under the federal statute, but suit is brought under the State law, or by some person not authorized to maintain an action under the federal statute, defects in the original petition may be cured by an amendment that does not set up a new and distinct cause

of action, filed after the expiration [680] of two years from the accrual of the cause of action, as the amendment will relate back to the filing of the original petition." Cincinnati, etc. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329.

A like conclusion was reached by the United States circuit court of appeals for the fourth district; that court holding that an amendment to the pleadings might be made after the expiration of two years, alleging that defendant was engaged in interstate commerce, and that plaintiff was employed in such commerce at the time of his injury. Smith v. Atlantic Coast Line R. Co. 210 Fed. 761, 127 C. C. A. 311.

In the last edition of his work on the Federal Employers' Liability Act (page 308) Mr. Thornton refers to the above cases, and concludes that:

"An amendment after the two-year limitation by adding formal allegations to bring the case under the federal act is permissible; the allegations concerning the injury remaining the same. In such an instance no new cause of action has been brought by adding the amendment or changing the complainant."

So, without further elaboration, we hold that the court of civil appeals improperly sustained that branch of the motion for peremptory instructions interposing the bar of the two-year statute.

Apart from the effect of the statute of two years, the court of civil appeals thought that the motion for peremptory instructions was not well made. The court found material evidence in the record to sustain the verdict of the jury. This action of the court of civil [681] appeals is attacked by the railway company. We have discussed the facts orally, and are of opinion that the court of civil appeals was correct in its conclusion. We think there is evidence to sustain the judgment below.

The court of civil appeals thought the case should be reversed on account of the manner in which the trial judge delivered his charge. Instead of stating the issues of fact to the jury, the circuit judge read a portion of the declaration of the plaintiff below, and directed the jury to find in favor of the plaintiff if the greater weight of the evidence was on that side on any one or more of the five counts. This was error. Certain of the averments of negligence were not supported by the proof. In fact, no proof was offered as to some of the matters charged, particularly on the question of defective brakes; yet the circuit judge submitted this question to the jury along with others. This, of course, was improper, and, moreover, it is not desirable for the trial judge to read the pleadings to the jury, but rather to give them a

succinct statement of the issues with proper instructions as to the law.

The court of civil appeals sustained the third assignment of plaintiff in error in that court directed to a special request which the circuit judge gave in charge. It is insisted for the company that there was no evidence upon which such a request might have been predicated. We do not agree with the railway company in this contention. We think there was such evidence in the record, and we see no error in the requested instruction [682] given. It results that the action of the court of civil appeals in this respect is reversed.

The court of civil appeals likewise sustained the assignment of error which challenged the propriety of the court's instruction on the measure of damages under the federal Employers' Liability Act. We think the court of civil appeals was correct in this action. For this error there must be a new trial.

This suit arose under the act of April 22, 1908 (35 Stat. Chapter 149, p. 65), and before the amendment of April 5, 1910 (36 Stat. chapter 143, section 2, p. 291 (Fed. St. Ann. 1912 Supp. p. 335)).

The beneficiaries in this suit are the widow and minor child of the deceased. They were both entitled to support from the deceased. Their damages would therefore have first included such sum as the widow might reasonably have expected to receive from her husband for support, and such a sum as the child might reasonably have expected to receive from his father for support during minority.

In addition to this the supreme court of the United States, in *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417, Ann. Cas. 1914C 176, after explaining that the beneficiaries can only recover pecuniary damages, has said:

"Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of the services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, [683] have reasonably received from the parent, and which can only be supplied by the service of another for compensation."

The circuit judge gave the above-quoted extract in his charge, except that he omitted the phrase "under the evidence," which is all-important.

Likewise, in the concluding portion of his charge, the trial judge told the jury that the damages were to be determined upon a consideration of deceased's expectancy of life, etc., and his earnings, and that, taking these things into consideration, they should assess

such damages as might be sufficient to compensate for the pecuniary loss of the widow and child.

If it was meant by his honor to tell the jury that they might find as damages for these beneficiaries a sum equal to the entire amount of the probable earnings of deceased, in the absence of any proof as to what portion of said earnings the beneficiaries might reasonably have expected to receive, this was plain error. It would have been error to have instructed the jury, under such circumstances, that they might find the damages to be the net value of the earnings of deceased after payment of his personal expenses. *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 35 S. Ct. 844, 59 U. S. (L. ed.) 1478. The pecuniary loss of these beneficiaries was not what the deceased might have earned, but what part of his earnings they might reasonably have expected to receive.

Furthermore, it seems very clear from a study of the decisions of the supreme court of the United States [684]—namely, *Michigan Cent. R. Co. v. Vreeland*, supra; *American R. Co. v. Didricksen*, 227 U. S. 145, 33 S. Ct. 224, 57 U. S. (L. ed.) 456; *Gulf, etc. R. Co. v. McGinnis*, 228 U. S. 173, 33 S. Ct. 426, 57 U. S. (L. ed.) 785; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 S. Ct. 305, 58 U. S. (L. ed.) 591, Ann. Cas. 1914C 159; *St. Louis, etc. R. Co. v. Craft*, 237 U. S. 648, 35 S. Ct. 704, 59 U. S. (L. ed.) 1160; *Norfolk, etc. R. Co. v. Holbrook*, 235 U. S. 625, 35 S. Ct. 143, 59 U. S. (L. ed.) 392; and *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 35 S. Ct. 844, 59 U. S. (L. ed.) 1478—that there must be evidence of pecuniary damage before such damage can be allowed. This rule is enforced with more strictness by the supreme court of the United States perhaps than by some of the State courts in jurisdictions where acts fashioned after *Lord Campbell's Act* prevail.

In this case deceased's age, expectancy, and earning capacity were proven. It was also proven that his wife and child were dependent upon him for support.

There was no proof, however, as to the value of his customary contributions to the support of these beneficiaries, and nothing to indicate what such beneficiaries might reasonably have expected from him in the way of support. There was no proof of any service, pecuniarily determinable, as defined in *Michigan Cent. R. Co. v. Vreeland*, which deceased had rendered or might reasonably be expected to render to his wife. There was no proof as to the personal qualities of the deceased and the interest which he took in his family, and therefore no occasion to charge the jury that they [685] might take into consideration the care, counsel, training, and education which the child might reasonably have ex-

pected from his father. *Norfolk, etc. R. Co. v. Holbrook*, supra.

It was therefore improper for the trial judge to have submitted such matters to the jury in the absence of any evidence.

The measure of damages of the wife and child was the probable amounts they would have received from the deceased if he had lived, and not his probable earnings. *Thornton on federal Employers' Liability Act* (3d Ed.) p. 246.

The measure of the damages of these beneficiaries was the amount which the deceased would probably have earned during his life for their benefit, taking into consideration his age, ability, and disposition to work and habits of life and expectancy. *Tiffany on Death by Wrongful Act* (2d ed.) section 160.

It is further complained with reference to the charge that the jury were not instructed to consider in any way the expectancy of the wife, but it was assumed she would live as long as her husband would have lived had he not been injured.

We think this complaint is well made. Mr. Tiffany says:

"The damages to the widow should be calculated upon the basis of their joint lives. The damages to the minor children for the loss of support should be confined to their minority." *Tiffany on Death by Wrongful Act* (2d ed.) section 160.

[686] Mr. Tiffany's discussion of the measure of damages has been approved in two or three cases by the supreme court of the United States. He discusses Lord Campbell's Act and similar acts upon which the act of Congress is modeled.

In this case it was only shown that the beneficiaries of this suit had sustained a loss. There was no proof as to the extent of the loss. There was proof of the earning capacity of deceased and his expectancy, but there was nothing to show what these beneficiaries might reasonably have expected to receive from the deceased, and, under such circumstances, under the rules laid down in the late supreme court cases, no recovery for more than nominal damages could stand.

The elements of damage to be considered by the jury are indicated in the foregoing authorities. There must be proof to show the reasonable expectation.

Under the reasoning of the supreme court decisions, the widow's expectancy of life should be taken into account in estimating her loss.

Likewise, as plainly intimated in *Norfolk, etc. R. Co. v. Holbrook*, supra, the estimate of the child's pecuniary loss should be confined to the period of his minority, both for support and other elements of damage.

As indicated in *Michigan Cent. R. Co. v. Vreeland*, supra, cases may arise in which

more latitude would be permitted in measuring damages recoverable under this statute. There is nothing exceptional, however, in the case before us, and it is better for all parties that [687] this court confine the pecuniary loss to be estimated herein, within limits certainly included by the Act, as construed by the supreme court.

We find it necessary again to point out that there should, in suits founded on this act, be pleadings averring the pecuniary losses which plaintiffs expect to prove.

Reversed and remanded for another trial, with special reference to the decisions of the supreme court of the United States cited in this opinion.

NOTE.

In the reported case it is held that a change of the plaintiff in an action for death by wrongful act by substituting the personal representative of the deceased for the widow is not equivalent to the commencement of a new action within the statute of limitations, though the effect of the amendment is to permit of the enforcement of a liability under the federal employers' liability act (*Fed. St. Ann. 1909 Supp. p. 584*). In so holding the court follows *Missouri, etc. R. Co. v. Wulf*, 228 U. S. 570, reported in *Ann. Cas. 1914B 134* with a note on the capacity in which a suit under the federal employers' liability act must be brought.

GREENLEAF

v.

MINNEAPOLIS, ST. PAUL, AND
SAULT STE. MARIE RAILWAY
COMPANY.

North Dakota Supreme Court—January 4,
1915.

30 N. Dak. 112; 151 N. W. 879.

Attorneys — Lien — On Cause of Action for Tort.

Section 6293, Rev. Codes 1905, being section 6875, Comp. Laws 1913, and which provides for an attorney's lien on "money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing," applies to tort actions for personal injuries as well as to actions which are founded upon contract, and this although

such actions do not survive the death of the plaintiff.

[See note at end of this case.]

Same.

The words "action" and "proceeding" as used in section 6293, Rev. Codes 1905 (section 6875, Comp. Laws 1913), include actions and proceedings for the recovery of damages for personal injuries.

[See note at end of this case.]

Action — Definition.

An action is "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

Proceeding — Definition.

The term "proceeding" includes the form and manner of considering judicial business before a court or judicial officer, and regular and ordinary proceedings in form of law, including all possible steps in an action from its institution to the execution of judgment.

Statutes — Construction — Motive of Legislature.

Where the language of a statute is unambiguous, it is not for the courts to inquire as to the motive of the legislature, nor to depart from the meaning which is clearly conveyed.

Attorneys — Lien on Cause of Action — Effect of Judgment.

The attorney's lien given by section 6293, Rev. Codes 1905 (section 6875, Comp. Laws 1913), when sought to be asserted in an action or proceeding for the recovery of damages for personal injuries, attaches to that into which the right of action is merged. If a judgment is recovered the lien attaches to it, if a compromise agreement is made, the lien attaches to it, and in either case the attorney's lien is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent.

Settlement of Cause of Action Subject to Lien — Remedy of Attorney.

It is opposed to the policy of the law and section 6293, Rev. Codes 1905 (section 6875, Comp. Laws 1913), gives to an attorney no right to prevent his client from himself settling his claim for damages for personal injuries and without dictation by such attorney. An agreement which seeks to deprive the client of such right is void, but it does not otherwise invalidate an agreement for contingent fees which is otherwise valid.

[See note at end of this case.]

Same.

Where a lien is claimed under section 6293, Rev. Codes 1905 (section 6875, Comp. Laws 1913), in an action for personal injuries, and due notice thereof is given to the defendant and a settlement or compromise is made with the plaintiff with or without the consent of the attorney, such lien will attach merely to the proceeds of the settlement, and if the contract or lien is for a percentage of the claim or recovery, it will merely be for such

percentage of the amount for which such claim is settled or compromised.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Ward county: FISK, Judge.

Action by D. C. Greenleaf, plaintiff, against Minneapolis, St. Paul and Sault Ste. Marie Railway Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

E. R. Sinkler and W. F. Doherty for appellant.

Palda, Aaker & Greene for respondent.

[115] BRUCE, J.—This is an appeal from an order sustaining a general demurrer to a complaint. The only question involved is whether an attorney who has made an agreement with his client in a personal injury action for a percentage "of any amount received, recovered, or obtained from the said defendant by reason of the injuries sustained by him, either in settlement or by action," and who subsequently serves upon the defendant a notice of an attorney's lien based upon such agreement, can recover from such defendant such percentage on the amount which the said defendant has paid to the plaintiff in settlement of the claim and action, before judgment, and without the knowledge or consent of the said attorney. More specifically the question is: Does subdivision 3 of § 6293, Rev. Codes 1905, § 6875, Compiled Laws 1913, provide for attorneys' liens in the case of unliquidated claims for personal injuries? We think it does.

The statute, § 6293, Rev. Codes 1905, 6875, Compiled Laws of 1913, provides that "an attorney has a lien for a general balance of compensation in and for each case upon: . . . 3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing to such adverse party or the [116] attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed and in general terms for what services."

Counsel for defendant and respondent claims, and the demurrer was no doubt sustained upon the theory, that: "(1) Lundy's claim against the defendant was for damages alleged to have been sustained through the negligence of the defendant, which resulted in certain personal injuries of a serious character to said Lundy. It was, therefore, a tort action or demand. (2) An attorney's lien, if a valid one, amounts to an assign-

ment of an interest in his client's cause of action. (3) A cause of action for a personal tort cannot be assigned unless there is a statute declaring that such a cause of action shall not abate on the death of the injured party, or a statute expressly authorizing such assignment. (4) There is no statute in this state in derogation of the common-law rule that a cause of action for personal tort is not assignable, and does not survive. (5) It is against public policy, and therefore contrary to law, to recognize the right of a person to assign an interest in a claim which would not survive his death."

The first proposition, of course, is to be accepted. The action is certainly a tort action.

We, too, no doubt, have held in the cases of *Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733, and *Lown v. Casselman*, 25 N. D. 44, 141 N. W. 73, that an attorney's lien is in the nature of an equitable assignment of an interest in the claim. The subsequent conclusions of counsel, however, seems by no means to flow from these premises. Nor can we concede that in North Dakota, or indeed in any state, it is necessarily against public policy and therefore contrary to law to recognize the right of a person to assign an interest in a claim which would not survive his death, or at any rate that the legislature may not authorize such an assignment. Would anyone, for instance, claim that if a person had contracted for an annuity during his life, and interest in that annuity during the lifetime of the insured could not be assigned merely because under the contract the payments would stop at his death?

There is, in short, nothing in the nature of things which makes survivorship an essential to the legislative right to create a statutory lien. All that the question of survivorship affects is the right of assignability and the securing of a claim thereby when the statute is [117] silent and itself creates no lien. It is true that there is some confusion of thought upon the subject to be found among the authorities; but the confusion can, we believe, all be traced to one basic error, and that is the failure to distinguish between the cases which were decided in states and at a time when no statutory lien or right of an assignment was given or authorized, and in which the common-law rules as to assignability and as to attorneys' liens were alone to be relied upon, and those in which the legislature had spoken and in which a statutory lien such as ours had been created.

The Illinois cases of *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222, and *Standidge v. Chicago Rys. Co.* 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C 65, illustrate the point. At the time of the transaction which

was passed upon in the former of these cases, no statutory lien existed in Illinois, and the plaintiff's attorney had attempted to avoid the fact and to protect his claim by having the cause of action assigned to him as security for his fees. This the court held could not be done in the absence of statutory authority, as *the cause of action did not meet the common-law criterion of assignability which seems to have been survivability*. Between the handing down of the opinion in this case, however, and that in the later case of *Standidge v. Chicago Rys. Co.* supra, the legislature had intervened and created such a lien, and the court in the later opinion sustained the statute and the lien without even mentioning the elements of survivability or assignability.

The question, indeed, for us to determine is not whether the cause of action survives and is assignable, but whether, in enacting the statute under consideration, the legislature intended that its provisions should apply to tort as well as to contract actions. We think it did. If the North Dakota legislature intended that such a lien should exist, the cases which are founded on the common-law rule are certainly not applicable. There is no constitutional provision which forbids the enactment of any such statute. The allowance of such a lien cannot be said to be against public policy if the statute is otherwise valid, for public policy is the policy of the people of a state as a whole, and in the absence of a constitutional inhibition can be adequately and fully expressed by the legislature of a state. *Northern Pac. R. Co. v. Richland County*, 28 N. D. 172, Ann. Cas. 1916E 574, L.R.A.1915A 129, 148 N. W. 545.

[118] It is true that the statute in North Dakota does not provide that actions for personal injuries shall survive the death of the plaintiff. It seems, however, to be universally conceded, and even by the authorities on which respondent relies, that if such a statute existed, a lien such as that which is claimed in the case at bar would be valid and enforceable. *Corson v. Lewis*, 77 Neb. 449, 114 N. W. 281. It seems, too, to be conceded that, even in the absence of a statute of survivorship, such a lien would be enforceable upon the rendition of the judgment. *Anderson v. Itasca Lumber Co.* 86 Minn. 480, 91 N. W. 12, 291.

In commenting upon the Iowa case of *Smith v. Chicago, etc. R. Co.* 56 Ia. 720, 10 N. W. 244, the Minnesota court, for instance, in the case of *Anderson v. Itasca Lumber Co.* supra, says: "For authority we are cited to the case of *Smith v. Chicago, etc. R. Co.* supra. In that case attorneys were employed by a party claiming a cause of action against the defendant for personal injuries, and notice of the attorney's lien had been

served upon the defendant pending the action. After the entry of judgment, the client and defendant settled the case regardless of the attorney's notice, whereupon they brought suit against defendant to recover the amount of their fees, claiming a lien upon the money in its possession, and the court held in their favor. The statute upon which the court based its decision is similar to our own, but there is this distinction between the cases: In the Iowa suit the cause had ripened into a judgment, and therefore the attorney's claim had become vested in that judgment by virtue of which money actually became due the plaintiff from the adverse party." What distinction, however, there can be between a tort action after judgment and a tort action after a settlement between the parties it is difficult for us to see. The Minnesota case of *Anderson v. Itasca Lumber Co.* supra, says that the lien in the Iowa case of *Smith v. Chicago, etc. R. Co.* supra, was properly asserted because there was money which was actually due. Would anyone claim that after a valid settlement, and agreement between the plaintiff and the railroad company, and before the payment of the amount agreed upon on such settlement, there was not a liquidated sum of money actually due in the hands of the company and belonging to the plaintiff? After such settlement, he certainly could have sued in contract for the recovery thereof. It is admitted [119] that an action in contract is assignable and the subject of a lien. It is also admitted that the inchoate right to a lien, which was suspended until the rendition of a judgment in the Iowa case, was not made invalid because it had been so suspended, but, when the judgment was once obtained, could rest thereon. Why in the case at bar is it not reasonable to hold that under our peculiar statute the lien of the attorney, though suspended until a settlement or a judgment, became vested when that settlement was agreed upon and became a contract and the subject of an action in assumpsit? The only question in such cases should be whether there was any such settlement, and the defendant cannot deny the fact in this case, as it seems to have recognized it by paying over the money.

It is to be noticed indeed that the North Dakota statute uses the terms "action" and "proceeding" generally, and in no sense limits or qualifies their use. If it did not intend that the terms should cover tort as well as contract actions, why did it not use some qualifying clause, such as "an action or proceeding arising in contract" or "an action or proceeding not arising in tort?" We have, indeed, no option but to adopt the ordinary and statutory definition of the term "action" as well as the generally accepted meaning

of the word "proceedings." According to the Code, an action is "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Rev. Codes 1905, § 6742, Comp. Laws 1913, § 7330. According to the general acceptance of the term also, "the term 'proceeding' includes the form and manner of conducting judicial business before a court or judicial officer, regular and orderly progress in form of law; including all possible steps in an action from its institution to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." 23 Am. & Eng. Enc. of Law (2d ed.) 155.

The rule of statutory construction is well established. It is that, "if the language is clear and admits of but one meaning, the legislature should be intended to mean what it has plainly expressed, and there is no room for construction. The plain and sound principle is to declare it *lex scripta est*, although, so understood, the statute leads to absurd and [120] mischievous results, or to consequences not contemplated by the legislature; for courts are not to inquire as to the motive of the legislature, nor to depart from a meaning clearly conveyed in unambiguous words, because the statute, as literally understood, appears to lead to unwise consequences or to contravene public policy. *A fortiori*, there can be no departure from the terms of the statute, where no absurdity or inconvenience will follow from a literal interpretation. 26 Am. & Eng. Enc. of Law (2d ed.) 598.

It would appear to us that a plain reading of the statute before us can admit of but one construction, and that is that the words "action" and "proceeding" therein used include every form of action, whether founded on tort or in contract. We cannot say that the statute intervenes public policy, for, as we have before intimated, the legislature can announce its own public policy.

Nor are we without authority for coming to this conclusion. In speaking of a statute of Kansas which was in all material respects identical to our own, and from which our statute can no doubt trace its origin, even if it was not directly copied therefrom, the late Mr. Justice David J. Brewer, then a judge of the supreme court of Kansas, and before the adoption in North Dakota or in the territory of Dakota of the statute which is now before us, said: "Will the lien exist where the only claim of the plaintiff is one for damages for personal

injury, unliquidated and undetermined by judgment or verdict? In other words, may a defendant when sued in such an action, and before trial and verdict, settle with the plaintiff, pay him a certain amount, obtain a release and satisfaction of the claim, and thus free himself from all further liability either to the plaintiff or to his attorney, notwithstanding such attorney has, prior to the settlement, given notice of a claim for a lien, and such plaintiff is insolvent and irresponsible? This question must be answered in the negative. The lien will exist, and the defendant cannot thus defeat it. *It is unnecessary to inquire whether this would have been the rule independent of statute. This gives a lien not simply upon a judgment, but upon 'money due.'* It does not specify for what the money must be due, nor limit the lien to any particular class of liability or form of action. Wherever an action is pending, in which money is due, the attorney may establish his lien. And in an action, the verdict and judgment do not create the liability, [121] do not make the 'money due.' They are simply the conclusive evidence of the amount due from the commencement of the action. Again, according to the statute the lien dates from 'the time of giving notice.'" *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Anderson v. Metropolitan St. R. Co.* 10 Kan. App. 575, 61 Pac. 982.

Following these cases, also, are the Iowa cases of *Smith v. Chicago*, etc. R. Co. 56 Ia. 720, 10 N. W. 244; *Gibson v. Chicago*, etc. R. Co. 122 Ia. 565, 98 N. W. 474; *Barthell v. Chicago*, etc. R. Co. 138 Ia. 688, 116 N. W. 813; and *Winslow v. Central Iowa R. Co.* 71 Ia. 197, 32 N. W. 331, which base their holdings upon the Kansas decision, and come to the same conclusion, and later still and to the same effect the Illinois case of *Standidge v. Chicago Rys. Co.* 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C 65.

It is true that in Iowa there was also a statute which made a cause of action for personal injury survive the death of the plaintiff. The Iowa court, however, in no way based its holding upon this fact, nor did it make any reference to it or to the statute in any of the opinions cited. In the leading case of *Smith v. Chicago*, etc. R. Co. supra, the Iowa court said: "In the case at bar the parties agreed upon \$200 as the amount due. So far, the lien caused no embarrassment in the payment. The company should have paid the claimants' attorneys, the present plaintiffs and allowed them to settle with their client for what their services were worth. But the defendant claims that it was its right to pay the claimant directly, in the absence of the at-

torneys, and without their knowledge. The right to make such payment would doubtless be valuable in many cases. It is well known that irresponsible and unscrupulous claimants can be settled with upon more favorable terms after expensive litigation, if they can be allowed to receive the whole payment and cheat their attorneys. But, however valuable the right may be, this consideration has no weight when addressed to a court; nor do we think that there is anything which we can notice in the objection that, if a lien is allowed, attorneys will advise against proper settlements by compromise. The lien is valuable mainly where the claimant is irresponsible. Where such is the case, and the claim is a doubtful one, the attorneys are as much interested in settling by compromise as the claimant. Having considered how the [122] question stands upon principle, we have to inquire how it stands upon authority. The defendant relies upon *Wood v. Anders*, 5 Bush (Ky.) 601; *Henchey v. Chicago*, 41 Ill. 136; *Coughlin v. New York Cent. etc. R. Co.* 71 N. Y. 443, 27 Am. Rep. 75; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Hutchinson v. Howard*, 15 Vt. 544; *Foot v. Tewksbury*, 2 Vt. 97; *Hutchinson v. Pettes*, 18 Vt. 614; *Chapman v. Haw*, 1 Taunt. (Eng.) 341, 9 Rev. Rep. 786. All these cases, except the first, are cited in support of the proposition that there cannot be an attorney's lien before judgment. *But under our statute it is evident that there can be.* The provision under consideration is found in subdivision 3 of § 215 of the Code. Subdivision 4 of the same section provides for obtaining a lien after judgment. If no lien could be had except after judgment, no force could be given to subdivision 3. Besides, in *Myers v. McHugh*, 16 Ia. 335, above cited, the existence of an attorney's lien before judgment was expressly recognized. The case of *Wood v. Anders*, 5 Bush (Ky.) 601, cited by defendant, was decided under a statute which is in these words: 'Attorneys at law shall have a lien upon any chose in action, account, or other claim or demand put into his hands for suit or collection.' It was held that the claim or demand contemplated by the statute was a claim or demand arising only by contract. We cannot say, taking the whole provision together, that the construction placed upon the language used is not correct. *But our statute is different. It gives a lien upon money due.* It gives a lien, we think, wherever there is a liability to be discharged in money had an action is brought for its recovery. Damages for a tort are to be paid in money. It may be that the lien in such case, or in any case, is not enforceable until the amount has been determined by judgment or agreement. But whenever en-

forceable, the lien dates from the service of the notice. Code, § 215. The only decision to which our attention has been called, made by an appellate court upon a statute similar to ours, is in *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92. That action, like the present, was brought to recover for personal injuries. Notice of a claim of an attorney's lien was given. Afterwards the company settled with and paid off the claimant, and no judgment was rendered. The court held that the lien attached, and that the attorneys were entitled to recover of the company. The court said: "This (statute) gives a lien not simply upon a judgment, but upon 'money due.' It does not specify for what [123] the money must be due, nor limit the lien to any particular class of liability or form of action. Wherever an action is pending in which money is due, the attorney may establish his lien. And in an action the verdict and judgment do not create the liability, do not make the money due. They are simply the conclusive evidence of the amount due from the commencement of the action.' *In our opinion, then, the fact that the action in which the plaintiff's lien was sought was for a tort, and no judgment was rendered, is not sufficient to defeat their lien.*"

In speaking of this subject the author in *Ruling Case Law* says: "The lien which the statute fixes on the plaintiff's cause of action follows the transition, without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the lien attaches to that; if a compromise agreement is made, the lien attaches to that; and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent. Money paid to a litigant in settlement of a claim is held to be 'recovered' within the meaning of that word as used in an attorney's lien law." 2 R. C. L. 1081.

We agree with counsel for respondent that it is opposed to the policy of the law that any barrier shall be interposed to the right of the client to settle his controversy himself, and to dismiss his own cause of action without the dictation of his counsel. *Howard v. Ward*, 31 S. D. 114, 139 N. W. 771; *Kansas City El. R. Co. v. Service*, 77 Kan. 316, 14 L.R.A.(N.S.) 1105, 94 Pac. 262; *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760; *Williams v. Ingersoll*, 89 N. Y. 508; *Davis v. Webber*, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222; *Lipscomb v. Adams*, 193 Mo. 530, 112 Am. St. Rep. 500, 91 S. W. 1046.

We realize, of course, that there are some authorities which hold that the invalidity

of an agreement which provides that the client shall not settle the controversy without the consent of the attorney renders the whole contract invalid, the preliminary oral negotiations and the right to recover for the reasonable value of the services being merged in the written contract, and the written contract being void. See *Kansas City El. R. Co. v. Service*, 77 Kan. 316, 14 L.R.A.(N.S.) 1105, 94 Pac. 262; *Moreland v. Devenney*, 72 Kan. 471, 83 Pac. 1097; *Bowman* [124] v. *Phillips*, 41 Kan. 364, 3 L.R.A. 631, 13 Am. St. Rep. 292, 21 Pac. 230. The cases cited, however, do not seem to express the general rule; and we prefer to follow that general rule which seems to be that "where a contract between an attorney and his client is valid except as to the clause prohibiting either from settling without the consent of the other, this clause may be stricken from the contract and the balance of it upheld." See *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760; *Jackson v. Stearns*, 48 Ore. 25, 5 L.R.A.(N.S.) 390, 84 Pac. 798.

The holding which we make, however, in no way interferes with this right of settlement when legitimately and honestly pursued. We, in fact, adopt the statement of the law on the subject which is to be found on page 1080, vol. 2, of *Ruling Case Law*, and which is as follows: "Since the charging lien of an attorney does not attach before judgment, in the absence of statute giving a lien on the cause of action or on the property involved, or on money in the hands of the adverse party, or where a contract between the parties operates as an equitable lien on or an assignment of the cause of action, the fact that the lien of the attorney will attach to the judgment, decree, or award when obtained, will not affect the almost universally conceded right of the client at any time before judgment to dismiss, compromise, or settle his cause of action without his attorney's consent or even over his objection, where such dismissal, compromise, or settlement is effected in good faith, and thereby to prevent the attorney's lien from attaching to the money or property received by the client in settlement. The lien of the attorney may be defeated by such act or the client, though the latter agreed to pay the attorney a percentage of the proceeds of the judgment, and notwithstanding an express agreement on the part of the client not to dismiss, settle, or compromise without the consent of the attorney. *Even in those jurisdictions where the attorney's lien attaches by virtue of statute to the cause of action, to the property involved, or to money in the hands of the adverse party, it has been held that the client may compromise or settle the litigation without the consent of the attorney, but where such right is exercised the*

lien of the attorney will not be defeated thereby, but will attach to the proceeds of the settlement. The lien which the statute fixes on the plaintiff's cause of action follows the transition, without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the [125] lien attaches to that; *if a compromise agreement is made, the lien attaches to that*; and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent." See also *Standidge v. Chicago Rys. Co.* 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C 65.

It is perfectly clear that a lien would have existed in favor of the attorney on any judgment that might have been obtained, and that such a lien would not have been against the policy of the law, even though the action happened to be a tort action. It seems to be equally clear that if a settlement has been agreed upon in the action, and the attorney had been afterwards employed to sue on and to enforce that contract of settlement, a lien could have been given to him in the matter. What supposed rule of public policy then does a statute violate which, though not depriving the client of the right to settle when and how he pleases, gives to the attorney, through whose services that settlement has presumably in a large measure been made obtainable, a lien upon whatever amount may be agreed to be paid?

Counsel is entirely in error in his assumption made upon the oral argument that contingent fees in personal injury suits are frowned upon by the law. Their validity is now, at least in America, everywhere recognized, and it is a matter of common knowledge, or should be a matter of common knowledge to every lawyer and judge, that the American Bar Association has refused to disapprove of them, and, although recognizing their liability to abuse, has merely sought to guard against that abuse. The code of ethics of the American Bar Association goes no further than to say that "contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges." See 34 Am. Bar. Asso. Rep. p. 1163.

The reason is very clear and that is that the original reason for the protest against contingent fees and champertous contracts no longer exists, and not only the American bar, but the American legislatures, have long since come to recognize the fact. The English rule against contingent fees has never in fact generally prevailed in America, and even that rule was the result of an effort to cover up and perpetuate injustice

rather than to prevent it. It was the result, indeed, of two great arbitrary confiscations of property; those perpetrated by the Norman [126] Kings when they dispossessed the Saxon proprietors and parceled their lands among their own retainers, and those perpetrated by the Parliament of Henry VIII. when the churches were dispossessed and the same division of property took place. Those in control did not want title litigated or suits encouraged, and hence the rules against champerty and maintenance, while those against contingent fees have only been justified in England in later days by a resort to the fiction that the attorney is not a "laborer entitled to his hire," but an aristocrat, beneath whose dignity it is, and who therefore is not allowed, to contract for any fees at all. "The dignity of the role, instead of any principle of policy, furnished all the argument that can be brought to the support of the rule." Chief Justice Gibson in *Foster v. Jack*, 4 Watts (Pa.) 334; see *Lytle v. State*, 17 Ark. 608; *Foster v. Jack*, *supra*; *Davis v. Webber*, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822. Here in America not only is the contingent fee generally allowed, but in many cases it is socially necessary. The poor man who loses his legs or arms in an accident is perforce pauperized and liable to become a public charge unless some redress can be obtained from the guilty party, and that cannot be had without the help of counsel. Contingent fees are abused, and the ambulance chaser is abroad, but so also is the defaulting client who refuses to pay for service rendered, as well as the unconscionable claim agent. These evils, however, can be cured by legislation or by proper court supervision, and their cure by no means necessitates the abolition of the contingent fee.

The refinements of ethical theory indeed cannot overcome plain ethical facts. If contingent fees in personal injury suits are not permissible, how, in the majority of instances, can a poor man get any redress at all? When, indeed, the states everywhere provide for employers' liability acts which shall be enforced by the states themselves, or poor men's lawyers who shall not be mere fledgling volunteers, but competent attorneys, then, and not till then, can the contingent fee be done away with.

In dealing with this question of public policy, we cannot do better than to quote from the case of *O'Connor v. St. Louis Transit Co.* 198 Mo. 641, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703, where the supreme court of Missouri says: "It is insisted by appellant that this act restricts or destroys the defendant's right to contract. We are [127] unable to give our assent to this insistence. The provisions of this act

simply create a lien upon the cause of action in favor of the attorney at law, and requires the defendant, after due notice, which creates such lien, in dealing with the party as to such cause of action, that such lien shall be respected. If we are dealing with the owner of a horse, and have notice that there is a valid subsisting lien upon the horse, we would not contend for a moment that such lien could be ignored. So it is in respect to other property,—in dealing with the owner of it, if we have notice of the existence of a lien, such lien cannot be ignored. Is there any difference if a defendant has notice of the existence of a lien of an attorney upon a cause of action, and the instances above cited? We think not. This law does not deprive a defendant of any of his rights. When the lien is created, in dealing with the plaintiff in respect to such cause of action he must act accordingly. It does not deprive him of the right to make a settlement, but in making such settlement it simply requires that he shall take into consideration the fact that the attorney at law has a lien upon the cause of action, and, if such lien is ignored, he will be required to account to him in an action at law for the amount of such lien. This act is vigorously assailed by learned counsel for appellant on the ground that it tends to lead to the commission of unprofessional acts on the part of attorneys. This may be true in some instances, but the profession of law, when practised upon a high plane, is an honorable one, *and by no means should an act of the general assembly, presumably enacted for the benefit of the honorable practising lawyers of the state, be declared invalid for the reason that instances may arise by reason of the law, which enable some of the less reputable attorneys to do acts which are not commendable along professional lines.* In our opinion this law is constitutional and valid." See also *Standidge v. Chicago Rys. Co.* 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C 65; *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 492, 66 N. E. 395, 13 Am. Neg. Rep. 396.

There is therefore in our opinion no merit in the contention that a contrary view must be taken because the policy of the law is undoubtedly in favor of the settlement of controversies, and that it would be against public policy for a client to relinquish to his attorney the right of settling and disposing of such an action. The statute, as we construe it, by no means gives to the attorney this right. If it did so it would express [128] the public policy of the legislature, and we find nothing in the Constitution to prevent the establishing of that public policy. It does not, however, do so. It merely gives to the attorney a lien on the

amount of "money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing to such adverse party, or the attorney of such party." Comp. Laws 1913, § 6875.

There was no money due in the hands of the adverse party until the settlement was made, and that settlement, under the common law and under the statute, the client was at liberty to make even without the consent of his attorney. Immediately, however, that the settlement was made, the controversy became liquidated, and there was a sum of money due and owing to the plaintiff and in the hands of the defendant. See *Standidge v. Chicago R. Co.* supra, 2 R. C. L. 1081. Then, and not till then, did the lien vest, but at that time it was valid and operative. It vested and was operative merely upon the amount which had been agreed to be paid to the client and the attorney, who, having no right to dictate the terms of settlement, could not claim a lien upon any greater amount. See 2 R. C. L. 1081.

We have carefully examined the authorities cited by counsel for respondent, and find them by no means as conclusive as they seem to appear to him. The case of *Howard v. Ward*, 31 S. D. 114, 139 N. W. 771, was one in which the plaintiff's attorney sought to set aside a settlement which had been made by the defendant with his client. There was in it no attempt to assert a lien on the amount for which the settlement was made under a statute similar to our own.

The case of *Lawrence v. Martin*, 22 Cal. 174, merely involved the assignability of a cause of action for malicious prosecution, and no attorney's lien or statute creating the same was in any way involved.

The case of *Coughlin v. New York Cent. etc. R. Co.* 71 N. Y. 444, 27 Am. Rep. 75, was handed down in 1877, and nowhere considers or passes upon the right of an attorney to a lien under a statute similar to our own. The case of *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109, involves the assignability of a cause of action for fraud merely, and the right of an attorney to a lien is not [129] considered nor discussed. The case of *Pulver v. Harris*, 52 N. Y. 73, was handed down in 1873, and no statute similar to our own was discussed or involved. The case of *Murray v. Buell*, 76 Wis. 657, 20 Am. St. Rep. 92, 45 N. W. 667, merely involves the assignability of an action for conspiracy, and no attorney's lien is discussed or considered. The same is true of the case of *Tyler v. Superior Ct.* 30 R. I. 107, 23 L.R.A.(N.S.) 1045, 73 Atl. 467,

the action involved, however, being one of assault and battery.

The case of *Hammons v. Great Northern R. Co.* 53 Minn. 249, 54 N. W. 1108, holds that a lien cannot be created upon a mere right of action for a personal tort, and bases its conclusion upon the fact that the cause of action does not survive, but discusses no statute. It relies upon the case of *Hunt v. Conrad*, 47 Minn. 557, 14 L.R.A. 512, 50 N. W. 614, which holds that a cause of action for false imprisonment cannot be assigned, but passes upon no statute relating to an attorney's lien. The case of *Anderson v. Itasca Lumber Co.* 86 Minn. 480, 91 N. W. 12, 291, passed upon a statute similar to our own, and is an authority for respondent. It, however, seems to concede that a lien would vest in the judgment, and in that case there would be *money due* in the hands of the defendant. It is difficult for us to see, if this is the case, why there would not be money due after a settlement had been made. The case of *Boogren v. St. Paul City R. Co.* 97 Minn. 51, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691, 106 N. W. 104, is a case, not where the attorney seeks to impose a lien upon the amount for which the client has settled, but to continue the action in order to assert a lien. It may, however, generally speaking, be considered an authority in support of the contention of the respondent.

The case of *Smelker v. Chicago, etc. R. Co.* 106 Wis. 135, 81 N. W. 994, seems to recognize an attorney's lien in a tort action, but lays down a rule of procedure which we hardly wish to recognize here, and which is not argued for by respondents. It is that "under Rev. Stat. 1898, § 2591a, providing that one claiming a right of action sounding in tort, or for unliquidated damages, may contract with an attorney to prosecute it, and give him a lien on such cause of action as security for his fees, and that, when notice of the agreement is given the opposite party, no settlement or judgment of such action shall be valid as against the lien, provided the agreement for fees be fair and reasonable, settlement, [130] without such attorneys' knowledge, does not give them a right to maintain in their own name against the defendant an action for their fees, though the agreement was that they should receive one third of any amount recovered, but their remedy is by prosecuting the original action, in which they must prove the case as though there had been no attempted settlement."

The case of *Hanna v. Island Coal Co.* 5 Ind. App. 163, 51 Am. St. Rep. 246, 31 N. E. 846, was handed down in a state where there was no provision for an attorney's lien on "money due" in the hands of the defendant, but merely on *any judgment rendered in*

favor of any person or persons employing such attorney.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings according to law.

FISK, Ch. J.—I most respectfully dissent.

ON PETITION FOR REHEARING.

(March 18, 1915.)

Goss, J.—A strong petition for rehearing has been filed. The writer can add but little to what has been well said in the main opinion by Justice Bruce. As the only statutes identical with our statute of peculiar phraseology are those of Kansas and Iowa, decisions from those states should have great weight in declaring the construction of our statute. Especially is this so when it had received a construction by the supreme court of Kansas before or practically contemporaneous with its adoption here. The decision in 1876 of *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92, characteristic of opinions written by Justice Brewer, left little unsaid. It is directly in point, and supports every contention of the plaintiffs, and is based on the same statute. That decision has ever continued without modification as the law of that state and as a satisfactory construction of the statute before us. *Smith v. Chicago, etc. R. Co.* 56 Ia. 720, 10 N. W. 244, the first pronouncement of the supreme court of Iowa on the subject in tort action, cites and follows the Kansas case, and has likewise remained the law of that state. This statute was adopted as § 9 of chapter 18 of Revised Codes of Dakota territory in 1877 prior to its construction in Iowa, but one year after it had been construed in Kansas. With the adoption of the [131] statute from Kansas was also adopted its construction, and this is true whether it was indirectly adopted therefrom through Iowa or directly from Kansas. The statute first appeared in Iowa as § 2 of chapter 167 of Laws of 1870. It existed prior to 1866 in Kansas.

Up to two years ago Minnesota had a statute somewhat similar, which read, "upon money in the hands of the adverse party," instead of like ours, "upon money due his client in the hands of the adverse party." The Minnesota holding, *Anderson v. Itasca Lumber Co.* 86 Minn. 480, 91 N. W. 12, 291, has been against the right to a lien on settlement before judgment until the holding in *Desaman v. Butler*, 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E 643, holding that a collusive settlement after verdict renders the party against whom the verdict was had liable for an attorney's lien as for the settlement of a judgment. See note to-

Ann. Cas. 1913E 646. Nebraska and Minnesota long had the same statute. It is significant that on the identical statute, as so construed in Minnesota, Nebraska in *Corson v. Lewis*, 77 Neb. 454, 114 N. W. 281, has elected to follow Kansas and Iowa, whose statute we have. After answering every contention made by respondent's counsel in the instant case, including that of nonassignability of causes of action for tort, the Nebraska supreme court in 1907 said: "We prefer to follow the courts of Kansas and Iowa in holding that in a pending cause of this nature, notice of an attorney's lien properly given binds the defendant, so that a settlement between the parties and payment before judgment will not operate to defeat the attorney's right."

And legislation in at least three of the states whose precedent we are urged to adopt, viz., New York, Minnesota, and Wisconsin, establishes that the early statutes, as construed in those states, were so unsatisfactory in practice as to cause the enactment of unequivocal statutes granting the attorney a lien on the cause of action whether in tort or in contract. Subdivision 3 of § 4955, Minn. Gen. Stat. 1913, amending prior law, and *Smelker v. Chicago*, etc. R. Co. 106 Wis. 135, 81 N. W. 994. In *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 492, 66 N. E. 395, 13 Am. Neg. Rep. 396, Justice Vann reviews the legislation of that state. This case is also authority for the kind of action brought in the instant case,—a separate action in equity to define, determine, and enforce the attorney's lien of the plaintiffs, [132] instead of the procedure sometimes used in some other states, that of continuing proceedings entitled as in the former action or by intervening therein, as illustrated by *Desaman v. Butler* and *Corson v. Lewis*, supra, respectively. See note in 51 Am. St. Rep. 251; also discussion in text with citation of authority at 2 R. C. L. 1080-1086. Here a statutory attorney's charging lien, sought to be enforced by an independent action in equity, is being dealt with. No common-law lien rules apply. The trend of decisions is toward adequate protection to the attorney against unjust and inequitable settlements. My conclusion is that this lien existed in an inchoate form from and after notice thereof given until a condition arose whereunder it became complete; and such was the situation immediately upon the agreement made between the client and the defendant, whereby the unliquidated liability in tort became converted into an amount certain and a recovery in the action. *Standidge v. Chicago Rys. Co.* 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C 65. Thereupon the lien of the attorney immediately attached to

the fund, whatever its form. It was then money due "in the hands of the adverse party" within the meaning and intent of the statute.

Nor is the right of the defendant to buy its peace involved; nor is the right of the plaintiff to make a bona fide settlement with defendant necessary to be considered. As to these respective rights the courts of all states, those denying as well as those granting the attorney's lien, are in accord. Courts have the power, and exercise it, to protect the client from the unscrupulous attorney whenever necessary, and that power must not be confused or confounded with authority to likewise preserve the attorney's rights from his unscrupulous client in a collusive settlement with a naturally unfriendly defendant. These questions are discussed in *Fischer-Hansen v. Brooklyn Heights R. Co.*, and in *Desaman v. Butler* supra, and cases cited. Paragraph 13 of the complaint charges a collusive and fraudulent settlement "secretly for the purpose of cheating and defrauding said firm out of their attorney fees in said action." As the lien attached to this money in the hands of the opposite party in that pending action before its payment to the plaintiff in that action, it was not discharged by said payment; and for the purposes of this action, to the amount of the lien, the fund is to be treated as still in the hands of the defendant company and subject [133] to court order. This assumes, of course, on demurrer only, the truth of all matters in the complaint.

Rehearing is denied.

NOTE.

Lien of Attorney as Extending to Action for Tort.

Generally.

The common-law rule is that since a cause of action for tort is unassignable an attorney's lien will not attach thereto until after the rendition of judgment therein, and that rule apparently obtains in several jurisdictions. *Lamont v. Washington*, etc. R. Co. 2 Mackey (D. C.) 502, 47 Am. Rep. 268; *Hanna v. Island Coal Co.* 5 Id. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; *Grand Rapids*, etc. R. Co. v. *Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495; *Weller v. Jersey City*, etc. R. Co. 66 N. J. Eq. 11, 57 Atl. 730; *Tyler v. Superior Ct.* 30 R. I. 107, 73 Atl. 467, 23 L.R.A.(N.S.) 1045.

The common-law rule has also been declared in early cases in a number of jurisdictions wherein by virtue of statutes hereafter discussed a lien on a cause of ac-

tion for tort is now held to exist. *Henchey v. Chicago*, 41 Ill. 136; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L.R.A. 177; *Hammons v. Great Northern R. Co.* 53 Minn. 249, 54 N. W. 1108; *Anderson v. Itasca Lumber Co.* 86 Minn. 480, 91 N. W. 12, 291; *Nielsen v. Albert Lea*, 91 Minn. 388, 98 N. W. 195; *Boogren v. St. Paul City R. Co.* 97 Minn. 51, 106 N. W. 104, 114 Am. St. Rep. 691, 3 L.R.A.(N.S.) 379; *Quincey v. Francis*, 5 Abb. N. Cas. (N. Y.) 286; *Wade v. Orton*, 12 Abb. Pr. N. S. (N. Y.) 444; *Pulver v. Harris*, 52 N. Y. 73, 62 Barb. 500; *Coughlin v. New York*, etc. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; *Randall v. VanWagenen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; *Keane v. Keane*, 86 Hun 159, 33 N. Y. S. 250; *Oliwell v. Verdenhalven*, 17 Civ. Pro. 362, 7 N. Y. S. 99. See also *Desaman v. Butler*, 118 Minn. 198, Ann. Cas. 1913E 643, 136 N. W. 747. See also *Sweet v. Bartlett*, 4 Sandf. (N. Y.) 661. See also *Wright v. Wright*, 70 N. Y. 98. Compare *Kusterer v. Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

A statute giving to an attorney a lien on the cause of action or on the money due to his client from the adverse party "in any action" in which he is employed or by the use of similar general terms indicating no intention of confining the lien to actions on contract gives a lien on a cause of action for tort. *Miller v. Houston*, 27 Colo. App. 89, 136 Pac. 786; *Coleman v. Ryan*, 58 Ga. 132; *Standidge v. Chicago Rys. Co.* 254 Ill. 524, Ann. Cas. 1913C 65, 98 N. E. 963, 40 L.R.A.(N.S.) 529; *Smith v. Chicago*, etc. R. Co. 56 Ia. 720, 10 N. W. 244; *Winslow v. Central Iowa R. Co.* 71 Ia. 197, 32 N. W. 331; *Gibson v. Chicago*, etc. R. Co. 122 Ia. 565, 98 N. W. 474; *Barthell v. Chicago*, etc. R. Co. 138 Ia. 688, 116 N. W. 813; *Cheshire v. Des Moines City R. Co.* 153 Ia. 88, 133 N. W. 324; *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Anderson v. Metropolitan St. R. Co.* 10 Kan. App. 576, 61 Pac. 982; *Castigliano v. Great Northern R. Co.* 129 Minn. 279, 152 N. W. 413; *Yonge v. St. Louis Transit Co.* 109 Mo. App. 235, 84 S. W. 184; *Corson v. Lewis*, 77 Neb. 449, 114 N. W. 281; *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 492, 66 N. E. 395; *O'Brien v. Mut. Ry. Co.* 27 App. Div. 1, 50 N. Y. S. 159; *Astrand v. Brooklyn Heights R. Co.* 24 Misc. 92, 53 N. Y. S. 294; *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041; *Tompkins v. Nashville*, etc. R. Co. 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340; *Gulf*, etc. R. Co. v. *Eldredge*, 35 Tex. Civ. App. 467, 80 S. W. 556; *Smelker v. Chicago*, etc. R. Co. 106 Wis. 135, 81 N. W. 994. And see the reported case. See also *Alexander v. Grand Ave. R. Co.* 54 Mo. App. 66.

Thus a statute whereby a lien is given to attorneys on all claims and demands and on all judgments due or to become due from any client, gives a lien on a cause of action in tort. *Miller v. Houston*, 27 Colo. App. 89, 146 Pac. 786. In that case it appeared that the parties to a breach of promise suit settled after the commencement of the action without the knowledge of the plaintiff's attorney, whose contract was for one-third of the recovery. The court in holding that the attorney had a lien said: "There is nothing in the statute indicating a purpose of the legislature to exclude causes of action for personal injuries from the lien act. There is every reason why such causes of action should be included therein. Under the recent development of our great factory system, extensive power, transportation, mining and other developments, serious personal injuries and accidental deaths are constantly taking place among the wage earners and persons of small means. Their suits are generally presented, and necessarily so, for a portion of the amount to be recovered as a contingent fee. Without this privilege it would be most difficult, if not impossible, for most of the injured ones, or the relatives of the dead ones, to enjoy the privileges of the courts in collecting damages for such injuries by reason of the lack of necessary means to employ counsel. However, without this statute, we do not understand that the courts, generally in England or America, permitted collusive settlements between plaintiffs and defendants for the purpose of depriving the attorney of the plaintiff of the value of his services, which made such settlement possible. While public policy favors settlements and cessations of litigation, it does not favor them by collusion and fraud upon other vested rights in the subject of the action."

A statute which by its terms gives an attorney a lien on "money due his client in the hands of an adverse party" without specifically confining it to actions on contract, entitles an attorney to a lien on an action for tort. *Smith v. Chicago*, etc. R. Co. 56 Ia. 720, 10 N. W. 244, wherein the court said: "We come next to inquire whether the actions in which an attorney's lien can properly be claimed are limited to actions on contract. The statute provides that an attorney may have a lien upon money due his client in the hands of the adverse party in 'an action,' etc. If by 'an action' is meant simply an action upon contract, the legislative intent was certainly very inexplicitly and very strangely expressed. We can see no reason for leaving the word, upon contract, to be interpolated by judicial construction. But it is said that the necessity for such interpolation appears from the very nature of the case. It is said that there

cannot be money due the claimant in the hands of the adverse party in an action where there is simply a liability for a tort. In a certain sense this is true; but it is not more true than that there cannot be money due the claimant, in the hands of the adverse party, in an action where there is simply a liability upon contract. In neither case is there any specific money upon which the attorney has a lien in the sense in which an innkeeper has a lien upon the trunk of his guest, or the landlord upon the personal property of his tenant, used upon the premises during the tenancy. An attorney's lien is a mere right to demand that when the payment of the money due the attorney's client comes to be made, whether voluntarily or involuntarily, the attorney's claim shall be respected. Viewing the lien in this light, it will be seen at once that there is no more difficulty in allowing it in an action brought for a tort than in an action brought upon a contract."

A statute providing that "an attorney has a lien for a general balance of compensation . . . upon money due to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party," gives a lien on a cause of action for tort. *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92.

As to the constitutionality of a statute giving an attorney a lien on a cause of action for tort, see the note to *Standidge v. Chicago R. Co.* Ann. Cas. 1913C 65.

Remedy of Attorney.

The courts seem to differ as to the remedy to be pursued by an attorney against the defendant in an action for tort who settles with the plaintiff without the attorney's knowledge.

In some jurisdictions where an attorney gives notice to the defendant before trial that he has a lien on the cause of action, after which the parties settle and the suit is dismissed, the attorney may maintain a separate action to recover the amount due on his lien, and in such an action the client is not a necessary party. *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Yonge v. St. Louis Transit Co.* 109 Mo. App. 235, 84 S. W. 134. And see the reported case. And in such an action it is no defense that the plaintiff is solvent and willing to pay. *Yonge v. St. Louis Transit Co.* supra.

A statutory remedy by means of a petition, is not exclusive, but cumulative, and an attorney is not precluded from bringing an action in equity to enforce his lien; and this is true though the relief ultimately granted

is in the form of a money judgment. *Fischer-Hansen v. Brooklyn Heights R. Co.* 173 N. Y. 492, 66 N. E. 395. Compare *O'Brien v. Metropolitan St. R. Co.* 27 App. Div. 1, 50 N. Y. S. 159.

It was held in *Tompkins v. Nashville*, etc. R. Co. 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340, that the plaintiff was not precluded from directing a dismissal of a tort action without prejudice and his attorney could not object to a dismissal without his consent; nor would he be permitted to prosecute the suit to a judgment for his own benefit. In *Rowe v. Fogle*, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708, it was held that an action by an attorney to enforce his lien against the defendant would not lie where the plaintiff who retained the attorney dismissed the suit in good faith and without receiving anything, the attorney's remedy being against the plaintiff and not the defendant. Compare *Wood v. Anders*, 5 Bush (Ky.) 601.

In other jurisdictions the remedy of the attorney in case of a settlement by the client of a cause of action for tort on which he has a lien is to intervene in the original action and continue it for his own benefit. *Coleman v. Ryan*, 58 Ga. 132; *Corson v. Lewis*, 77 Neb. 449, 114 N. W. 281; *Smeecker v. Chicago*, etc. R. Co. 106 Wis. 135, 81 N. W. 994.

An attorney who notifies the defendant of his lien in a tort action need not state the amount of his claim, but if stated the defendant may arrange any settlement with the plaintiff not inconsistent with the attorney's lien; and such notice when served after rendition of judgment, which is reversed on appeal, is sufficient without serving a new notice, and any settlement made after the reversal will remain subject to the original notice. *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92. To the same effect see *Astrand v. Brooklyn Heights R. Co.* 24 Misc. 92, 53 N. Y. S. 294. Nor is it necessary that in such notice the attorney should apprise the defendant of any of the terms of the agreement existing between himself and the plaintiff in order to put the defendant on inquiry. *Grand Rapids*, etc. R. Co. v. *Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495.

To nullify a settlement made in good faith between the parties, proof of the notice sent to the defendant by the attorney seeking to enforce his lien must be satisfactory and not depend on mere inferences. *Wright v. Wright*, 70 N. Y. 98. And the burden is on the attorney to show that the defendant had notice before settlement. *Gulf*, etc. R. Co. v. *Eldredge*, 35 Tex. Civ. 467, 80 S. W. 556.

LORICK

v.

SEABOARD AIR LINE RAILWAY.

South Carolina Supreme Court—October 14,
1915.

102 S. Car. 276; 86 S. E. 675.

Master and Servant — Federal Employers' Liability Act — Employees Included — Car Repairer.

An injury received by a car repairer, while raising a fallen drawhead to standard height during the temporary stoppage of the car for that purpose while in interstate transit, falls within the federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [Fed. St. Ann. 1909 Supp. p. 584]), regulating the liability of interstate carriers to employees.

[See Ann. Cas. 1914C 164; Ann. Cas. 1916E 472.]

Assumption of Risk.

Whether a car repairer who continued at work after complaining of the lack of a certain tool, on the master's promise to supply it, assumed the risk of working without it so as to bar an action under the federal employers' liability act (Fed. St. Ann. 1909 Supp. p. 584) is held to be for the jury.

[See note at end of this case.]

Appeal from Common Pleas Circuit Court, Lexington county: MEMMINGER, Judge.

Action by J. H. Lorick, plaintiff, against Seaboard Air Line Railway, defendant. Judgment for defendant. Plaintiff appeals. **REVERSED.**

[277] Action by J. H. Lorick against Seaboard Air Line Railway brought under the Federal Employers' Liability Act for an injury sustained by him while engaged in repairing a coupler to a car which had become out of repair, in transit from some point on the line of the Seaboard Air Line Railway to a point without the State of South Carolina.

The car was being repaired by reason of the fact that a connecting road, to which it had been tendered, had refused to receive it until repairs were made.

The testimony tended to show that the plaintiff, a car inspector, was not provided with a jack, which was necessary to make the repairs he was required to make, and that he had on several occasions complained to his superior officers, agents of the Seaboard Air Line Railway, that he should be provided with such appliance, and the promise had been made to him, the last time, about three weeks before the accident, that a jack would be furnished him.

Not having the necessary appliance, the only way in which he could raise this coupler

was to use his shoulder and press it up, and, in doing so, he sustained an injury for which the action was brought.

[278] At the close of plaintiff's evidence, the defendant moved for a nonsuit on the ground that the plaintiff had assumed the risk of the work and that there was no compulsion for him to do this work at that time.

From order granting the nonsuit, plaintiff appeals.

Frank G. Tompkins and *Geo. Bell Timmerman* for appellant.

Lyles & Lyles and *C. M. Eford* for respondent.

WATTS, J.—The exception raises but one point, and that is that the presiding Judge erred in granting the *nonsuit*, when the evidence showed facts that should have been submitted to the jury for their determination. It is conceded by both sides that the plaintiff brought his case under the Federal Employers' Liability Act, as it was shown clearly by the evidence that the car was to be taken from one State to another State, and was engaged in interstate commerce at the time plaintiff was making repairs on it. This being the case, the Federal Safety Appliance Act also applies (36 Stat. at L. 298, chap. 160, Fed. St. Ann. 1912 Supp. p. 335, Compiled Stats. 1913, sec. 8617). Section 4 of this act, known as the act of 1893, as amended in 1903 and 1910, is as follows: "That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act not [279] equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the act of March 2, 1893, as amended April 1, 1896: *Provided*, That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section 4 of this act or section 6 of the act of March 2, 1893, as amended by the acts of April 1, 1896, if such movement is necessary to make such repairs, and such repairs cannot be made except at such repair point; and such movement of hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee

caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

The provision of this section applicable to the question has been construed by the opinion of the Supreme Court of the United States in the case of *U. S. v. Erie R. Co.* 237 U. S. 402, 35 S. Ct. 621, 59 U. S. (L. ed.) 1019, where the following language is used: "The hauling of the cars with defective equipment was clearly in contravention of the statute. While section 4 of the act of 1910 permits [280] such cars to be hauled without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars by means of chains instead of drawbars in association with other cars in commercial use, unless the defective cars 'contain live stock or perishable freight.' Six of the cars that were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of drawbars in association with other cars in commercial use, and it is not claimed that they contained live stock or perishable freight."

This act applies to all trains of cars engaged in interstate commerce and all vehicles in connection therewith. *Southern R. Co. v. U. S.* 222 U. S. 20, 56 U. S. (L. ed.) 72, 32 S. Ct. 2. The evidence in this case shows that the defendant was engaged in transferring the defective car in question from one State to another, and comes within the meaning of the Federal Employers' Liability Act of April 22, 1908 (Fed. St. Ann. 1900 Supp. p. 584).

It is the settled law of this State, that the servant assumes the ordinary risk incident to his labor, but he does not assume such risks as may be caused by the master negligently failing to furnish suitable appliances to perform his work, but if the servant continues in the service with knowledge of such defective appliances he is deemed to have waived the master's negligence, and to have assumed the risk in spite of the master's

negligence; but if he complains of, and calls attention to the defect, and there is a promise on the part of the master to furnish such suitable appliances as it is his duty to do, and the employee, while remaining thereafter in the master's service is injured, [281] it is a question for the jury to determine whether the employee, by remaining in the master's service, assumes such risk.

"The remaining in master's service by an employee, after knowledge of an alleged defect in the instrumentalities to be furnished by the master, is not, as a matter of law, an assumption of risk by the employee. Whether the employee assumed the risk, is a question for the jury, to be determined from all the circumstances of the case." *Mew v. Charleston, etc. R. Co.* 55 S. C. 101, 32 S. E. 828. "A promise by the master to remedy a defect tends to rebut the inference of waiver of the defect by the servant's remaining in the master's service after knowledge. If the servant continued in discharge of his duties, relying on the master's promise to remove the defect, he could not be said to have waived such defect. The jury was the tribunal to determine this question in this case." *Powers v. Standard Oil Co.* 53 S. C. 363, 31 S. E. 276. As to the same principle, see *Bodie v. Charleston, etc. R. Co.* 61 S. C. 478, 30 S. E. 715; *McCarley v. Manufacturing Company*, 75 S. C. 390, 56 S. E. 1; *Hankinson v. Charleston, etc. R. Co.* 94 S. C. 154, 77 S. E. 863.

The law of assumption of risk as settled by the Supreme Court of United States in *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 504, 34 S. Ct. 635, 58 U. S. (L. ed.) 1070, L.R.A.1915C 1, Ann. Cas. 1915B 475, is as follows: ". . . Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from [282] it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. (Here the Court cites number of cases.)

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the

employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise." (Here the Court cites number of cases.)

It has also been held where there is a conflict of testimony as to the assumption of risk, it is a question to be decided by the jury.

This has always been the law of this State, and so, also, determined by the Supreme Court of United States in *McGovern v. Philadelphia, etc. R. Co.* 235 U. S. 389, 35 S. Ct. 127, 59 U. S. (L. ed.) 283. So neither under the State law, nor under the Federal law, could this issue be determined without submission to the jury. His Honor was in error in granting the *nonsuit*, and the order of *nonsuit* must be set aside and reversed.

Reversed.

Gary, C. J., and Hydrick and Gage, JJ., concur in the opinion of the Court.

FRASER, J. (*dissenting*).—I dissent. I think the evidence shows that the plaintiff injured himself.

NOTE.

The reported case, recognizing the doctrine that with certain exceptions the common-law rule of assumption of risk applies in an action under the federal employers' liability act (Fed. St. Ann. 1909 Supp. p. 584), holds that it is a question for the jury whether the risk of injury was assumed by a railroad repair man who continued to work without an appliance needed in his work for three weeks after he had complained of the lack of that appliance and the master had promised to furnish it. The assumption of risk under the federal employers' liability act is discussed in the note to *Seaboard Air Line Ry. v. Horton*, Ann. Cas. 1916B 475.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

v.

O'BRIEN.

Kentucky Court of Appeals—February 10, 1916.

168 Ky. 403; 182 S. W. 227.

Carriers of Goods — Delay in Transportation — Damages.

In an action for damages to shipments of tobacco, limited by the trial court to the damages resulting from an unreasonable delay between an intermediate point and destination, and to the difference between the market value of the damaged shipment when delivered and its market value when it should have been delivered, the evidence is held to sustain a verdict for plaintiff for \$1,000.

Instructions — Abstract Instruction.

In an action against a carrier for damages to shipments of tobacco, an instruction that it was the duty of the defendant and its connecting carriers, after the tobacco had been damaged by flood at an intermediate point, and as soon as conditions there would permit, to promptly carry it to destination, and that defendant and its connecting carriers failed to perform such duty by reason of which the tobacco was further damaged, in so far as bearing on the question of promptness, merely prefatory and abstract, and not submitting the question itself, is not prejudicial to defendant.

Assumption of Facts in Instruction.

Where tobacco in transit was damaged and delayed by flood, and it appeared that even after the shipment was started from that point to destination the tracks were in bad condition, though it did not appear that such condition was the cause of the delay, that there was a through train to destination, and that the usual shipping time between the place of origin and delivery was about five days, and that there was a delay of twenty days from the intermediate point, the court did not err in assuming that the delay was unreasonable.

Same.

In such case, where the evidence showed that the longer tobacco was permitted to remain wet the greater the damage, and there was no evidence to the contrary, the court did not err in assuming that the tobacco was further damaged by the delay, and in leaving the extent of the damage to the jury.

Evidence — Presumptions — Authenticity of Reply Letter.

In an action for damages to shipments of tobacco, where it appeared that the shipper wrote a letter to the agent of the terminal carrier in the state advising him of the damage, the consignee's or agent's refusal to accept it, and presenting a claim for a certain amount, and that he later received a type-

written letter on a letterhead of the terminal carrier, office of its freight claim adjuster, and signed by such adjuster, addressed to the shipper and relating to its claim, and denying responsibility because the damage was due to a flood, stating its sale for shipper's account and balance to his order, such letter is prima facie genuine and admissible in evidence without proof of the handwriting or other proof of its authenticity.

[See note at end of this case.]

Appeal from Circuit Court, Jefferson county, Common Pleas Branch, Fourth Division.

Action by E. J. O'Brien, doing business as E. J. O'Brien and Company, plaintiff, against Louisville and Nashville Railroad Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

T. K. Helm and Charles H. Moorman for appellant.

O'Doherty & Yonts and Thomas C. Mapother for appellee.

[404] Clay, C.—In this action for damages to two shipments of tobacco from Frankfort, Kentucky, to Jersey City, New Jersey, plaintiff, E. J. O'Brien, doing business as E. J. O'Brien & Company, recovered of the defendant, Louisville & Nashville Railroad Company, a verdict and judgment for \$1,000.00. Defendant appeals.

Briefly stated, the facts are as follows: The tobacco, consisting of thirty-two hogsheads and valued at \$2,312.75, was delivered to the Louisville & Nashville Railroad for shipment on the afternoon of March 20, 1913. It reached Dayton, Ohio, on the afternoon of March 24. The two cars containing the tobacco were then delivered to the Erie Railroad and placed in a through train due to leave the same day at 10:15 p. m. Owing to the high water and consequent washouts between Dayton and Marion, the train was held for about three hours and subsequently released. The next morning between eight and nine o'clock the Lewistown reservoir broke and the city of Dayton was enveloped by an unprecedented flood. The railroad yard was covered by water. Many of the cars were completely submerged. The water on others reached to a point three or four feet above the trucks. The road was unable to move any trains until April 4. The cars in question went out on the first train. The tracks north of Dayton were washed out and temporary repairs had to be made in order to get the train over after the water went down. It was about three weeks before normal conditions were restored. The cars in question did not reach Jersey City until

April 20. They were placed on a siding adjoining the Jarvis warehouses. Mr. Jarvis inspected the tobacco. At a distance of about three feet above the floor of the cars there was a dry muddy line extending the full length of the cars. He opened one of the cars and saw the same dry muddy line on the hogsheads. He then advised E. J. O'Brien & Company of the condition [405] of the tobacco and they instructed him to refuse delivery. Richard J. Whallen, plaintiff's manager and a tobacco expert of long experience, testified that although the tobacco was damaged by water, yet, if only half of the hogsheads were submerged and the tobacco was promptly rehandled, there would be a salvage of from 50 to 75 per cent. On the other hand, the longer it was permitted to remain wet the greater would be the damage. Over the objection of the defendant, plaintiff introduced a letter which he received from H. C. Barlowe, freight claim adjuster of the Erie Railroad, in reply to one which he had addressed the Louisville agent of that road, stating that as his tobacco was refused, the railroad was compelled to sell it, and that after paying the advertising and other expenses of sale the net amount realized was \$8.41.

The trial court held, as a matter of law, that the unprecedented flood at Dayton was an act of God and was the proximate cause of all the damage that accrued prior to the time the tobacco left Dayton, and authorized the jury to find only such damages as resulted from the unreasonable delay between Dayton and Jersey City. The court further held, as a matter of law, that there was an unreasonable delay and authorized the jury to find for plaintiff the difference between the market value of the damaged tobacco when delivered, and its market value when it should have been delivered at Jersey City.

Defendant insists that the evidence of damage after the tobacco left Dayton is entirely too speculative to justify the verdict. This contention is based on the ground that Whallen, who testified on the subject, did not know the extent of the damage by the flood or the condition of the tobacco when it reached Jersey City. It appears, however, that the water line reached to about the middle of the hogsheads, and there is no evidence to the contrary. His opinion of the extent of the salvage was based on this fact. He says that although about one-half of the tobacco was wet, there would have been a salvage of from 50 to 75 per cent if the tobacco had been promptly delivered and rehandled. It is true that no one testifies to the exact condition of the tobacco when it was delivered at Jersey City. However, the letter of the freight claim adjuster of the Erie Railroad shows that the tobacco was

advertised for sale and sold on the market, and after the expenses were paid the net proceeds [406] amounted to \$8.41. In other words, the tobacco was practically worthless. The uncontradicted evidence also shows that the market price of the tobacco, if it had been delivered in an undamaged condition at Jersey City, would have been \$2,312.75 plus the cost of transportation, amounting to \$181.47, or a total of \$2,494.22. On the basis of a salvage of 50 per cent, if the tobacco had been promptly delivered after the damage at Dayton, the evidence would have authorized a verdict of \$1,156.37. On the basis of a salvage of 75 per cent, the evidence would have authorized a verdict of \$1,734.57. As the tobacco was practically worthless when delivered, and as the verdict of \$1,000.00 is less than the lowest sum fixed by the witness, or the sum of \$1,156.37, we conclude that the evidence was sufficient not only to take the case to the jury, but to sustain the verdict.

The point is also made that the trial court erred in telling the jury that it was the duty of the defendant and its connecting carriers after the tobacco had been damaged by the flood at Dayton, and as soon as the flood conditions at that place would permit, to remove the said tobacco from that place and promptly carry the same to Jersey City, and to deliver it, or offer to deliver it, to the plaintiff; and in further instructing the jury that it had been proven by undisputed evidence that the defendant and its connecting carriers failed to perform this duty, and by reason thereof the tobacco was caused to be further injured and damaged. It is first insisted that the instruction imposed on the defendant and its connecting carriers too high a degree of care. Whether this be true or not it is unnecessary to decide. The instruction, in so far as it bears on the question of promptness, is merely perfunctory and abstract. The question itself was not submitted to the jury. That being true, defendant was not prejudiced by the instruction unless the court itself erred in holding, as a matter of law, that there was an unnecessary delay in the shipments after they left Dayton, and that by reason thereof the tobacco was further damaged. It is true that defendant shows that, even after April 24, when the shipments were started, its tracks were in bad condition by reason of the flood. Defendant, however, did not follow this statement up and actually show that such condition was the cause of the delay. It did not undertake to trace the cars and account for the delay at any particular [407] point. The evidence shows that the usual time to transport such a shipment, even from Louisville, Kentucky, is about five days. Dayton is much nearer Jersey City. Prior to reaching

Dayton several transfers must be made. From Dayton to Jersey City there is a through train. From that point on there was a delay of twenty days. In view of the defendant's failure to account for the delay, the court did not err in assuming that the delay was unreasonable. But it is argued that the court erred in assuming that the tobacco was injured by the further delay. On this point the evidence shows that the longer tobacco is permitted to remain wet the greater the damage. There is no evidence to the contrary. The court, therefore, had the right to assume that the tobacco was further damaged and to leave the extent of the damage to the jury.

Another ground urged for reversal is the admission of the letter of the freight claim adjuster of the Erie Railroad without preliminary proof of its genuineness. The facts attending the introduction of the letter are as follows: On April 25, 1913, plaintiff wrote a letter to S. W. Moore, agent, Erie Railroad, Louisville, Kentucky, in which he advised him of the damage to the tobacco in question and of the refusal of the Jarvis warehouses to accept it, and presented a claim against the Erie Railroad for the sum of \$3,294.08. On July 10, plaintiff received a typewritten letter on the letterhead of the Erie Railroad Company, Office of Freight Claim Adjuster, purporting to be signed by H. C. Barlow, F. C. A. The subject of the letter is Claim E-151958—L&D. The letter is addressed to Messrs. E. J. O'Brien & Company, Louisville, Kentucky. It begins as follows:

"We have your letter of April 25, 1913, addressed to Mr. S. W. Moore, our agent at Louisville, Ky., enclosing a bill for \$3,294.08, said to be the value of 42 hhds. of tobacco damaged in transit."

The letter goes on to state that the tobacco in question was caught in the flood and that the company was not responsible because the damages were due to an act of God. The letter concluded as follows:

"Inasmuch as the tobacco was refused and left on our hands, we were obliged to dispose of same in the interest of whom it may concern, and accordingly turned it over to auctioneers, who disposed of it to the best possible advantage, the net amount realized being \$8.41. [408] We have this amount on hand after taking care of the advertising and other expenses of sale."

Professor Greenleaf, in his work on Evidence, Section 575c, 16th Edition says:

"A further exception to the rule requiring proof of handwriting has been admitted in the case of letters received in reply to others proved to have been sent to the party. Thus, where the plaintiff's attorney wrote a letter addressed to the defendant at his residence, and sent it by the post, to which he received

a reply purporting to be from the defendant, it was held that the letter thus received was admissible in evidence, without proof of the defendant's handwriting; and that letters of an earlier date, in the same handwriting, might also be read, without other proof."

In 17 Cyc. 411, the rule is thus stated:

"A letter received in the due course of mail purporting to be written by a person in answer to another letter proved to have been sent to him is *prima facie* genuine, and is admissible in evidence without proof of the handwriting or other proof of its authenticity."

This doctrine has been approved and followed in a number of cases. National Acc. Soc. v. Spiro, 78 Fed. 774, 47 U. S. App. 293, 24 C. C. A. 334; White v. Tolliver, 110 Ala. 300, 20 So. 97; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Davis v. Robinson, 67 Ia. 355, 25 N. W. 280; Lyon v. Railway Pass. Assur. Co. 46 Ia. 631; Melby v. Osborne, 33 Minn. 492, 24 N. W. 253; Atlantic Ins. Co. v. Manning, 3 Colo. 224; Chicago, etc. R. Co. v. Roberts, 10 Colo. App. 87, 49 Pac. 428; J. H. Sanders Pub. Co. v. Emerson, 64 Mo. App. 662.

We see no reason why the rule should not be extended so as to apply to the facts of this case. Here plaintiff proved that he had sent a letter to S. W. Moore, agent of the Erie Railroad at Louisville, Kentucky. He introduced in evidence a copy of the letter. In this letter he asserted a claim against the railroad for damages to the tobacco in question. The natural thing for the agent to do would be to send the letter to the particular agent of the company having jurisdiction of freight claims. The letter in dispute shows on its face that it is in reply to the letter of plaintiff addressed to S. W. Moore, the local agent of the Erie Road at Louisville, and forwarded to the writer. It is written on the letter head of the Erie Railroad and purports to come from the office of the [409] freight claim adjuster and to have been signed by him. The letter shows on its face that it had reference to the very claim asserted by plaintiff. As the purpose of plaintiff's letter, though addressed to the agent at Louisville, was to assert a claim against the company, and the purpose of the reply, though coming from another agent, was to deny the justice of the claim against the company and to show what disposition was made of the tobacco, the effect is the same as if plaintiff's letter had been addressed and sent to, and the reply had been signed by and had come from the company itself. We, therefore, conclude that the facts were sufficient to make out a *prima facie* case and to authorize the introduction of the letter without proof of its genuineness.

Finding in the record no error prejudicial to the substantial rights of the defendant, it

follows that the judgment should be affirmed and it is so ordered.

NOTE.

Presumption as to Authenticity of Letter Received in Reply to Letter.

Genuineness of Signature.

Ordinarily a private letter is not admissible in evidence against the writer without a preliminary showing of its authenticity, by proof of the handwriting or otherwise. See 10 R. C. L. title *Evidence*, p. 1151. But with respect to a letter received in the due course of the mail and purporting to come from a person to whom a letter has previously been sent and to be in reply thereto, the recent cases are in accord with the decision in American Bonding Co. v. Ensey, 105 Md. 211, 11 Ann. Cas. 883, in holding that a presumption of fact is indulged in favor of the genuineness of the signature and the letter is admissible in evidence without further authentication. Central of Georgia R. Co. v. Malone, 165 Ala. 432, 51 So. 730; Rike v. McHugh, 188 Ala. 237, 66 So. 452; American Workmen v. James, 14 Ala. App. 477, 70 So. 976; Barnham v. Delight Bank, 94 Ark. 158, 126 S. W. 394; Jones v. Cooke, 25 App. Cas. (D. C.) 524; Illinois Cent. R. Co. v. Messnard, 15 Ill. App. 213; Consolidated Perfume Co. v. National Bank, 86 Ill. App. 642; Grayville Water Works v. Burdick, 109 Ill. App. 520; Nichols Shepard Co. v. Ringler, 135 Ia. 181, 112 N. W. 543; City Nat. Bank v. Jordan, 139 Ia. 499, 117 N. W. 758; Fisher v. Carter (Ia.) 160 N. W. 15; Lancaster v. Ames, 103 Me. 87, 68 Atl. 533, 125 Am. St. Rep. 286, 17 L.R.A. (N.S.) 229; Connecticut v. Bradish, 14 Mass. 296; Hoxsie v. Empire Lumber Co. 41 Minn. 548, 43 N. W. 476; J. H. Sanders Pub. Co. v. Emerson, 64 Mo. App. 662; Hays v. General Assembly American Benev. Assoc. 127 Mo. App. 195, 104 S. W. 1141; Hicks v. National Surety Co. 169 Mo. App. 479, 155 S. W. 71; Charles H. Scholes v. Oppenheim, 136 N. Y. S. 37; Echerd v. Viele, 164 N. C. 122, 80 S. E. 408; Eichenhofer v. Philadelphia, 248 Pa. St. 365, 93 Atl. 1065; Tilden v. Smith, 24 S. D. 576, 124 N. W. 841; Ullman v. Babcock, 63 Tex. 68; Sun Mfg. Co. v. Egbert, 37 Tex. Civ. App. 512, 84 S. W. 667; McDonald v. Hanks, 52 Tex. Civ. App. 140, 113 S. W. 604; Lewis v. Alexander (Tex.) 31 S. W. 414; Central City Supply Co. v. Beury, 69 W. Va. 612, 72 S. W. 657. And see the reported case.

The rule was said in J. H. Sanders Pub. Co. v. Emerson, 64 Mo. App. 662, to rest "upon the presumption that letters are delivered to the person to whom they are ad-

dressed and that the reply was written by him or by his authority."

In *Lancaster v. Ames*, 103 Me. 87, 68 Atl. 333, 125 Am. St. Rep. 286, 17 L.R.A. (N.S.) 229, the court said: "It is true as a general rule that documentary evidence, to be admissible, must be authenticated, and in case of a letter this is ordinarily done by proof of the genuineness of the signature of the writer. When the signature is typewritten this method of authentication may be difficult, if not impossible. At any rate it was not tried in this case. But there is a relaxation of this rule in the case of what are called reply letters. The rule does not apply to a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed. Proof of these facts is sufficient evidence of the genuineness of the reply to go to the jury without specific proof of the genuineness of the signature. The genuineness is assumed, at least, until the contrary is shown."

In *Barham v. Delight Bank*, 94 Ark. 158, 126 S. W. 394, it was said: "As a general rule, a letter that is offered in evidence must be authenticated by proving the genuineness of the signature of the writer. But when a letter is received in the due course of mail and purports to be in answer to a letter that was previously duly addressed and mailed, the presumption arises that such letter is the genuine instrument of the purported writer. It is then sufficiently authenticated to go to the jury; and, upon its genuineness being denied, it then becomes a question of fact for the jury to determine as to whether the letter is genuine or not."

To obtain the benefit of the rule by which the genuineness of a reply letter is presumed the character of the letter as such must be shown by proof of the letter to which it is a reply. *Linn v. New York L. Ins. Co.* 78 Mo. App. 192; *Lovett v. Gibb*, 128 N. Y. S. 1047. The fact that the letter purports to be a reply to one previously received is not sufficient. *Consolidated Grocery Co. v. Hammond*, 175 Fed. 641, 99 C. C. A. 195, wherein it was said: "The only evidence offered to show that the letter was genuine was proof that the plaintiff received it 'by regular mail.' It was received as evidence, without further proof, we presume, because it was construed as purporting to be an answer to a letter previously written by the plaintiff. It was written on April 27th, and contains a reference to 'yours of the 24th.' It has been held that, where it appears from the evidence that a letter is received by due course of mail in answer to one previously posted to the writer, the letter may be submitted in evidence without further proof. 3 *Wigmore on Evidence*, § 2153. But, in such case, it must first

be proved that a letter was written and mailed, to which the letter offered is an answer. *National Acc. Soc. v. Spiro*, 78 Fed. 774 [47 U. S. App. 293] 24 C. C. A. 334. The defect in the preliminary proof here is that it was not shown that Hammond wrote and posted a letter to Acosta. If that was shown, his reply, received in due course of mail, may have been treated as *prima facie* genuine. The statement in a letter offered that it is in answer to a letter previously received cannot, of itself, make the letter admissible. To so hold would make the statement in the letter prove the writing and posting of the previous letter, and also prove its own genuineness. That cannot be permitted."

But in *Dix v. Jackman* (Tex.) 37 S. W. 344, it was held that proof by parol of the letter replied to is sufficient. The court said: "The court should have admitted in evidence the letter from the McGrew Milling Company set out in appellant's bill of exception No. 1. In order to permit this letter to go before the jury, it was not necessary that the one written by Ford Dix, to which this one was in response, should have been introduced in evidence. It was presumably in the possession of the parties to whom it was addressed, who resided in another state. Under such circumstances it was not required that the original should be produced. The testimony of Ford Dix was a sufficient basis for the admission of this letter, and tended to explain its pertinency."

In *Fisher v. Carter* (Ia.) 160 N. W. 15, it was held that a mere general statement by a witness of his conclusion that a letter was an answer to a previous one, if not objected to, was sufficient to admit the letter.

A letter in response to an oral communication is not within the rule dispensing with proof of the authenticity of a reply letter. *Charles H. Scholes Co. v. Oppenheim*, 136 N. Y. S. 37.

It has been held that a person who has written letters to another and received replies thereto is competent to express an opinion as to the genuineness of a disputed signature of that person, although the authenticity of the signatures from which his familiarity with the handwriting is obtained rests wholly on the fact that they were attached to reply letters. *Campbell v. Woodstock Iron Co.* 83 Ala. 351, 3 So. 369; *McKonkey v. Gaylord*, 46 N. C. 94. And see *Nichols Shepard Co. v. Ringler*, 135 Ia. 181, 112 N. W. 543.

The rule that the genuineness of the signature to a reply letter will be assumed applies to a letter signed in typewriting. *Barham v. Delight Bank*, 94 Ark. 158, 126 S. W. 394, *Consolidated Perfume Co. v. National Bank*, 86 Ill. App. 642; *Norwegian Plow Co. v. Munger*, 52 Kan. 371, 35 Pac. 11; *Huber Mfg.*

Co. v. Claudel, 71 Kan. 441, 80 Pac. 960; Lancaster v. Ames, 103 Me. 87, 68 Atl. 533, 125 Am. St. Rep. 286, 17 L.R.A. (N.S.) 229. And see National Acc. Assoc. v. Spiro, 78 Fed. 774, 47 U. S. App. 293, 24 C. C. A. 334 (signature by rubber stamp). In Lancaster v. Ames, *supra*, the court after stating the general rule said: "This is true when the signature is in the handwriting of some person. Logically it must be equally true when the signature is typewritten." In Norwegian Plow Co. v. Munger, 52 Kan. 371, 35 Pac. 11, it was said: "It appears from the record that Mr. Patton was officially connected with the First National Bank, at Garden City, and that, as an officer of the bank, he had collections to make for the company. He corresponded through the mails with that company, which was located at Dubuque, Iowa, relative to the \$325 warrant, or order, of the Borders Town Company, referred to in the memorandum. In answer, he received the letters by mail, purporting to come from the company, and dictated by C. W. Mitchell, as the secretary of the company, but written with a typewriter. Under these circumstances, there was a sufficient identification of the letters to permit them to be introduced as *prima facie* evidence."

Authority of Agent to Sign.

The majority of the recent cases support the rule laid down in American Bonding Co. v. Ensey, 105 Md. 211, 11 Ann. Cas. 883, 65 Atl. 921, that where a letter sent in the ordinary course of business is answered by an agent of the individual or corporation addressed, his authority so to do is presumed and the reply letter is admissible against the alleged principal without preliminary proof of authority. Scofield v. Parlin, etc. Co. 61 Fed. 804, 18 U. S. App. 692, 10 C. C. A. 83; Central of Georgia R. Co. v. Malone, 165 Ala. 432, 51 So. 730; Bloom v. State Ins. Co. 94 Ia. 359, 62 N. W. 810; Enos v. St. Paul F. etc. Ins. Co. 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796; Weeks v. Barron, 38 Vt. 424; Capital City Supply Co. v. Beury, 69 W. Va. 612, 72 S. E. 657. And see the reported case.

The reason for the rule was stated in Bloom v. State Ins. Co. *supra*, as follows: "Much of the argument of counsel for appellant is directed to exceptions taken to the introduction of evidence consisting of letters written from the home office, because there was no evidence that the writers were authorized by the defendant to write them. The length of this opinion admonishes us that we should not take the space necessary to discuss these objections in detail. Nearly all of these letters were in answer to letters written not to any officer of the company,

but to the company, and letters written by the attorney employed to collect the note. All were written upon paper with letterheads similar to that above set out. One of these letters, and a most important one, was signed 'W. M. Black, Sec'y., J.' Others were signed 'K. B. Miller, Supt. Loss Dept.' It should be presumed that the letters addressed to the defendant were answered by the proper officers. Surely it ought not to be held, without some evidence rebutting the presumption, that some janitor, floor sweeper, or other subordinate employee, obtained possession of the correspondence, and answered the letters."

In Scofield v. Parlin, etc. Co. 61 Fed. 804, 18 U. S. App. 692, 10 C. C. A. 83, the court said: "Of the authenticity of these letters, and the contract transmitted with one of them, the circumstances in proof, the regular transmission by mail, the letterheads and envelopes, and the contents of the letters themselves leave no reasonable doubt. They should have gone to the jury, and in the absence of contrary evidence, should have been accepted as conclusive of the execution of the contract by the defendant. The ruling of the court to the contrary, and presumably, the sworn denial of the execution of the contract, proceeded upon the theory that, in order to bind the corporation, a contract must be shown to have been executed or authorized by a formal corporate act, such as an order or resolution of a board of directors. But the business of modern mercantile and manufacturing corporations is not always, or even generally, conducted in that way, but is committed to agents and managers, whose powers are limited practically only to the lines of business for the prosecution of which the corporations were formed. It follows that correspondence conducted by these agents, and contracts made by them, in the name of the principal, in the due and ordinary course of business, must be admissible in evidence as if the parties were natural persons. If a document offered against a corporation is not genuine, or its execution unauthorized, the corporation will be able in most instances to show the fact, while, on the other hand, if direct proof of formal or overt corporate action or authority were required of the opposite party, it would often be, indeed it would be in the power of the corporation to make it, difficult or impossible."

In Enos v. St. Paul F. etc. Ins. Co. 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796, it was said: "Subsequently Perry wrote Enos, on one of the company's letterheads, containing the names of the general officers of the company and 'A. W. Perry, Adjuster;' the subject of the letter being this same statement. This letter is addressed to Enos, and acknowledges the receipt of one from him,

which, he writes, 'is referred to me for reply.' Enos testifies that, 'to the best of his recollection,' his letter, to which Perry's purports to be a reply, was addressed to the company. If, as against all this evidence, which we think was competent, Perry was not in fact the agent of the company, but was perpetrating a fraud on both the plaintiff and defendant, the company was in a position to show it, and should have done so. We think, further, that the evidence sufficiently shows that Perry represented the company in the capacity of an adjuster; at all events, it tends to prove it."

In *Capital City Supply Co. v. Beury*, 69 W. Va. 612, 72 S. E. 657, the court said: "It is proven by a witness for defendant that the signature was not made in the handwriting of Thomas C. Beury. The question then arises, should the letter have been excluded? We do not think so. While we have not found any authority directly bearing on this point, we think the true rule is that, even though such a reply letter may not have been signed by the person whose name appears to it, still the presumption is that it was signed by proper authority; and the presumption of genuineness is not overcome by simply proving that he did not sign it himself, but it was necessary to go further, and prove that he did not authorize the signing of it, or adopt the signature as his own. In these modern days of large and multiplied business, it is well known that such correspondence is carried on, and important business transacted, through dictations, made to clerks and stenographers, who take down the dictation, and then transcribe it into longhand. It is also known that clerks employed in offices of large business concerns are often directed to write the signature of their employers to their letters. It is scarcely to be supposed in the present case, in view of the subject-matter of the letter in question, that Lewis, Mr. Beury's book-keeper, would have either written the body of the letter, or signed Mr. Beury's name to it, without his authority. We think it is entirely within the rule relating to the presumed genuineness of reply letters purporting to come from the addressee of another letter, in due course of mail, to include the authority to sign the name which appears to it. It was, therefore, not enough to overcome the presumption of the genuineness of the letter to prove simply that the signature was not in the handwriting of Mr. Thomas C. Beury. It should also have been made to appear that the signature was made without his authority."

In *Weeks v. Barron*, 38 Vt. 424, it was said: "The plaintiff then offered the testimony of Ballard, who was his attorney, and this letter, which was received by Bal-

lard in reply to one which he had addressed and sent to the defendant. This reply to the letter addressed by Ballard to the defendant, though written by the defendant's clerk, was written in the name of the defendant. The evidence was material as bearing upon the issue of fact, made on the testimony, in respect to the alleged claim of a lien upon the chair made by the defendant; for the reply, in connection with the testimony of Ballard, had a tendency to corroborate the testimony which the plaintiff had given, or to show that the defendant had a claim against Le Barron, for the security of which the chair was detained. We therefore regard the testimony as being material. It might fairly have been argued that the defendant received Ballard's letter, and directed the reply which was made by the clerk, notwithstanding the denial of the defendant that he ever received or saw Ballard's letter."

In a few jurisdictions, however, while the rule heretofore stated has not been explicitly repudiated, decisions of a contrary tendency have been rendered. Thus, in *Easter v. New York, etc. Despatch Express Co.* 74 Misc. 399, 132 N. Y. S. 402, it was said: "The plaintiff also urges that errors were committed by the trial court in excluding certain letters purporting to have been received from the defendant company in answer to letters written by the plaintiff to that company. On behalf of the plaintiff numerous cases are cited to support the proposition that the arrival of a letter by mail purporting to be from the addressee of a prior letter duly addressed and mailed is sufficient evidence of the genuineness of the reply to go to the jury; but in this case there was not only a question of the genuineness of the letters purporting to have come from the defendant company, but there was also a question of the authority of the person who wrote and signed them to bind the company in the matter. Of this authority no evidence was given, as was pointed out by the court upon the trial. The mere receipt of the letter was not enough, without proof that the person whose name was signed to the letter had authority to act for the defendant corporation in the matter. *Wickham v. Lehigh Valley R. Co.* 85 App. Div. 182, 83 N. Y. S. 146."

In *Georgia Steel Co. v. White*, 136 Ga. 492, 71 S. E. 890, a syllabus decision, a paragraph of the official syllabus reads as follows: "It was error to admit in evidence the following letter: 'Gadsden, Ala., 3-17-1908. T. C. White, Esq., Trenton, Georgia. Dear Sir: Yours, 5th received, while I was away from home. I would advise you to hold on to your lumber ready to sell it to the new company. I don't think it will be long before you will be called on for it. Respy. E. T.

Shuler,' it not appearing by any legal evidence that the one whose name was signed thereto was authorized to write such a letter by either of the companies, or that he was an agent or officer of either of such companies."

In *Yost v. Mensch*, 141 Pa. St. 73, 21 Atl. 507, in excluding a reply letter from the son of the person to whom the original letter was sent, it was said: "The answer upon its face purporting to come from Milton Mensch, the son, he being in court, in the absence of any proof of authority, in the absence of any authority to write such an answer, and in the absence of any proof of the reception of the letter by the defendant, the objection is sustained; exception."

In *Butler v. Price*, 115 Mass. 578, it appeared that a creditor sent a letter demanding payment. He received a reply from the wife of the debtor inclosing money on account. It was held that the payment could not be shown to toll the statute of limitations without proof that it was authorized by the husband. The court said: "But in order that the reply of Mrs. Price or anything contained in it should affect the defendant, it is necessary first to show that she acted in writing it by his authority or as his agent. As no such authority or agency can be inferred from the relation of husband and wife, there is no evidence of any unless the letter itself is permitted to furnish it. Until some evidence of authority from the defendant to Mrs. Price to write the letter is offered, it cannot be examined or considered, and we cannot therefore reason from anything contained in it, and until then the fact that she replied to a letter addressed to the defendant is immaterial."

In *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. S. 1064, with respect to a letter signed in a firm name followed by that of one de Guague, a stenographer of the firm, the court said: "But even conceding the genuineness of the signature of de Guague, that does not establish the liability of the defendants. What the letter, which purports to be a firm letter, undertakes to do, is to state the individual knowledge or belief of the members of the firm, for, obviously, the firm itself could have no knowledge save that of its members. This being so, it is obvious as well that de Guague was in no position to make representations as to the knowledge or belief of the members of the firm, except in so far as they or any one of them authorized him to do so and advised him of his or their knowledge or belief. Upon no theory could a stenographer in a firm, employed without either general or special authority shown, be held to have power to bind the firm by representations as to the knowledge or belief of its members."

BEST PARK AND AMUSEMENT COMPANY

v.

ROLLINS.

Alabama Supreme Court—April 22, 1915.

192 Ala. 534; 68 So. 417.

Pleading — Demurrer — Scope of Specifications.

Specifications in a demurrer that no negligence was shown for which defendant was liable, and that it was not shown how or wherein defendant's servants were negligent, do not raise the point that the complaint failed to show the servants were negligent while acting within the scope of their employment.

Appeal and Error — Grounds for Reversal — Deficiency of Pleading Supplied by Proof.

Under Practice Rule No. 45 (61 South. ix), a judgment cannot be reversed because of omitted allegations in the complaint, where the instructions specifically required proof thereof.

Theaters and Amusements — Scenic Railway — Liability for Personal Injury.

The operator of a scenic railway in an amusement park is bound to exercise the highest degree of care and caution for the safety of its passengers, the same as would a common carrier; the danger of such amusement necessitating excessive care.

[See note at end of this case.]

Same.

In an action against the operator of a scenic railway, where the court charged that it was bound to exercise the highest degree of care as were common carriers, defendant, if fearful that the jury might apply tests of care applicable only to steam or electric railways, should request explanatory charges.

[See note at end of this case.]

Appeal from City Court of Birmingham: PUGH, Judge.

Action by Hattie Rollins, plaintiff, against Best Park and Amusement Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED.**

[534] Transferred from Court of Appeals under section 6, Acts 1911, p. 449.

Defendant was the proprietor of an amusement park, and operated what is known as a scenic railway. The cars were about six feet long, and when raised by a cable to the highest point, are allowed to run by gravity over a track that winds and doubles back and dips throughout its extent of about 2,300 feet. The track begins on a trestle about

40 feet high, and is continuously [535] down-grade. The cars make the trip in about a minute and a half. Plaintiff was riding on one of these cars when it ran into another car at the bottom of the dip, which had for some reason failed to go over the incline ahead, as it was designed and accustomed to do. The collision resulted, according to plaintiff's evidence, in physical injury to her, and on the evidence adduced the jury rendered a verdict for plaintiff, and there was judgment accordingly. The opinion fully discusses the only errors assigned.

Burgin, Jenkins & Brown for appellant.
Gaston, Pettus & Drennen for appellee.

SOMERVILLE, J.—(1) Conceding that the complaint in this case was defective in not showing that defendant's servants were guilty of the negligence charged while acting within the scope or course of their employment, we think that the specifications of the demurrer do not sufficiently point out this defect. The only grounds supposedly in point are: (2) That no negligence is shown for which defendant is liable; and (5) that it is not shown how or wherein defendants servants were negligent. These grounds are very general in their terms, and are at least of ambiguous application.

(2) Moreover, the written charges of defendant (Nos. 2, 7, 15, 16, 17 and 18) specifically required proof by plaintiff of the omitted allegation. This cured the error on the pleading, if there was any, and, under our Practice Rule No. 45, 61 So. ix, forbids a reversal of the judgment on that ground.

(3) In his oral charge to the jury the trial judge instructed them, without objection from defendant, that [536] the relationship of the parties was that of common carrier and passenger, and that defendant owed her the duty to exercise the highest degree of skill and care (for her protection and comfort while she was a passenger on its car) known to common carriers of passengers. Afterwards, at the instance of plaintiff, he gave the following written charge: "The law imposes upon a common carrier of passengers for hire or reward the duty of exercising the highest degree of care and skill known to persons engaged in the business of common carriers, and holds such common carriers responsible for the slightest negligence resulting in injury to one of its passengers."

It may be a question of grave doubt whether the operation of a "scenic railway" in an amusement park, such as we are concerned with here, can be properly designated as a common carrier of passengers. But obviously the measure of care to be observed in their operation must depend upon the perils to

which passengers thereon are ordinarily exposed, and this will, in turn, depend upon the character of the track and cars and their mode of operation. A collection of the cases of injuries received by the patrons of amusement parks in the use of scenic railways and other devices will be found in 1 Neg. Cas. Ann. 609, and in 4 Id. 46.

Perhaps the leading case on this subject is *O'Callaghan v. Dellwood Park Co.* 242 Ill. 336, 89 N. E. 1005, 26 L.R.A. (N.S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407. As to the conditions specified, that case was not materially different from the case in hand. It was there said: "The passengers carried therein are subject to great risk of life and limb. The steep inclines, sharp curves and great speed necessarily are sources of peril. . . . We think, not only by fair analogy, but on reason and sound public policy, appellant should be [537] held to the same degree of responsibility in the management of the railway in question as a common carrier."

(4) And an instruction was approved which imposed upon the operator of the miniature railroad "the highest degree of care and caution for the safety of its passengers . . . consistent with the mode of conveyance and the practical operation of the railway." This is the measure of care required of common carriers in this state (*Birmingham R. etc. Co. v. Barrett*, 179 Ala. 274, 282, 60 So. 263), and hence the charge complained of was abstractly correct, and its giving could not therefore work a reversal of the judgment. But we are constrained, also, to the opinion that the measure of care prescribed by this charge upon carriers in general might be properly applied to the facts of the present case; and, if there was any likelihood of the jury's applying to this case the tests of care applicable only to an ordinary steam or electric railway, defendant should have requested an explanatory charge limiting the application and comparison to those engaged in carrying passengers by means and agencies similar to those here used.

Finding no error, the judgment will be affirmed.

Affirmed.

Anderson, C. J., and Mayfield and Thomas, JJ., concur.

NOTE.

The reported case, passing on the liability of the proprietor of a scenic railway in an amusement park for an injury to a patron, expresses doubt as to whether a person engaged in operating such a device may be termed a common carrier of passengers. It

134 Tenn. 149.

is, however, held that from the nature of the device and the perils to which its patrons are exposed the proprietor is held to the same degree of care as is required of a common carrier, i. e., the highest degree of care and caution consistent with the practical operation of the railway. The question whether the proprietor of a scenic railway or similar device is a common carrier of passengers is discussed in the note to *O'Callaghan v. Dellwood Park Co.* 17 Ann. Cas. 407. With respect to the duty of the owners and managers of exhibitions and places of amusement as to the safety and protection of their patrons see the notes to *Williams v. Mineral City Park Assoc.* 5 Ann. Cas. 924; *Scott v. Michigan University Athletic Assoc.* 15 Ann. Cas. 515; *Smith v. Cumberland County Agricultural Soc.* Ann. Cas. 1915B 544; and *Horney v. Nixon*, 110 Am. St. Rep. 520, 532.

HARTMAN

v.

TENNESSEE STATE FAIR ASSOCIATION ET AL.

Tennessee Supreme Court—March 4, 1916.

134 Tenn. 149; 183 S. W. 733.

Theaters and Amusements — Personal Injury — Liability for Defective or Unsafe Device.

The general concessionary as to amusement devices from a state fair association, who, for a percentage of the receipts, let privileges to operate particular devices to subconcessionaries, having control of the amusements on the grounds and the selection of the attractions and of their operators, was under duty to use reasonable care to see that a device for the carriage of passengers, simulating wave motion, called an "Ocean Wave," was reasonably safe.

[See note at end of this case.]

Same.

The immediate operator of an amusement device at a state fair carrying passengers, who leases the privilege to operate from the general concessionary from the fair for a share of the receipts, is charged with the duty to his patrons of maintaining the place and device in a safe condition.

[See note at end of this case.]

Same.

In an action for personal injuries by the patron of an amusement device at a state fair against the fair association, its general concessionary, and the latter's subconcessionary, where plaintiff's ticket purported to be issued by the general concessionary, the question whether he or the subconcessionary was

the immediate operator of the device is for the jury.

[See note at end of this case.]

Certiorari to Court of Civil Appeals.

Action by Hattie Hartman, plaintiff, against Tennessee State Fair Association et al., defendants. Judgment in trial court for defendant C. T. Kennedy. Judgment affirmed by Court of Civil Appeals. Plaintiff brings certiorari. The facts are stated in the opinion. REVERSED.

W. A. Lawrence and John T. Allen for plaintiff.

Samuel N. Harwood for defendant Bogle. Pendleton & DeWitt for defendants Kennedy and Tennessee State Fair Association.

[151] WILLIAMS, J.—The suit was instituted by Hattie Hartman against the Tennessee State Fair Association, C. T. Kennedy, and others, to recover damages for personal injuries sustained by her in the collapse, because of negligence, of an amusement contrivance, known as the "Ocean Wave," operated on the grounds of the association during the State fair in October, 1913.

The action, so far as it affected the Tennessee State Fair Association, was dismissed; but the case went to trial to test the liability of Kennedy. A motion of the latter for a peremptory instruction that there was no liability on his part was sustained by the trial judge, and his ruling was affirmed by the court of civil appeals; but we are satisfied that this action of that court was an inadvertence, the details respecting which need not be recited. Miss Hartman has petitioned for a review on writ of certiorari.

It appears that a part of the fair grounds was set apart for various kinds of shows and amusements; that the amusement privilege on the entire grounds was let to Kennedy, who in turn sublet privileges to operate amusements to various persons. He granted to J. B. Davis the right to bring in and operate the Ocean Wave, which was a pleasure riding device, operated by an engine and in such way that, moving in a circular course, one side dipping down while the other side was raised, a wavelike effect was produced. The [152] passengers were seated on a circular platform about eight feet above the surface of the ground, and they ascended by climbing steps. Miss Hartman purchased a ticket, and, after taking a trip, she started to descend, and when she was approaching the edge of the platform for that purpose, the steps broke and the platform suddenly gave down. She fell to the ground, and other passengers fell on her. She became unconscious and suffered a considerable physical injury.

Kennedy, under his contract with Davis, received thirty per cent of the gross receipts from the operation of this contrivance, and through his own agent sold the tickets, thus controlling the financial end of the particular enterprise. This ticket seller, on the inquiry of Miss Hartman, a lady of considerable avoirdupois, assured her of the safety of the Ocean Wave.

The other employees engaged about the machine and in its operation were those of Davis.

It is insisted by counsel of appellee that Kennedy did not have any proprietary interest in the machine, and had nothing to do with the manner of its operation, and that therefore, he is to be deemed the mere licensor or landlord of its operator, and under no duty to those who patronized the attraction, and that Davis was an independent contractor for whose negligence appellee is not to be held to respond.

Kennedy, as concessionary, held the sole right or exclusive privilege of bringing and operating amusements in the fairgrounds. We think it cannot be [153] maintained, in any event, that his *status* as regards liability was higher than that of the usual fair association which, as the owner of exhibition grounds, grants a concession directly to the operator of such an amusement.

In recent years quite a body of law has grown up in relation to the liability for negligence in the operation of amusement apparatus. A number of these cases pass on the question of the liability of a fair association or an amusement park owner, charging a general fee for admission to the grounds, for the negligence of an independent contractor who furnishes attractions on the premises, and it is the general rule that such a defendant is, as the inviter of the patronage, under the obligation of exercising reasonable care to have and keep the premises and equipment reasonably safe for visitors. A defendant is not relieved of this duty by reason of the fact that he had leased a part of the premises or the equipment to an independent contractor. In one of the earlier cases (*Thompson v. Lowell*, etc. St. R. Co. 170 Mass. 577, 49 N. E. 913, 40 L.R.A. 345, 64 Am. St. Rep. 323) it was said:

"The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was . . . a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm."

See also, in harmony with the above case, *Richmond*, etc. R. Co. v. Moore, 94 Va. 493, 27 S. E. 70, 37 L.R.A. [154] 258; *Turgeon v. Connecticut Co.* 84 Conn. 541, 80 Atl. 714; *Bernier v. Woodstock Agricultural Soc.* 88 Conn. 558, 92 Atl. 160; *Sebeck v. Platt-deutsche Volkfest Verein*, 64 N. J. L. 624,

46 Atl. 631, 50 L.R.A. 199, 81 Am. St. Rep. 512; 38 Cyc. 258.

A number of cases deal with the phase presented by the fact that the exhibitor, owner, and operator of such a device is a concessionary on a percentage basis, and they are in practical unanimity in holding that an association conducting a fair is liable to a patron for an injury due to a defect in the apparatus employed by a concessionary for the amusement of its patrons, where it thus receives as compensation for the concession a percentage of the sums paid by those who use the machine, when the defect could have been discovered in the exercise of reasonable care. *Stickel v. Riverview Sharpshooters Park Co.* 250 Ill. 452, 95 N. E. 445, 34 L.R.A. (N.S.) 659; *Hollis v. Kansas City Retail Merchants' Assoc.* 205 Mo. 506, 103 S. W. 32, 14 L.R.A. (N.S.) 284 and note; *Thornton v. Maine State Agricultural Soc.* 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488; *Texas State Fair v. Brittain*, 118 Fed. 713, 56 C. C. A. 499; and note to *Johnson v. Hot Springs Land, etc. Co.* L.R.A. 1915F 689, 696.

Wodnik v. Luna Park Amusement Co. 69 Wash. 638, 125 Pac. 941, 42 L.R.A. (N.S.) 1070, is an extreme and doubtful case on its facts (carrying the duty of the park owners to the point of inspecting simple tools), but the following declaration of general principles therein is sound:

[155] "The appellants contend that, under this evidence, they cannot be held responsible for the injury. This position is not tenable. They were admittedly the owners, managers, and operators of Luna Park, and advertised its amusement features as a means of procuring the patronage of the public for their own pecuniary advantage. They received a part of the proceeds from the specific amusement feature in patronizing which the respondent was injured. He was there by their invitation. There was an implied representation that the instrumentalities for amusement which they advertised were reasonably safe. The fact that the amusement was furnished by a third party under an independent contract with the appellants in no manner relieved them from the duty to see that the appliances were reasonably safe for the use intended. The duty of exercising reasonable care for the safety of their patrons while engaged in the performance of the very purpose for which they were invited cannot be avoided in any such way."

In *Stickel v. Riverview Sharpshooters Park Co.* supra, the question determined was that there was an obligation on the part of a park company to see that the amusement device operated by its concessionary was itself reasonably safe for the purposes for which the public was invited to use it; and in *Babicz v. Riverview Sharpshooters' Park Co.*

256 Ill. 24, 99 N. E. 680, it was held that the obligation extended to seats for patrons furnished by a concessionary, who thus paid a percentage of his gross profits to the park company.

[156] We need not discuss cases which, while recognizing the above rule, distinguish such liability from that claimed to exist in cases where the personal negligence of the independent contractor or concessionary, or of his employee, is the cause of the injury. *Thomas v. Springer*, 134 App. Div. 640, 119 N. Y. 460; *Reisman v. Public Service Corp.* 82 N. J. L. 464, 81 Atl. 838, 38 L.R.A. (N.S.) 922. Here the injury resulted from the defective condition of the amusement apparatus.

We are cited no case which treats of the liability of a general concessionary who himself lets privileges to subconcessionaries, taking as compensation a percentage of the gross receipts of the latter. However, where, as here, the control of the amusements on the grounds and the selection of the character of the attractions and of their operators is with such general concessionary, we think it clear that the principles above set forth are applicable on the point of liability, and on the measure of care to be observed by Kennedy, when so treated.

The immediate operator of such an amusement contrivance is himself charged with the duty to his patrons of maintaining the place and device in a safe condition. *Scott v. University Athletic Assoc.* 152 Mich. 684, 116 N. W. 624, 17 L.R.A. (N.S.) 234, 125 Am. St. Rep. 423, 15 Ann. Cas. 515; *Bole v. Pittsburgh Athletic Co.* 205 Fed. 468, 123 C. C. A. 536, 46 L.R.A. (N.S.) 602; *Smith v. Cumberland County Agricultural Soc.* 163 N. C. [157] 346, 79 S. E. 632, Ann. Cas. 1915B 544 and note; 38 Cyc. 268.

We can conceive of no principle that would free from liability one who occupies the intermediate position held by appellee.

The appellant goes further and insists that Kennedy should be held liable as the immediate operator of the Ocean Wave, since he sold appellant the ticket, bearing his name, which entitled her to ride, thereby holding himself out as the one in charge.

This contention may prove to be material in a trial following a remand, since if Kennedy is to be held as the immediate operator of the device, a different rule as to the measure of care would be applicable to him.

The ticket was in the following form:

"The C. T. Kennedy Shows
"Admit one person to show using
this number (59518)
and only on date of sale.
"Price 5c."

On back:

"Kennedy 5c."

When appellant purchased the ticket, it was in her hands a token or evidence of a contract between the parties which the law implied as lying behind the ticket (*O'Rourke v. Citizens St. R. Co.* 103 Tenn. 124, 52 S. W. 872, 46 L.R.A. 614, 76 Am. St. Rep. 639, and cases cited), by the terms of which contract the exhibitor agreed to furnish appellant a ride with due diligence [158] on his part for her safety. The ticket was some evidence of the particular contractual relationship between Kennedy and appellant so contended to exist.

In either view, the case was one for the jury. The motion for peremptory instructions in favor of Kennedy was improperly sustained. Writ granted. Reverse the judgment of the court of civil appeals and remand for a new trial.

NOTE.

The reported case deals with the somewhat novel question of the liability of a person who, holding a general concession of the privilege of furnishing amusements at a state fair, sublets to various persons the privilege of operating amusement devices. It is held that such a general concessionary is bound to use reasonable care to see that the devices so installed and operated are reasonably safe, and failing to do so is liable for a personal injury sustained by a patron. The duty of the owners and managers of exhibitions and places of amusement as to the safety and protection of their patrons is discussed in the notes to *Williams v. Mineral City Park Assoc.* 5 Ann. Cas. 924; *Scott v. University Athletic Assoc.* 15 Ann. Cas. 515; *Smith v. Cumberland County Agricultural Soc.* Ann. Cas. 1915B 544; and *Horney v. Nixon*, 110 Am. St. Rep. 520, 532.

PULLEN

v.

CITY OF EUGENE.

Oregon Supreme Court—March 2, 1915.

77 Oregon 320; 146 Pac. 822; 147 Pac. 768, 1191; 151 Pac. 474.

New Trial — Grounds — Error of Law.

On motion for new trial, the court can only re-examine the facts, and should not consider errors of law.

Effect of Statute Specifying Grounds.

L. O. L. § 174, prescribing grounds for granting new trial, does not restrict the court to the grounds specified.

Power of Court to Grant on Own Motion.

Where the court discovers that it erroneously sustained a demurrer to the answer, it may at any time while it has jurisdiction of the cause grant a new trial on its own motion.

[See 14 Ann. Cas. 65; Ann. Cas. 1914A 412.]

Appeal and Error — Necessity of Exception — Order Sustaining Demurrer.

An order sustaining a demurrer to the answer being made upon the matter in writing and on file in the court, no exception is necessary under L. O. L. § 172, to obtain review on appeal.

Municipal Corporations — Personal Liability of Officers — Defective Condition of Street.

The charter provision that a city should not be liable to any person for injuries caused by defects in sidewalks or streets unless the mayor, the chairman of street committee, or the street commission shall have had actual notice and reasonable opportunity to repair the defect, and that in no case shall more than \$100 be recovered as damages from the city, is not in violation of Const. art. 1, § 10, declaring that every person shall have remedy by due process of law for injuries done his person, property or reputation; for, as the city council is given power to repair the streets and sidewalks, one injured by reason of defects may maintain an action against the city officers for their breach of official duty.

[See note at end of this case.]

Same.

Though the mayor and councilmen of a city receive no compensation for such services, they are liable for injuries received by reason of a defective way, where, with notice of the defects, they do not repair them, although authorized by the charter to do so.

[See note at end of this case.]

Statutes — Repeal — Effect on Existing Cause of Action.

A judgment of \$2,000 against a municipality for personal injuries was set aside because the charter limited a recovery in such cases to \$100. Subsequently such charter provision was repealed, and plaintiff moved for an order directing a judgment upon the verdict. It is held that, since the repealing enactment did not provide for the maintenance of existing causes of action, plaintiff could not recover more than the amount originally limited.

Appeal from Circuit Court, Lane county:
HARRIS, Judge.

Action by Josie Pullen, plaintiff, against City of Eugene, defendant. From judgment rendered, plaintiff appeals. **AFFIRMED.**

[321] This is an action by Josie Pullen against the City of Eugene, a municipal corporation, to recover damages for a personal injury. The plaintiff, Josie Pullen, was returning at night from the business section of the City of Eugene to her home in company with her husband, who stepped on the outer end of a broken plank in the sidewalk, thereby elevating one end of [322] the middle fracture, over which she stumbled and fell, sustaining an injury. The complainant charges that the defendant negligently constructed on Willamette Street a sidewalk, and carelessly permitted it to become dilapidated: that the defendant and its agents had knowledge of such conditions, or, by the exercise of reasonable diligence, should have known them; and that, in consequence of such defects, the plaintiff fell and was injured, particularly setting forth the manner of building the sidewalk, the defects therein, and the negligence complained of.

The answer admits that the defendant is a municipal corporation, and that the street where the injury occurred is used for public travel, but denies all the other averments of the complaint. For a further answer it is alleged in effect:

(1) That the defendant was incorporated by an act of the legislative assembly, filed in the office of the Secretary of State February 18, 1905; (2) that Section 116 of such act reads (setting forth a copy thereof as hereinafter quoted): "That neither defendant nor the council, chairman of the street committee, or street commissioner of said city at any time prior to the alleged accident and injury mentioned in said complaint had any notice, actual or otherwise, of the said alleged dangers or defective condition, defect, or dangerous place of the sidewalk referred to in the complaint, if such condition existed."

For a second defense, paragraph 1 of the first separate answer is repeated, and it is further alleged:

"That at and prior to the time of the occurrence of the alleged injury which plaintiff claims to have received, defendant had provided the necessary officers of defendant city to take charge of the improvement and repair of sidewalks in said city, and had performed all other acts required by the charter of said city to accomplish said purposes; that at the time of [323] said alleged injury defendant and its mayor, council, street commissioner, chairman of the street committee, and officers and employees had no notice, actual or otherwise, of any defect, dangerous condition, or dangerous place in the sidewalk mentioned in plaintiff's complaint; that defendant exercised reasonable care and prudence in doing all the things, and taking all the steps appropriate, or requisite by said charter, to maintain said sidewalk in a safe condition."

A demurrer to the first separate defense was sustained. The remaining averments of new matter in the answer were denied in the reply, and the cause, having been tried, resulted in a verdict and judgment in plaintiff's favor for the sum of \$2,000. Thereupon the defendant's counsel, based upon affidavits, moved to set aside the judgment and for a new trial on the grounds of newly discovered evidence; that the damages awarded were excessive; insufficiency of the evidence to justify the verdict; and error in law occurring at the trial and excepted to by the defendant.

The motion was allowed for the reason, as stated by the court, that the defendant was entitled to avail itself of the defense afforded by Section 116 of the city charter, and that an error had been committed in denying the assertion of such right. From the order granting a new trial the plaintiff appeals.

L. M. Travis and *A. K. Meck* for appellant.

O. H. Foster and *Skipcorth & Lewis* for respondent.

[324] MOORE, C.J. (*after stating the facts*).—1-4. It is contended that upon a motion for a new trial, which is an application for a re-examination of an issue of fact, the court was not authorized to set aside the judgment in consequence of having sustained a demurrer to the answer, which ruling is a determination of an issue of law, and hence an error was committed in this respect. A text writer, in discussing the subject of a new trial observes:

"The question as to the sufficiency or insufficiency of the evidence to justify the findings raises a plain issue of fact, and is properly determined on a new trial motion. It is otherwise, however, as to the insufficiency of the evidence to justify the judgment. Upon the same principle—viz., that a new trial is a re-examination of an issue of fact—it has been held that errors in rulings upon demurrers to pleadings cannot be reviewed on motion for a new trial. It is manifest that this is a correct application of the principle; for, if final judgment is given upon the demurrer for either plaintiff or defendant, there would be no issue of fact, in the case." Hayne, *New Trial and Appeal* (Rev. ed.), § 1.

It will be remembered that the demurrer herein challenged the sufficiency of only one ground of defense, thereby leaving for trial an issue of fact with respect to the second defense.

In 14 Ency. Pl. & Pr. 718, in speaking of the statutory grounds for a new trial, it is said:

"In the various Codes and practice acts attempts have been made to enumerate and

briefly state the grounds for new trial. Such enumeration does not restrict the inherent power of courts to relieve a party where justice has not been done, or to grant new trials for any other sufficient causes not enumerated, unless the restriction is express."

[325] Our statute prescribes seven grounds for setting aside a judgment and granting a new trial: Section 174, L. O. L. This enactment does not restrict an exercise of such right to the particular instances specified: *De Vall v. De Vall*, 60 Ore. 493, 119 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A 409, 40 L.R.A.(N.S.) 291. If at any time while jurisdiction of cause is retained it is discovered that such an error has been committed as would necessitate a reversal of the final determination reached in the trial of the cause, the court, committing such mistake of law, may, on motion of the party aggrieved, thereby or at its own instance voluntarily set aside the judgment and grant a new trial, thereby avoiding the necessity of an appeal: *De Vall v. De Vall*, 60 Ore. 493, 118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A 409, 40 L.R.A.(N.S.) 291; *Taylor v. Taylor*, 61 Ore. 257, 121 Pac. 431, 964; *Sullivan v. Wakefield*, 65 Ore. 528, 133 Pac. 641; *L. C. Smith, etc. Typewriter Co. v. McGeorge*, 72 Ore. 523, 143 Pac. 905; *Frederick v. Bard*, 74 Ore. 457, 145 Pac. 669. If, however, an error was committed in sustaining the demurrer to the first cause of defense, the court on its own initiative was authorized to set aside the judgment and grant a new trial. Nor was it necessary, when the demurrer was sustained, to save an exception to the court's ruling, since it was made upon a matter in writing and on file in the court: Section 172, L. O. L.

5. The remaining question is whether or not Section 116 of the municipal charter violates a clause of the organic law of the state which provides that: "Every man shall have remedy by due course of law for injury done him in his person, property or reputation:" Article I, Section 10, of the Constitution of Oregon.

[326] The part of the charter referred to reads:

"The City of Eugene shall not in any event be liable in damages to any person for an injury caused by any defect or dangerous place at or in any sidewalk, crosswalk, street, alley, bridge, public grounds, public buildings, or ditch, unless the mayor, chairman of the street committee, or street commissioner shall have had actual notice of such defect or dangerous place, and a reasonable time thereafter in which to repair or remove such defect or dangerous place before the happening of such accident or injury, and in no case shall more than \$100 be recovered as damages, from the city for any such accident or injury."

Upon considering the demurrer the trial court was of the opinion that the language last quoted trenching upon the clause of the fundamental law referred to. When, however, the motion for a new trial was interposed, the court, having carefully examined the charter and discovered that its provisions did not exempt any officer of the city from liability for damages from an injury resulting from negligence in failing to keep a sidewalk in repair, set aside the judgment. In *Mattson v. Astoria*, 39 Ore. 577, 65 Pac. 1066, 87 Am. St. Rep. 687, the charter provided that:

"Neither the city nor any member of the council thereof shall in any manner be held liable for any damages resulting from a defective condition of any street, alley, or highway thereof."

And it was held that such clause was repugnant to Section 10 of Article I of the original act of the state. In *Batdorff v. Oregon City*, 53 Ore. 402, 100 Pac. 937, 18 Ann. Cas. 287, a clause of the charter exempted Oregon City from liability for loss occasioned by accident on account of the condition of any street, but not exonerating any officer for a casualty caused by the willful neglect or gross negligence of such officer, [327] and it was determined that the charter practically denied a remedy to any person injured in consequence of the carelessness of agents of the city.

By Section 48 of the charter of the City of Eugene authority is conferred upon the common council to levy, assess and collect taxes upon all nonexempt property (subdivision 1); to appropriate for any item of city expenditure, and provide for the payment of the expenses of the city (subdivision 40); to prevent and remove all obstructions from the streets, alleys, crosswalks, sidewalks, public parks, and other public places, and to repair and clear the same at the expense of the property fronting on such improvement, or of the city (subdivision 51). The common council is also empowered to improve or repair any street or alley, or any part thereof: Section 50.

In *Batdorff v. Oregon City*, 53 Ore. 402, 100 Pac. 937, 18 Ann. Cas. 287, it is said:

"Though there is a conflict of judicial utterance as to the common-law liability of a city for a failure to keep a street in repair, the weight of authority supports the principle that, when a charter invests a municipal corporation with exclusive control over the streets within its limits, and authorizes it to employ the means necessary to improve and maintain such highways, a duty to the public arises by implication of law to keep the streets that have been opened for travel in a reasonably safe condition; and for any injury that may result from a failure to discharge such obligation the city, without any

statutory provision to that effect, must respond in damages."

In addition to the authorities there cited, see, also, the notes to the cases of *Browning v. Springfield*, 17 Ill. 143, 63 Am. Dec. 345, *Goddard v. Harpswell*, 84 Me. 499, 24 Atl. 958, 30 Am. St. [328] Rep. 373, and *Batdorff v. Oregon City*, 53 Ore. 402, 100 Pac. 937, 18 Ann. Cas. 287.

To recover for a loss occasioned by official dereliction of duty, not involving more than \$100, an action may be maintained against the defendant herein. If, however, the amount of injury caused by the negligence of the defendant or its agents exceeds that sum, an action may be maintained against the officers of the municipality whose duty it was to cause the street to be repaired, and to see that the highway was kept in suitable condition for public travel. Since such a remedy is availing, the section of the charter referred to does not violate the clause of the fundamental law of the state.

No error was committed in setting aside the judgment and granting a new trial, and the order to that effect is affirmed.

Affirmed.

Benson, Burnett and McBride, JJ., concur.

ON PETITION FOR REHEARING.

(April 20, 1915.)

The Circuit Court having been affirmed in setting aside the judgment rendered therein and granting a new trial, the appellant files in this court a petition for rehearing. Upon the hearing of said application the rehearing was denied and the former opinion sustained.

L. M. Travis and A. K. Meek for appellant.
Skipworth & Lewis for respondent.

[329] MOORE, C. J.—6. In a petition for rehearing it is maintained that, though the charter of the City of Eugene confers upon the common council authority to repair a street and to defray the expense thereof either by taxing all the nonexempt property in the municipality or by imposing upon the premises specially benefited an assessment for the improvement made (Special Laws Or. 1905, p. 255, c. 7, § 48, subd. 51), the mayor and councilmen upon whom such obligation primarily devolves are not liable for any injury sustained by reason of their nonfeasance in failing to discharge that duty, nor are they responsible for the misfeasance of their subordinates, since the officers particularly designated receive no compensation for their services: *Id.* § 34.

The case relied upon to support the principle asserted is *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62, which was an action to recover damages sustained by the plaintiff's wife by falling into a river at

night, in consequence of the negligence of the defendant, a bridge-tender, who, while operating the draw of the span, failed to shut the gates thereat or to hang out lanterns as warnings of danger. The court, having found that the appointment of the keeper of the bridge was not honorary, nor that his services were gratuitous, determined that, as a public officer, he was responsible for his acts of misfeasance, on the ground that his labor was voluntary and attended with compensation, and his duty was entire, absolute, [330] perfect and personal, and not only were his services such as he was under obligation to perform, but he was also clothed with ability to discharge the duty both in respect to the means at his command and the legal authority to act, irrespective of superior officers. That case has been cited as a recognized authority by the Supreme Judicial Court of Massachusetts in several of its decisions, but we have not found an instance in which the want of compensation by an officer for the performance of the services required of him has been considered as a prerequisite to the liability imposed. The rule so adopted in that state has been adhered to, but the decisions of that court have been put on other grounds. Thus in *Moynihan v. Todd*, 188 Mass. 301, 305, 74 N. E. 367, 108 Am. St. Rep. 473, in referring to the preceding case relied upon herein, it is said:

"We are of opinion that the principle which underlies the rule that public officers and other agencies of government are not liable for negligence in the performance of public duties goes no further than to relieve them from liability for nonfeasance and for the misfeasance of their servants or agents. For a personal act of misfeasance, we are of opinion that a party should be held liable to one injured by it, as well when in the performance of a public duty as when otherwise engaged. We think that the general course of decisions in this commonwealth is not in conflict with this view. But, for acts of misfeasance of a servant or agent in such cases, there is no liability. This is because the rule *respondent superior* does not apply."

In *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439, 450, 8 Am. Dec. 428, it was held that a civil action would not lie against an overseer of highways by an individual who had sustained an injury in consequence of the negligence of such officer in failing to keep a [331] bridge in repair. In deciding that case, Chancellor Kent observes:

"When the laws render a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not uncompensated or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect."

The case last mentioned is referred to in *Adsit v. Brady*, 4 Hill (N. Y.) 630, 632, 40 Am. Dec. 305, where it is said:

"When an individual sustains an injury by the misfeasance or nonfeasance of a public officer, who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case."

In *Robinson v. Chamberlain*, 34 N. Y. 389, 396, 90 Am. Dec. 713, it was ruled that a contractor who, pursuant to law, had been employed by the state and received a compensation for performing a public duty, was liable to any person sustaining special damage in consequence of his failure to discharge such obligation.

The case of *Piercy v. Averill*, 37 Hun (N. Y.) 360, was an action against the mayor and aldermen of the City of Ogdensburg, New York, to recover damages for a personal injury resulting from the defendant's failure to cause snow and ice to be removed from a sidewalk, whereby the plaintiff slipped, fell and was hurt. A demurrer to the complaint having been overruled, an interlocutory judgment was rendered, in reversing which it was said:

"The general rule in this state is that public officers, charged with a ministerial duty, are answerable in damages to anyone specially injured by their carelessness [332] and negligent performance of, or an omission to perform the duties of their office."

Further in the opinion it is observed:

"The defendants again urge that they are not liable for a neglect of their duty, because by the city charter the city is declared not to be liable for any injury caused by a sidewalk being out of repair, or by slipping upon snow or ice thereon. They argue that, if the principal is not liable, they [the agents], are not. It is hardly accurate to say that the city and the common council stand merely in the relation of principal and agent. . . . But, if we adopt the view that the common council are the agents of the city, still there is no reason why an agent should not suffer for damages occasioned by his wrongful act, even though his principal be not liable. If a statute should relieve a railroad company from any liability for the wrongful act of its servants, there would be no reason why the servants should not continue liable for their own wrongful acts. If the doctrine of *respondent superior* were abolished, the doctrine that he who does an injury should pay the damages he has caused would be unaffected."

It is also remarked:

"A further argument is that public policy should forbid us to hold the defendants liable, inasmuch as such a rule of liability would drive from the common council persons of

responsibility. We cannot give much weight to this argument. The defendants say we ought to be allowed to accept office and knowingly to neglect our duties, without any liability to those whose limbs are broken through our negligence, because no responsible persons will accept office, except on the condition that they may neglect its duties with impunity. It is enough to say in reply to this that it is better to have irresponsible officers who attend to their duties than responsible officers who do not."

[333] In the decisions last mentioned no reference is made to the doctrine announced in the case of *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428, to the effect that, in order to render a public officer liable to special damages for neglect of duty, it must appear that his services were voluntary and for compensation. We conclude, therefore, that the principle announced by the Chancellor in the original case was in the later case regarded as no longer controlling.

If the payment of compensation to a public officer for a performance of the duties required of him is to determine the question of liability for his negligence, then the amount of his salary is immaterial, so that, if he annually received a nominal sum only, his responsibility would be the same as if he were well paid for his services. The mere statement of such inequitable consequences that would necessarily result from the case supposed conclusively illustrates the absurdity of the doctrine maintained. If the mayor and the councilmen have funds or the authority to procure them, and, neglecting their duty, make no effort to obtain such means, they are liable in failing to repair a street, if they had notice of the defect: *Bates v. Horner*, 65 Vt. 471, 27 Atl. 134, 22 L.R.A. 824.

In *Grant v. Baker*, 12 Ore. 329, 7 Pac. 318, it was held that an action would lie against such officers to recover damages resulting from personal injury alleged to have been caused by their failure to keep a street in repair, though nothing was said in the opinion with respect to any compensation having been paid to the councilmen.

The mayor and councilmen of the City of Eugene are not parties hereto, and anything said or intimated in this opinion will not conclude them from controverting their liability for the damages sustained by the [334] plaintiff, if she institutes an action against them. Without deciding the question, however, it is believed that she has a *prima facie* right of action against them.

The former opinion is therefore adhered to and a rehearing denied.

Rehearing denied. Former opinion sustained.

Benson, Burnett and McBride, JJ., concur.

SECOND PETITION FOR REHEARING.

(May 18, 1915.)

This is a second application and petition for a rehearing herein. The reason for denying this petition is set forth in the opinion of the court.

L. M. Travis and *A. K. Meek* for appellant and for petition.

Skipworth & Lewis and *O. H. Foster* for respondent and against petition.

MOORE, C. J.—In a second petition for rehearing, judgment for \$100, the limit of a recovery against the municipality, is demanded, together with the costs and disbursements incurred at the trial and on the appeal. Had the request been made when the motion to set aside the judgment and grant a new trial was interposed, [335] a very different conclusion would probably have been reached by the trial court. Speculating, however, upon a reversal of the ultimate judgment, it was insisted upon appeal that errors had been committed in granting the original motion. When the judgment was affirmed, an offer was made to accept a judgment against the city for the sum for which a recovery might have been had.

This application comes too late, and for that reason is denied.

Second petition for rehearing denied.

Benson, Burnett and McBride, JJ., concur.

PETITION TO RECALL MANDATE.

(September 14, 1915.)

The order and judgment of the lower court setting aside the verdict of the jury for \$2,000 in favor of plaintiff, and granting a new trial, was affirmed on appeal, and plaintiff now moves to recall the mandate heretofore issued and for an order directing judgment to be entered on the verdict in her favor.

L. M. Travis and *A. K. Meek* for appellant and for petition.

Skipworth & Lewis and *O. H. Foster* for respondent and against petition.

[336] MOORE, C. J.—7. This is a motion to recall a mandate and to secure an order directing a judgment to be entered on a verdict. The plaintiff was injured by falling on a sidewalk in the City of Eugene, and in an action against that municipality to recover the damages sustained she secured a verdict and judgment for \$2,000. This judgment was set aside by the trial court, because the defendant's charter limited a recovery in such cases to \$100. The action of the trial court was affirmed on appeal: this court holding that the clause of the charter was not violative of Article I, Section 10, of the

Constitution of Oregon, which declares that every person shall have remedy by due process of law for injuries done his person, property or reputation, for, as the city council was given power to repair sidewalks, anyone hurt by reason of a defect therein might maintain an action against the city officials for a breach of their duty: Pullen v. Eugene, 77 Ore. 320, 146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474. The mandate from this court having been sent down, an amended complaint was filed by leave of court, making as parties defendant the city officers whose breach of duty is asserted to have been the cause of the accident. Thereafter the clause of the charter was repealed, at an election held for that purpose, whereupon this motion was interposed; the plaintiff's counsel insisting that, the impediment against a recovery of more than \$100 having been removed, judgment should now be entered as originally given.

In Newsom v. Greenwood, 4 Ore. 119, it was held that an enactment repealing or modifying the remedy of a party should not be so construed as to affect actions or suits brought before the repeal or modification. [337] The repeal of a law conferring jurisdiction, however, takes away the right to proceed as to all actions undetermined at the time of the repeal, unless there is a saving clause in the abrogating enactment: State v. Ju Nun, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513. "Legislation which prejudicially affects vested rights or the legal character of past transactions," says Mr. Justice Bean, in Judkins v. Taffe, 21 Ore. 89, 91, 27 Pac. 221, 222, "will not be construed as retroactive, unless it is declared so in the act, and the courts will give to such enactments a prospective rather than a retroactive construction, if possible." A certified copy of the enactment, repealing the limitation clause of the charter, having been sent up, an examination thereof shows that no provision was made therein for the maintenance of existing causes of action thereunder. The plaintiff's remedy, if more than \$100 is undertaken to be recovered, is against the city officers, as it existed prior to the repeal of the limiting clause of the charter.

The petition should be denied, and it is so ordered.

Petition denied.

Benson, Burnett and McBride, JJ., concur.

NOTE.

Personal Liability of Public Officer for Injuries Caused by Defective Condition of Street or Highway.

Majority Rule:

Rule Stated, 939.

Qualification of Rule. 940.

Minority Rule, 941.

Majority Rule.

RULE STATED.

The authorities passing on the personal liability of a public officer for injuries resulting from a failure to keep streets or highways in repair are in an almost irreconcilable conflict. Most of the jurisdictions, however, hold that a public officer is liable for injuries resulting from his negligence where the duty imposed on him of keeping the streets or highways in repair is ministerial in character and not judicial or discretionary.

United States.—Balls v. Woodward, 51 Fed. 646.

California.—Huffman v. San Joaquin County, 21 Cal. 426; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 Pac. 881; Wurzbarger v. Nellis, 165 Cal. 48, 130 Pac. 1052; Taylor v. Manson, 9 Cal App. 382, 99 Pac. 410;

Illinois.—Tearney v. Smith, 86 Ill. 391; Skinner v. Morgan, 21 Ill. App. 209; Harris v. Carson, 40 Ill. App. 147.

Massachusetts.—Mognihan v. Todd, 188 Mass. 301, 74 N. E. 367, 108 Am. St. Rep. 473. See also White v. Phillipston, 10 Metc. (Mass.) 108.

Maryland.—Calvert County Com'rs v. Gibson, 36 Md. 229; Baltimore County Com'rs v. Baker, 44 Md. 2; Anne Arundel County Com'rs v. Duvall, 54 Md. 350, 39 Am. Rep. 393; Baltimore County Com'rs v. Wilson, 97 Md. 209, 54 Atl. 71, 56 Atl. 596; Garrett County Com'rs v. Blackburn, 105 Md. 226, 66 Atl. 31; Adams v. Somerset County Com'rs, 106 Md. 197, 66 Atl. 695; Anne Arundel County Com'rs v. Carr, 111 Md. 141, 73 Atl. 668; Richardson v. Kent County, 120 Md. 153, 87 Atl. 747.

Montana.—Smith v. Zimmer, 45 Mont. 282, 125 Pac. 420; Smith v. Zimmer, 48 Mont. 332, 137 Pac. 538.

New Hampshire.—Waldron v. Berry, 51 N. H. 136; Downes v. Hopkinton, 67 N. H. 456, 40 Atl. 433; Brown v. West, 75 N. H. 463, 76 Atl. 169.

New York.—Griffith v. Follett, 20 Barb. 620; Peck v. Batavia, 32 Barb. 634; Wilson v. New York, 1 Denio 595, 43 Am. Dec. 719; Lacour v. New York, 3 Duer 406; Adsit v. Brady, 4 Hill 630, 40 Am. Dec. 305; Hicks v. Chaffee, 13 Hun 293; Bostwick v. Barlow, 14 Hun 177; Babcock v. Gifford, 29 Hun 186; Piercy v. Averill, 37 Hun 360; Rochester White Lead Co. v. Rochester, 3 N. Y. 466, 53 Am. Dec. 316; Conrad v. Ithaca, 16 N. Y. 158; Mills v. Brooklyn, 32 N. Y. 489; Hicks v. Dorn, 42 N. Y. 47; Hover v. Barkhoof, 44 N. Y. 113; McCarthy v. Syracuse, 46 N. Y. 194; Johnson v. Belden, 47 N. Y. 130; Hines v. Lockport, 50 N. Y. 238; People v. Board

of Auditors, 75 N. Y. 316; *Olmsted v. Dennis*, 77 N. Y. 378; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 91 note; *Bennett v. Whitney*, 94 N. Y. 302; *Flansburg v. Elbridge*, 205 N. Y. 423, 98 N. E. 750, 41 L.R.A.(N.S.) 546; *Hungerford v. Waverly*, 56 Misc. 186, 107 N. Y. S. 291. Compare *Bartlett v. Crozier*, 17 Johns. (N. Y.) 451, 8 Am. Dec. 428.

North Carolina.—*Hathaway v. Hinton*, 46 N. C. 243; *Templeton v. Beard*, 159 N. C. 63, 74 S. E. 735; *Hipp v. Farrell*, 169 N. C. 551, 86 S. E. 570.

Oklahoma.—*Mott v. Hull* (Okla.) 152 Pac. 92, L.R.A.1916B 1184.

Oregon.—*Rankin v. Buckman*, 9 Ore. 253; *Batdorff v. Oregon City*, 53 Ore. 402, 18 Ann. Cas. 287, 100 Pac. 937. And see the reported case.

Vermont.—See *Batthey v. Duxbury*, 23 Vt. 714.

Wisconsin.—*Robinson v. Rohr*, 73 Wis. 436, 40 N. W. 668, 9 Am. St. Rep. 810, 2 L.R.A. 366.

The court in *Wilson v. New York*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719, laid down the rule as follows: "Public officers, of every grade and description, may be impeached or indicted for official misconduct and corruption. To this there is no exception from the highest to the lowest. But the civil remedy for misconduct in office is more restricted, and depends exclusively upon the nature of the duty which has been violated. Where that is absolute, certain and imperative, and every mere ministerial duty is so, the delinquent officer is bound to make full redress to every person who has suffered by such delinquency. Duties which are purely ministerial in their nature, are sometimes cast upon officers whose chief functions are judicial. Where this occurs, and the ministerial duty is violated, the officer, although, for most purposes, a judge, is still civilly responsible for such misconduct. But where the duty alleged to have been violated is purely judicial, a different rule prevails; for no action lies in any case, for misconduct or delinquency, however gross, in the performance of judicial duties. And although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done."

In *Hicks v. Dorn*, 42 N. Y. 47, the court said: "In the discharge of this duty, thus imperatively imposed upon him by law, he acted ministerially. It is true that he was

bound to exercise his discretion as to the methods and instrumentalities to be employed, and this is true of all ministerial officers; and yet it has never been held that, merely because ministerial officers have a discretion to exercise, that gives them the immunity of judicial officers. In this case, then, the defendant was bound to discharge his ministerial duties in a prudent, careful manner, without infringing upon the rights of private individuals or unnecessarily injuring them, and for an improper discharge of his duty the law makes him liable to the individual injured."

In *Tearney v. Smith*, 86 Ill. 391, it was said: "The work of constructing or repairing a public highway is not a judicial, but a ministerial, act, and must be performed with a proper regard to individual rights as well as the public accommodation. Commissioners of highways are only in a very limited sense judicial officers; repairing a highway is not of that character. For the negligent performance of ministerial acts they are personally responsible if injury results to others."

The court in *Rochester White Lead Co. v. Rochester*, 3 N. Y. 466, 53 Am. Dec. 316, commenting on the rule of liability of public officers, said: "Wherever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action, for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. But this judicial immunity can be extended no further. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct."

QUALIFICATION OF RULE.

It was held in *Hicks v. Chaffee*, 13 Hun (N. Y.) 293, that a reasonable degree of watchfulness in ascertaining the condition of a defective bridge is all that is required by law of highway commissioners. There is no absolute undertaking or guarantee on the part of the commissioners that the bridge shall at all times and under all circumstances be in proper condition.

It has been held that the injury of which complaint is made must be the proximate result of the neglect or omission on the part of the officials charged with the duty to repair. *Day v. Crossman*, 1 Hun (N. Y.) 570.

Where officers are clothed by a statute with discretionary powers to keep the roads in good repair they are not liable individually unless they are guilty of a wilful and malicious exercise of the power vested in them or a gross neglect of duty. *Gray v. Batesville*, 74 Ark. 519, 86 S. W. 295; *Neinsteil v. Smith*, 21 Ill. App. 235; *Cook v. Hecht*, 64 Mo. App. 273; *Templeton v. Beard*, 159 N. C. 63, 74 S. E. 735.

It was held in *Baltimore County Com'rs v. Wilson*, 97 Md. 207, 54 Atl. 71, 56 Atl. 596, that where a statute deprived the county commissioners of almost all their authority relative to the construction, care and repair of roads they were not liable for injuries resulting from a defective condition of a road.

Where the duties of a superintendent of streets are governed by a city charter subject to ordinances adopted by the council, the failure to repair a street which he is not directed to repair by ordinance or order will not make the superintendent liable for resulting injuries, though he knows of its dangerous condition. *Edwards v. Brockway*, 16 Cal. App. 626, 117 Pac. 787.

Some decisions hold that no action is maintainable against commissioners of highways for a neglect in keeping roads and bridges in repair unless it can be shown that they had the requisite funds for that purpose on hand or that they had the power to procure such funds. *Hutson v. New York*, 5 Sandf. (N. Y.) 289; *Wright v. Smith*, 27 Barb. (N. Y.) 621; *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Monk v. New Utrecht*, 104 N. Y. 552, 11 N. E. 268. See also *Eveleigh v. Hounsfield*, 34 Hun (N. Y.) 140. The leading case on this point is *Bartlett v. Crozier*, 17 Johns. (N. Y.) 451, 8 Am. Dec. 428, wherein Chancellor Kent gave the reason for the rule thus: "If a private suit will lie in any case, for the recovery of damages occasioned by a broken bridge, I should suppose that the commissioners of highways are the only persons to be sued. Their duty is to give directions relative to the repairing of the roads and bridges, and to cause to be kept in repair the highways and bridges. This seems to be a general duty applicable at all times and in all places; yet, when we come to read the details of their duty, we perceive that it does not exist absolutely, but arises only when the commissioners have money in hand, from forfeitures and penalties, or which has been paid over to them under the direction of the supervisors. Except in one case, the commissioners have a discretion to apply the money upon the roads and bridges; their duty does not go further than to the expenditure of those particular moneys, and they may expend it upon the roads and bridges, or upon either of them, as they shall deem best." But in *Day v. Crossman*, 1 Hun (N. Y.) 570, it was held that a defense that the officers

had no funds would not avail unless they could show that they made an effort to procure funds through the proper channels. See to the same effect *Lament v. Haight*, 44 How. Pr. (N. Y.) 1.

It was held in *Wilson v. Jefferson County*, 13 Ia. 181, that a district supervisor of a road was not liable for damages resulting from defects where the repairs would entail an extraordinary expenditure of funds.

Where the commissioners of highways have in good faith expended all the funds at their command, they are not liable for injuries caused by an insufficient bridge. *Nagle v. Wakey*, 161 Ill. 387, 43 N. E. 1079. See to the same effect *Neville v. Viner*, 115 Ill. App. 364; *Van Muddlesworth v. Hill*, 161 Ill. App. 592; *Pearl v. King*, 179 Ill. App. 562.

It was held in *Fitzpatrick v. Slocum*, 89 N. Y. 358, that where injuries received in a street resulted from the negligence of one under the control of the police department and not from a defective condition of the street, the street commissioner was not liable.

Though the county engineer is answerable in a large measure for his actions to the county road commissioners, he is not liable for an injury due to his negligence, in failing to repair a defective condition in a public road. The fact that the engineer is appointed by the governor with power to repair and construct public roads and bridges does not relieve the road commissioners from liability where under the statute they are charged with the duty of keeping the roads in repair and are supplied with the means of discharging this duty. *Richardson v. Kent County*, 120 Md. 153, 87 Atl. 747.

Where under a statute a state road commission was required to construct and maintain a system of state highways, contributing funds to be used for the purpose, the court held that the commission was not liable for injuries sustained by reason of its negligence in permitting a road crossing a stream to be without a guard rail. *State v. Rich*, 136 Md. 643, 95 Atl. 956, wherein the court distinguished the case at bar from the decisions establishing the liability of county commissioners, saying: "The liability of county commissioners to be sued for injuries resulting from unsafe conditions on the highways under their charge rests upon the ground that, in addition to their general powers and duties in respect to road maintenance, and their capacity to sue and be sued as declared by statute, they are given authority to raise money by taxation, and are thus enabled to respond in damages when sued upon claims of this nature."

Minority Rule.

Some jurisdictions adhere to the rule that in the absence of an express statutory provi-

sion, a public officer on whom rests the duty of keeping streets or highways in repair, is not liable for any injury resulting from his negligence in that respect. *McKinnon v. Pen-son*, 8 Exch. 319, 25 Eng. L. & Eq. 457; *Worden v. Witt*, 4 Idaho 404, 39 Pac. 1114, 95 Am. St. Rep. 70; *Schneider v. Cahill* (Ky.) 127 S. W. 143, 27 L.R.A. (N.S.) 1099; *McConnell v. Dewey*, 5 Neb. 385; *Wilson v. Spencer*, 91 Neb. 169, 135 N. W. 546; *Chosen Freeholders v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 530; *Cooley v. Chosen Freeholders*, 27 N. J. L. 415; *Dunlap v. Knapp*, 14 Ohio St. 64, 82 Am. Dec. 468; *Smith v. Williams County*, 29 Ohio Cir. Ct. Rep. 610; *McKenzie v. Chovin*, 1 McM. L. (S. C.) 222; *Thornton v. Springer*, 5 Tex. 587. The court in *McConnell v. Dewey*, supra, speaking of the early New York decisions said: "Is this departure from the earlier adjudicated cases in New York sustained by the common law? I think not. On the contrary, the doctrine that a private action cannot be maintained at common law, for an injury sustained by neglect of one whose duty is to repair highways, seems to be a very ancient one. In *Brook's Abr. Title, Action on the Case*, it is said upon the authority of the Year Books, that if a highway be out of repair, so that a horse was ruined and injured, no action lies by the owner against him who ought to repair it, for it is a public matter and ought to be reformed by presentment."

In *McKenzie v. Chovin*, 1 McM. L. (S. C.) 222, it was held that a board of commissioners of roads who were appointed by the people of the district were not liable individually for injuries resulting from a neglect of the duty to keep the roads in repair. The court said: "The duty of keeping the roads and bridges in repair is prescribed and regulated by the statute, a duty imposed on the commissioners, under a penalty for refusing to serve, as well as for not repairing, recoverable by indictment: and it would be against every principle of justice and right, to hold them responsible, out of their private estates, for every injury that an individual may sustain, as well as liable to be indicted for every neglect of duty; to compel them to serve, and then subject them to a liability, from which their constituents and employers are exempt."

It was held in *Niles v. Martin*, 4 Mich. 557, 69 Am. Dec. 333, that in the absence of an express statutory provision, highway commissioners were not liable for damages sustained by individuals in consequence of the nonrepair of bridges and highways.

The courts in *Indiana* hold that no action will lie against road supervisors for damages sustained from their neglect to keep the roads and bridges in their districts in repair. *Lyon v. Adams*, 2 Ind. 142; *Lamphier v. Karch*, 56 Ind. App. 661, 100 N. E. 938. The court in

Lynn v. Adams, supra, said: "When the law renders a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not gratuitous, or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect." Upon an analysis of the statutes of New York upon the subject, he comes to the conclusion that the duty of the overseer to repair bridges is not absolute, but depends upon contingencies, and rests much on the discretion of the overseer. He finds that the duty of keeping the roads in repair is divided between the overseer and the commissioners of highways, and that there are 'no certain, stable, absolute duties imposed upon either, and, therefore, neither the commissioners nor the overseers are liable to a private suit, or to any suit for neglect of duty but such as is expressly provided for by the statute.'" But see *House v. Montgomery County*, 60 Ind. 580, 28 Am. Rep. 657; *Perry v. Barnett*, 65 Ind. 522. In *Baker v. State*, 27 Ind. 485, a prosecution against members of a city council for permitting obstructions to be maintained in certain streets, the court held that the defendants were not liable either civilly or criminal-ly for acts done by them in the exercise of a discretion given to them by law unless they acted corruptly.

In *Iowa* the earlier decisions held that road supervisors were liable in damages for negligence in failing to repair defective highways. *McCord v. Ilich*, 24 Ia. 336; *Gould v. Scherer*, 101 Ia. 582, 70 N. W. 697; *Sells v. Dermody*, 114 Ia. 344, 86 N. W. 325. But in *Snethen v. Harrison County*, 172 Ia. 81, 152 N. W. 12, the court held that since a board of supervisors were engaged in a public work, by virtue of their office, the rule of nonliability applied to them as well as to the body for which they were acting.

In *Minnesota* the decisions are in apparent conflict. It was held in *Tholkes v. Decock*, 125 Minn. 507, 147 N. W. 648, 52 L.R.A. (N.S.) 142, that a road overseer was liable to one injured through his negligence in failing to guard an excavation in a highway during the progress of the work. But in *Bollard v. Gihlstorff*, 134 Minn. 41, 158 N. W. 725, the court held that town officers were not liable to one injured on a highway because of their failure to keep the highway in repair. The court giving its reason for adopting the minority rule said: "An examination of the authorities discloses a diversity of decision. It is not necessary to review them. They are readily accessible. 1 *Dillon, Mun. Corp.* (5th ed.) §§ 436-441; 1 *Elliott Roads & Streets* (3d ed.) § 537; 25 *Cent. Dig. High.* § 507; 10 *Dec. Dig. High.* § 198; note 22 L.R.A. 824; note 95 Am. St. Rep. 72. The

opposing doctrines are sufficiently sustained by the authorities and are supported by well-considered arguments. Often statutes prescribing the duties of the officers affect the result. We have not overlooked *Howley v. Scott*, 123 Minn. 159, 143 N. W. 257, 51 L.R.A.(N.S.) 137, where we hold that an officer, in that case the county auditor, was liable for a failure to perform a ministerial duty imposed upon him by statute. Nor have we overlooked the duties imposed upon town officers by statute. G. S. 1913, §§ 2525, 2529, 2575. We have reached the conclusion that the better rule favors exemption from liability. This rule, as observed by the trial court, accords with the general understanding of lawyers and laymen as to the liability of town officers."

DAILEY

v.

SPRINGFIELD ET AL.

Georgia Supreme Court—December 17, 1915.

144 Ga. 395; 87 S. E. 479.

Deeds — Conveyance of Expectancy — Validity.

A deed which on its face purports to convey a bare contingency or possibility, and in which there is nothing to show a present right in the vendor to sell a future benefit, is void.

(a) A covenant of warranty in such deed will not inure to the benefit of the vendee, or his heirs, so as to subject after-acquired property of the vendor to such covenant.

[See note at end of this case.]

Same.

Accordingly, where a vendor for a named consideration conveyed to a vendee "all the present rights in or title to all interests that" the vendor "may become possessed of either by inheritance or by deed from" the mother of the vendor, in certain city lots which the mother "now owns" in a certain city, and any interest he "may in the future become possessed of in any other city property, . . . either by deed or inheritance from" the mother, this was an attempt to convey a mere naked possibility without any present interest, and was void.

(a) Where in such case an action was brought by the widow of the vendee, who was his sole heir, in her own right (there being no debts against the estate), to recover an interest in certain realty belonging to and the proceeds of certain other property derived from the mother's estate, after her death, a

demurrer to such petition was properly sustained.

[See note at end of this case.]

(Syllabus by court.)

Error to Superior Court, Whitfield county: FITE, Judge.

Action by Mrs. R. C. Dailey, plaintiff, against B. W. Springfield et al., defendants Judgment for defendants. Plaintiff brings error. **AFFIRMED.**

[396] Mrs. R. C. Dailey filed her petition alleging substantially as follows: Her husband, Horace Springfield, died leaving no indebtedness, and the plaintiff is his sole heir at law. This action is brought against B. W. Springfield, Bert Springfield, and John Robertson, and is based upon a certain deed executed to her husband by B. W. Springfield. The deed (a copy of which is attached as an exhibit to the petition) recited that on October 10, 1907, B. W. Springfield, in consideration of \$500, the receipt whereof was acknowledged, did bargain, sell, and convey unto Horace Springfield "all the present rights in and title to and all interests that the said B. W. Springfield may become possessed of, either by inheritance or by deed from Mrs. N. J. Springfield, in certain city lots which the said Mrs. Springfield now owns in the city of Dalton, Whitfield county, Georgia [describing the lots], . . . and any interests I may in the future become possessed of in any other city property in the city of Dalton, Georgia, Whitfield county, either by deed or inheritance from the said Mrs. N. J. Springfield." The deed also contained a covenant of warranty. It is alleged that the intention of the conveyance was, that, Mrs. N. J. Springfield, the mother of B. W. Springfield and Horace Springfield, being the owner of certain realty valued at approximately \$4,000 to each child's part, B. W. Springfield, one of the children, would in due course of time become entitled, either by deed or inheritance, to his portion thereof. B. W. Springfield was in need of financial assistance, and agreed to sell to Horace Springfield all of his rights as an heir of Mrs. N. J. Springfield for the above-stated consideration. [397] This was done with the knowledge of Mrs. N. J. Springfield, and it was contemplated that she should remain in the possession and use of her property during her lifetime, and at her death B. W. Springfield's inheritance from her should go to Horace Springfield. Horace Springfield died in 1911, and immediately thereafter B. W. Springfield began to devise some scheme whereby he might evade his contract with Horace Springfield, and to this end he sought to bring about a sale of the property owned

by Mrs. N. J. Springfield at the time of the execution of the above-mentioned deed, with a view to concealing and using the proceeds thereof prior to her death; and he did procure and bring about such a sale to John F. Robertson, who, prior to his purchase, was told by the plaintiff and by her attorney of the terms of the contract, and who bought with full notice thereof, and who retained from the purchase-price of \$4,200 the sum of \$450 in order to protect himself against the plaintiff's claim. Mrs. N. J. Springfield gave \$1,000 of the purchase-price of the property to Bert Springfield, and \$1,000 to B. W. Springfield, which the plaintiff is entitled to receive from him, the same being proceeds of the realty described in the above-stated deed of conveyance from B. W. Springfield to Horace Springfield. With a part of the remainder of the proceeds Mrs. N. J. Springfield purchased certain other described real estate in the city of Dalton. In addition to the above realty, Mrs. N. J. Springfield left at her death, on the 26th day of February, 1914, the sum of approximately \$1,000 in money as the proceeds of the realty described in the deed from B. W. to Horace Springfield. Plaintiff is entitled to recover from B. W. Springfield all of the real estate described in the last-mentioned deed, and the proceeds therefrom, or the property B. W. Springfield received by gift or inheritance from Mrs. N. J. Springfield's estate. B. W. Springfield inherited a half interest in the real estate above described; and he received by gift the \$1,000 above referred to as the proceeds of the property described in the deed attached to the petition; and he and Bert Springfield are now in possession of \$1,000 of the proceeds of the real estate, one half of which in law and equity belongs to the plaintiff. Bert and B. W. Springfield are seeking to convey the real estate described, under some deed or conveyance from Mrs. N. J. Springfield, not recorded, which plaintiff is informed was drawn in an attempt to convey one half interest [398] therein to B. W. Springfield, and to avoid her claim. Bert and B. W. Springfield are insolvent; they are seeking to dispose of the money left from the proceeds of the real estate described in the contract, as well as the real estate itself; and in the event they are allowed to do so, the plaintiff will be without remedy. She prays, that defendants be required to pay one half of the money inherited by B. W. Springfield into court; that they be enjoined from encumbering or disposing of any property left by Mrs. Springfield; that plaintiff have judgment for one half interest in the real estate described as being on Green Street, Dalton, and judgment against B. W. Springfield for \$1,000, and for one half the money left of the proceeds of the property described in the deed from B. W.

to Horace Springfield; and that she have judgment against John F. Robertson for \$450.

The defendants demurred to the petition, upon the grounds, among others, that there is a misjoinder of parties; that there is no allegation that there has not been previously appointed an administrator of Horace Springfield, and no allegation that the administrator authorized or consented for the plaintiff to sue in this case; and that no cause of action is set out against defendants. The court sustained the demurrer and dismissed the case, and the plaintiff excepted.

George G. Glenn and *M. C. Tarver* for plaintiff in error.

W. E. Mann and *W. C. Martin* for defendants in error.

HILL, J. (*after stating the facts*).—The controlling question in the case is whether the contract as expressed in the deed from B. W. Springfield to Horace Springfield, as set out in the foregoing statement of facts, is legal and enforceable. Section 4117 of the Civil Code of 1910 declares: "A bare contingency or possibility cannot be the subject of sale, unless there exists a present right in the person selling, to a future benefit." The question arises, did there exist in B. W. Springfield a *present right* to sell an interest in his mother's property while she was yet living, or was the thing attempted to be conveyed a bare contingency? There is no contention that B. W. Springfield had a present right to sell a future benefit at the date of the deed. Our own court seems not to have passed upon the exact question here raised, so far as we have been able to find. But a number of outside jurisdictions have decided the question. In *Hoyt v. Hoyt*, 61 Vt. 413, 416, 18 Atl. [399] 313, it is said: "At common law agreements for the sale of expectancies are generally held to be pernicious and void, for the reason that they offer temptations to heirs to anticipate the enjoyment of property by making disadvantageous bargains, which tend to their harm and to involve the name and character of the family." In *Poor v. Hazleton*, 15 N. H. 564, 566, it is said that such sales are "void as against public policy." In *Boynton v. Hubbard*, 7 Mass. 112, it is said: "It is a fraud on the ancestor, productive of public mischief, and void as well at law as in equity." In this last case the contract was called a wagering contract and declared to be against public policy. Such contracts have been upheld by some courts, where the contracts were shown to be fair and the purchaser bought the expectancy at the full market value; but the weight of authority seems to be otherwise. In the instant case the consideration for the

deed was \$500, and the plaintiff seeks to recover something like \$2,000 in money and one half of the real estate.

Our own court has passed upon a case (not exactly like the one at bar) where the principle ruled is the same as that involved here. In *Trammell v. Inman*, 115 Ga. 874, 42 S. E. 246, where a marriage settlement was "entered into between C and D, wherein C conveyed to B, as trustee for certain purposes, all her rights, interests, and expectancy in the estate of her deceased husband and in the estate of her deceased father, and also her interest in and to the property of any other person by virtue of any gift, devise, or conveyance of any kind whatsoever made to her or to which she might at any time thereafter be entitled by law," it was held that such settlement was "ineffectual to convey any rights, as it was an attempt to convey a mere naked possibility without any present interest." In delivering the opinion of the court, *Simmons, C. J.*, said (pp. 877-8): "That part of the marriage articles in which Mrs. Trammell undertook to convey to a trustee such interest as she might thereafter acquire in the property of any other person by virtue of any conveyance or by law was invalid and ineffectual. She undertook to convey property which she did not possess or have any expectation of possessing and in which she had no present interest whatever. It was no more than a mere chance. Some one might give her property other than that mentioned expressly, or she might inherit such property, or she might purchase property, and in each case it would come within the broad terms of this settlement. [400] This part of the settlement was an attempt to dispose of a bare naked possibility, which, in this State, is not the subject of grant or sale. A son cannot, in law, convey to another such property as he may inherit from his father who is in life at the time of the conveyance, and yet to do so would be to convey an interest less remote than that sought to be disposed of by the marriage settlement in the present case." While the last sentence quoted from Judge *Simmons* is obiter, yet he recognized it to be the true rule. We think the principle decided in the *Trammell* case is decisive of the instant one. And, to the same effect, see: *Purcell v. Mather*, 35 Ala. 570, 573, 76 Am. Dec. 307; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84, 87; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85; *Watson v. Dodd*, 68 N. C. 528; *Davis v. Hayden*, 9 Mass. 514; *Dart v. Dart*, 7 Conn. 250; *Boynton v. Aprn. Cas.* 1917D—60.

Hubbard, 7 Mass. 112; *McCall v. Hampton*, 98 Ky. 166, 32 S. W. 406, 33 L.R.A. 266, 56 Am. St. Rep. 335. As to a definition of an expectancy, see 2 *Fearne on Rem.* 22, 23.

The deed purports to convey only the "present rights in and title to and all interests that" the grantor has or may become possessed of by inheritance or deed from his mother, who was then living. This was a mere expectancy. No one is heir to the living, and consequently the grantor had nothing to convey from his mother's estate while she was in life. The deed was therefore void.

It is contended that the deed contained a covenant of warranty as to the interest conveyed, and that the grantor is estopped from denying its legality. But the interest he attempted to convey, as already shown, was nothing. The deed only purported to convey and to warrant his interest in his mother's estate; and as we have seen that he had no interest in his mother's estate to convey, the rule contended for did not apply. In the decision in *White v. Stewart*, 131 Ga. 460, 62 S. E. 590, 15 Ann. Cas. 1198, it was held: "If a deed purport to convey the right, title, and interest of the grantor in and to certain described realty, instead of conveying the realty itself, the covenants in the deed will be limited to the right or interest which the grantor has in the property."

The rulings here made being controlling of the case, the questions raised by demurrer, as to whether there is a misjoinder of parties, and whether an administrator upon the estate of *Horace Springfield* was the proper party to bring or authorize the present suit, [401] are immaterial. What we hold is that no cause of action is set out in the petition, whether brought by an administrator or by the plaintiff herself; and the court did not err in dismissing it upon demurrer.

Judgment affirmed.

All the Justices concur.

NOTE.

The reported case holds that an attempted conveyance of the expectant interest of the grantor in certain property then owned by his mother is void, and that a covenant of warranty in such a deed will not inure to the grantee so as to estop the grantor or subject an after-acquired interest. The validity of the transfer of an expectancy in an estate made by an heir or beneficiary to a stranger is discussed in the note to *Donough v. Garland*, Ann. Cas. 1916E 1238.

WELCH ET AL.

v.

CITY OF BOSTON.

Massachusetts Supreme Judicial Court—
May 22, 1915.

221 Mass. 155; 109 N. E. 174.

Trusts — Title to Trust Property.

The exclusive legal title to trust property is vested in the trustee

Taxation — Situs of Property — Intangible Property.

Bonds and stocks, which are "intangible property" because they can be kept in a small compass and are not likely to be observed for purposes of taxation, are customarily taxable at the domicile of the owner.

[See 62 Am. St. Rep. 452.]

Same.

To tax intangible property, located without the jurisdiction, in the state of the owner's domicile, is not in violation of Const. U. S. Amend. 14.

Situs of Personalty Held in Trust.

St. 1909, c. 490, pt. 1, § 23, declares that all personal estate within or without the commonwealth shall be assessable to the owner, while subsection 5 declares that property held in trust by an executor, administrator, or trustee shall be assessed to them in the city or town in which they reside. St. 1909, c. 516, exempts from taxation merchandise, machinery, and animals owned by inhabitants of the state and situated in another state. A resident of Maine devised stocks and bonds in trust for persons domiciled in California. The trustees resided in Massachusetts, but the property remained in Maine. It is held that as it could not be presumed that the property was taxed in Maine, it was legally assessable to the local trustees, particularly in view of the exemption of named property and the fact that the local courts might be invoked by the beneficiaries.

[See note at end of this case.]

Same.

In a proceeding to tax resident trustees on personal property, such as stocks and bonds, located in a foreign state and bequeathed by a foreign testator to residents of another second foreign state, it cannot be presumed, in the absence of evidence, that there was any law in the state where the property was located which allowed it to tax the property.

[See note at end of this case.]

On report from Superior Court, Suffolk county: KING, Judge.

Action by Francis G. Welch et al., plaintiffs, against City of Boston, defendant. Case reported. The facts are stated in the opinion. JUDGMENT FOR DEFENDANT.

Tyler, Corneau & Eumes for plaintiffs.
Joseph P. Lyons for defendant.

[156] Rugg, C. J.—This is an action to recover a tax paid under protest. The plaintiffs are trustees appointed by the Probate Court of York County in the State of Maine, under the will of a testatrix who at the time of her decease was and for a long time previous thereto had been domiciled in that county and State. All the beneficiaries under the trust are domiciled in the State of California. The *corpus* of the trust fund, so far as concerns the tax here in question, consists entirely of stocks and bonds of corporations foreign to this Commonwealth. These bonds and certificates of stock always have been deposited and kept in the State of Maine. The question is whether such property is legally assessable to the plaintiffs who are domiciled in this Commonwealth.

[157] It is to be noted that the personal property here sought to be taxed does not belong to the estate of a decedent in process of settlement. The plaintiffs do not hold as executors or administrators, but as trustees. It must be presumed that, at least so far as relates to the personal property held by the plaintiffs, the estate of the testatrix has been distributed and a legacy has been paid to them as trustees. It does not appear that the property has been taxed either at the domicile of the beneficiary or in Maine, nor does it appear that there is any law permitting or requiring the taxation of the property in either of those jurisdictions. We are not concerned, therefore, with any questions touching double taxation, except so far as that may be involved in the interpretation of our own statute.

Manifestly the legal title to the stocks and bonds in question is in the plaintiffs. It is one of the fundamental characteristics of trusts that the full and exclusive legal title is vested in the trustee. *Gray v. Lenox*, 215 Mass. 598, 102 N. E. 1097. The rights of the beneficiary are purely equitable and cannot be enforced ordinarily at law, but are cognizable only in equity. Our tax law proceeds upon the basis that in all instances where the trustee is a resident of this Commonwealth he is the person to whom the assessment must be made. That is on the ground that he is the owner in the legal sense. The opening words of the controlling section of the statute render liable to taxation all personal property owned by inhabitants of the Commonwealth whether within or without the Commonwealth, unless by reason of some special exemption. *Putnam v. Middleborough*, 209 Mass. 456, 95 N. E. 749. That it was the legislative intention to tax property of this character is manifest from St. 1909, c. 516, section one of which exempts from taxation "merchandise machin-

ery and animals owned by inhabitants of this Commonwealth but situated in another State," and § 2 of which subjects to taxation in the city or town where they are situated like personal estate owned by non-residents. The property in question is owned by inhabitants of this Commonwealth, although physically it is not kept within the State. But it is intangible in its character. It is quite different in nature from coal or cars or other corporeal property which, for purposes of taxation, by reason of its substantial body may acquire a *situs* of its own apart from the domicile of its owner. Union Refrigerator Transit Co. v. Kentucky, [158] 199 U. S. 194, 4 Ann. Cas. 493, 26 S. Ct. 36, 50 U. S. (L. ed.) 150. While for some purposes bonds, being specialties, have a *situs* where they are found, Callahan v. Woodbridge, 171 Mass. 595, 51 N. E. 176; Wheeler v. Sohmer, 233 U. S. 434, 34 S. Ct. 607, 58 U. S. (L. ed.) 1030, yet commonly they are held to be located at the domicile of their owner. Frothingham v. Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475. Bonds are but a species of indebtedness and wherever actually held or deposited "may for purposes of taxation, if not for all others, be regarded as situated at the domicile of creditor" or owner. Kirtland v. Hotchkiss, 100 U. S. 491, 498, 25 U. S. (L. ed.) 558. Certificates of stock, apart from express statute, have never been regarded as capable of acquiring a *situs* independent of the domicile of the owner and of the corporation whose fractional ownership they represent. Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432. Both bonds and stocks are in their nature difficult of discovery. They can be kept in small compass and are not likely to be observed. They are called intangible property. The maxim that they follow the person of their owner as to *situs* has its foundation not only in convenience but in the practical necessities of business. That maxim is recognized generally as applicable to such securities as here are in question, in the absence of some special provision. Covington v. Covington First Nat. Bank, 198 U. S. 100, 111, 25 S. Ct. 562, 46 U. S. (L. ed.) 963; Hawley v. Malden, 232 U. S. 1, 12, Ann. Cas. 1916C 842, 34 S. Ct. 201, 58 U. S. (L. ed.) 477.

The *situs* of such intangible securities for purposes of taxation commonly is treated as at the domicile of the owner. "Generally speaking, intangible property . . . may be regarded, for the purposes of taxation, as situated at the domicile of the creditor [owner] and within the jurisdiction of the State where he has such domicile." A tax upon such property to the owner at his domicile, in accordance with the State statute, "violates no provision of the Federal Constitution." Buck v. Beach, 206 U. S. 392, 401, 11 Ann. Cas. 732, 27 S. Ct. 712, 51 U. S.

(L. ed.) 1106. Even in the light of the most recent decisions domicile of the owner usually fixes the *situs* of personal property, for purposes of taxation, even as to classes described as tangible, unless it has become permanently located in some other jurisdiction and, so far as adjudications go, is also employed in the prosecution of business there. Southern Pac. Co. v. Kentucky, 222 U. S. 63, 74, 32 S. Ct. 13, 56 U. S. (L. ed.) 96. See 15 Columbia Law Review, 377.

Upon this aspect of the case the contention of the plaintiffs is that the owners of stocks and bonds may establish an independent *situs* for the purpose of their taxation, different from the [159] domicile of the owner, the debtor or the corporation issuing the stock, by a simple deposit of them in a foreign State, and thereby divest the jurisdiction of their domicile of the right to tax. Without undertaking to say what effect such deposit may have on the taxing power of the State of deposit, see Wheeler v. Sohmer, 233 U. S. 434, 439, 446, 34 S. Ct. 607, 58 U. S. (L. ed.) 1030, it seems to us that the power of the State of their domicile to tax such property is not affected.

If it be said that governmental protection is the consideration for taxation, Diamond Match Co. v. Ontonagon, 188 U. S. 82, 90, 23 S. Ct. 266, 47 U. S. (L. ed.) 394; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, 4 Ann. Cas. 493, 26 S. Ct. 36, 50 U. S. (L. ed.) 150, there is still support for the tax. The plaintiffs would be given whatever protection they as owners might require from our government, and they doubtless could be held by our courts to the performance of their trusts at the suit of their *cestui que trustent* or other interested parties.

The terms of cl. 5 of § 23 of our tax law are explicit to the effect that a resident trustee shall be assessed in the place where he resides when the income of the trust is payable to a non-resident. These words include a case like the present. There is no indication of a legislative purpose to restrict the operation of the tax law to instances where the trust had its origin within the State. It is the title to property alone which is made the test of liability to the tax. There is no manifestation of a design to exclude from taxation intangible personal estate received by trustees under the terms of a foreign will or other foreign instrument. The final sentence of the section exempting from taxation to domestic beneficiaries property on which a tax has been paid in another jurisdiction by foreign trustees, discloses a purpose not to impose in that instance double taxation.

It is urged that, because the plaintiffs owe their appointment to a foreign court, they cannot be taxed here. But there is nothing

to indicate that the trust fund held by the trustees is regarded as in the custody of that foreign court, or to show that the usual incidents of complete legal title did not follow the transfer of this intangible personal property to the trustees.

It does not appear on this record and it cannot be presumed in the absence of evidence that there is any provision in the law of Maine which undertakes to establish for shares of stock and bonds passing under the will of a deceased resident to non-resident trustees [160] a *situs* in that State for purposes of taxation. See *Augusta v. Kimball*, 91 Me. 605, 40 Atl. 666, 41 L.R.A. 475. Nor is it necessary to consider what extraterritorial effect such law, if it existed, would have.

Strong practical considerations lead to the same result. We know of no general principle of jurisprudence which apart from statute fixes the *situs* of a trust fund in the jurisdiction of the court which appoints a non-resident trustee to execute the terms of the trust. There is no way, so far as this record shows, in which the taxing power of Maine in this case can ascertain the items of the trust investment, in order to determine the amount there subject to taxation. There is or may be no method of making service upon a non-resident trustee or exercising any compulsion to make the *corpus* of the fund contribute to the support of government. Without undertaking to say what the law of this Commonwealth now is, it seems plain that before the enactment of St. 1889, c. 462, requiring the appointment of a resident agent, there were no direct means of reaching such non-resident trustee appointed by our courts. The natural method of dealing with the taxation of invisible and intangible property is to treat with the owner where he lives, where he can be reached and where it is comparatively easy to administer the law with justice. Any other course seems to open wide the door to evasion of all taxation.

Different questions would be presented if it appeared that the State of Maine had established by law a *situs* in that State for all intangible personal property held by trustees appointed by its courts, or that the property was part of an estate in process of settlement and distribution by the courts of a foreign State, upon which no opinion is expressed. In the case at bar the owners of the legal title to intangible personal property are residents of this Commonwealth and are made subject to taxation by the clear terms of our tax law. They have chosen, for reasons of their own, to cause the evidences of title to such intangible property to be deposited in a foreign jurisdiction. But that circumstance is not enough to divest this State of the power to tax. No reason appears why, on

legal grounds or even on equitable considerations, they are entitled to a relaxation of a settled rule of law as to the *situs* of intangible personal property.

For these reasons no right secured to the plaintiffs by the Fourteenth Amendment to the Constitution of the United States or by [161] our own Constitution is violated by the statute as thus interpreted. This conclusion is supported in principle by *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 U. S. (L. ed.) 558; *State Tax, etc.* 15 Wall. 300, 21 U. S. (L. ed.) 179; *Buck v. Beach*, 206 U. S. 392, 401, 11 Ann. Cas. 732, 27 S. Ct. 712, 51 U. S. (L. ed.) 1106; *Augusta v. Kimball*, 91 Me. 605, 40 Atl. 666, 41 L.R.A. 475; *Ailman Petitioner*, 17 R. I. 362, 22 Atl. 279; *People v. Feitner*, 168 N. Y. 441, 61 N. E. 763; *Mackay v. San Francisco*, 128 Cal. 678, 61 Pac. 382. See *Hemenway v. Milton*, 217 Mass. 230, 104 N. E. 362, L.R.A.1915C 949. It is contrary to *Goodsite v. Lane*, 139 Fed. 593, 2 Ann. Cas. 849, 72 C. C. A. 281, which, for the reasons stated, we are constrained not to follow.

Judgment for the defendant.

NOTE.

Situs, for Purpose of Taxation, of Personal Property Held in Trust.

The purpose of this note is to discuss the recent cases dealing with the *situs* for the purpose of taxation of personal property held in trust. The early cases are reviewed in the notes to *Goodsite v. Lane*, 2 Ann. Cas. 849, and *Buck v. Miller*, 62 Am. St. Rep. 436. Where personal property is held in trust, the law considers the trustee to be the legal owner and as such liable for the taxes assessed against the property; and his domicile is the place of assessment. *Hemenway v. Milton*, 217 Mass. 230, 104 N. E. 362, L.R.A.1915C 949; *Newcomb v. Paige*, 224 Mass. 516, 113 N. E. 458; *New York v. Dietz*, 66 Misc. 628, 123 N. Y. S. 1072. And see the reported case. Thus in *Hemenway v. Milton*, *supra*, it was held that where a trustee who resided in Massachusetts was appointed under a will to sell certain real property in New York and distribute the proceeds of this sale among beneficiaries also residing in Massachusetts, it was proper that a tax on the proceeds should be assessed against the trustee in Massachusetts. The court said: "It is plain that the words of this clause of the statute interpreted literally cover the facts of the present case. The trustees, being residents of the commonwealth, hold personal property in trust the income of which is payable to other persons resident in Milton in this commonwealth. It is equally plain that this state has the

power to tax such personal property. The legal title to it is in the trustees who are residents here and the beneficial interest is also in residents of this state. This is enough to support the exercise of the taxing power." In the reported case it is held that where trustees residing in Massachusetts hold legal title to stocks and bonds, and the beneficiaries live out of the state, the tax on this personal property may be assessed to the trustees, even though the bonds and certificates are deposited in another state.

In *New York v. Dietz*, 66 Misc. 628, 123 N. Y. S. 1072, it was held that where three trustees were appointed under a will to take charge of an estate of personal property, each of them was liable for taxes only on that part of the estate which was in his possession, and each one of them must be separately served with a summons and complaint.

In *People v. Trust Co. of America*, 208 N. Y. 463, 102 N. E. 578, *affirming* judgment 154 App. Div. 916, 139 N. Y. S. 1139, it appeared that a trust mortgage was executed and a trust company was appointed trustee. All of the bonds secured by the mortgage were not issued at the time of execution, and a part was reserved for future contingencies. Thereafter the trust company certified a certain number of these bonds and delivered them to the mortgagor for issue and they were issued on the same date. The mortgage tax then became due and payable. It was held that it was the duty of the trustee representing all the parties interested in the mortgage and bonds to pay the tax required by statute. The court said: "Whatever may be the general practice as to recording a trust mortgage or in paying the recording tax therefor, or the tax upon the mortgage upon an advancement of any part of the principal indebtedness secured by the mortgage, it is the trustee named as the mortgagee therein who represents the bondholders for whose benefit and security the mortgage is recorded. Any agreement relating to recording the mortgage as between the parties to the instrument affecting the responsibility of the trustee as between the parties to the instrument cannot affect the determination of the questions involved on this appeal. The defendant is not a gratuitous trustee. Its assumption of the duties devolved upon it is of value. The assumption of the duties of trustee was pursuant to some contract express or implied, and the recording tax or any tax upon the mortgage by reason of the mortgage having been previously recorded is a proper disbursement by it as trustee. Its duty to pay such recording tax or the tax upon the mortgage, as provided by the statute quoted, is imposed by the trust which it has accepted. It rests

upon the benefit derived by those for whom the trust is created. When a statute imposes a tax on a transaction and no provision is made in the statute as to which party thereto shall pay it, the actors in the transaction, when acting in the performance of their duty, are liable therefor."

However, under some circumstances the rule that the trustee is liable for taxes on trust property is not applicable. In *Wilder v. Hawaiian Trust Co.* 20 Hawaii 589, it appeared that a trustee was appointed under a will to distribute certain amounts annually to designated persons. It was held that the income tax was assessable against the annuitants and not against the trustee; and it was furthermore held that the surplus income arising from the trust property was not taxable prior to its distribution.

In *Newcomb v. Paige*, 224 Mass. 516, 113 N. E. 458, it appeared that a trust fund was created under the will of a resident of New York, and that one of the trustees lived in California, the second in New York and the third in Massachusetts. The will was probated in New York, and the evidence of the intangible securities forming the trust fund was kept in that state. It was held that Massachusetts could not tax this trust fund, because one of the trustees and the beneficiaries lived in Massachusetts. The court said: "When there are several trustees, one or more of whom is domiciled in the state of origin of the trust, and the corporeal custody of the securities of the trust is with that trustee at his domicile, and the title of the trustees is joint and their powers must be exercised as a unit, there is no such several ownership in one trustee resident outside the state of the establishment of the trust, but resident in Massachusetts, as brings him within the scope of our tax law as to the trust property. . . . Under these circumstances he alone as resident of this commonwealth does not hold the title as owner within the commonwealth in such sense as to bring him within the terms of the tax act. He cannot exercise ownership as a resident in this commonwealth, but only by conjoint action with his fellow trustees, none of whom are resident here, as to a fund in substance in the custody of the courts of another jurisdiction. His ownership is not of such character as to bring the taxable domicile of the trust within the terms of our law."

In *Mausoleum Builders v. State Board of Taxes*, etc. (N. J.) 100 Atl. 236, it appeared that the appellants had agreed to purchase from a cemetery company a plot of land on which to build a mausoleum. They were to pay an amount down and the balance in instalments. They entered into possession and then erected the building which became subject to a tax. The appellants claimed that

at the time the tax was levied, they had not yet acquired the legal title, and as buildings for cemetery purposes were exempt from taxation, this building also should be. It was held that even though the title had not yet passed to the appellants, yet they, as equitable owners, were liable for the tax; since the exemption of the cemetery company was personal to itself, and it could not transfer this exemption by delivering a deed, it could not do so by holding the legal title in trust for its vendee.

STATE

v.

DOUGHERTY ET AL.

New Jersey Court of Errors and Appeals—
November 15, 1915.

88 N. J. Law 209; 96 Atl. 56.

Criminal Law — Defenses — Inducement for Purpose of Prosecution.

An indictment charged a conspiracy to pervert the due administration of the laws. The proof was of an agreement by defendants with a detective in the employ of the state's law officers to detect defendants in corrupt conduct, by which the detective was to pay them money for their votes as members of a city council. Held that, as the indictment charged but one conspiracy, to which the detective was proper to be a necessary party, and as his object was to expose corruption, and prevent injury to the public, there was a failure to prove a conspiracy to pervert the due administration of the laws.

[See note at end of this case.]

(Syllabus by court.)

Error to Supreme Court.

Criminal action. Harry Dougherty et al., convicted of conspiracy and bring error. The facts are stated in the opinion. **REVERSED.**

Robert H. McCarter and William F. Sooy for plaintiffs in error.

Charles S. Moore and Edmund Wilson for defendant in error.

[209] SWAYZE, J.—The first count in the indictment, on which alone the state elected to stand, charges that the plaintiffs in error and others named, conspired to pervert the due administration of the laws relating to the municipal government [210] of Atlantic City by corruptly passing an ordinance for the passage of which the nine defendants (in-

cluding the two now plaintiffs in error) were to receive as bribes from one Harris, a person interested in securing the passage of the ordinance, the sum of \$500 each; that the defendants in execution of said agreement passed the ordinance and in further execution of the agreement received the sums agreed upon as bribes. At the trial it was proved that Harris was an alias for Reed who was in the employ of a detective engaged under the direction of the law officers of the state in the effort, which for four months had been unsuccessful, to detect the defendants in corrupt conduct as members of the council of Atlantic City; that the whole scheme was a plot contrived by him for the purpose of luring members of the common council by the promise of money into voting for an ordinance for a large public work, the merit of which by itself is not questioned; that it was never meant to proceed with the work when authorized, the only object being to catch the defendants in corrupt conduct. There was no evidence that any money was ever paid to Murtland. While the ordinance was pending Murtland asked Reed how much money he was to receive that day, said that he would not accept \$500, that he did not care to take the risk with less than \$5,000: and after some further conversation added that he would not interfere with the programme and wished to be remembered when it came to the contract.

We think it is unnecessary to consider the very interesting and important question so ably discussed by counsel, whether it is a good defence to an indictment that the defendants were entrapped into the alleged criminal conduct by representatives of the state. Cases may be found where this defence was rejected and others where it was held good. We limit our decision to the particular facts of this case.

The charge is that there was a conspiracy to pervert the due administration of the laws relating to the municipal government of Atlantic City by corruptly passing an ordinance for bribes to be paid by Harris, a person interested in securing its passage. The indictment is not for bribery, but [211] for conspiracy, and not for conspiracy among the defendants alone to sell their votes or to force "Harris" to pay money. The charge is that the conspiracy was with "Harris:" that he was to pay and did pay money. The conspiracy with "Harris" as the prime mover and an essential party is not only the conspiracy charged in the indictment, but the conspiracy on which the state in fact relied at the trial: it was only that alleged conspiracy that made admissible, so far as it was admissible, the testimony as to interviews between "Harris" and Phoebus on December 5th, 1911, at which the two planned for the

corruption of the other defendants. It was this conspiracy between "Harris" and Phoebus into which the defendants are said to have come subsequently. The nature of the charge in the indictment relieves us from the necessity of considering the effect of entrapment by the state, which would confront us if the indictment were for a conspiracy by the defendants alone to sell their votes or to extort money as the condition of passing an ordinance introduced in good faith and meant to become effective legislation of the city. The question is the much simpler one, whether a conspiracy originated by "Harris" under employment of the law officers of the state, with Phoebus as either stool pigeon or go-between, for the well meant purpose of testing the virtue of public officials and preventing injury to the public by exposing and bringing them to punishment if they proved corrupt, was a conspiracy to pervert the due administration of the laws relating to the municipal government of Atlantic City. If it was not, the defendants are not guilty as charged, however reprehensible their conduct and character may have been. Since the indictment charges but one conspiracy, and "Harris" was a necessary party to the conspiracy proved, the prime mover therein and the man who was to and did furnish the money, and since the conspiracy had no existence without him, the only conspiracy for which the defendants could be convicted is that organized by "Harris." Unless that conspiracy is criminal, the defendants are not guilty as charged. If it is criminal, "Harris" is also guilty. To so hold, it would be necessary to hold that "Harris'" act was a perversion [212] of the due administration of the law. To avoid that absurdity, it is necessary to hold that the conspiracy was not a conspiracy to pervert the due administration of the law as charged in the indictment. It was in fact an arrangement to secure the due administration of the law by demonstrating the readiness of the councilmen to be corrupted, in a made-up plan not meant to be executed, in order to prevent by exposure similar corruption in the genuine legislation of the city. Without the complicity of "Harris," the conspiracy charged is not proved: with him it ceases to be a conspiracy to pervert the due administration of the laws, and is no crime. We are less reluctant to reach this result than we would otherwise be, for the reason that the reason that the state sought by indicting the defendants for conspiracy to make available statements made by "Harris" and Phoebus in the absence of the other defendants even before they had come into the conspiracy, and by Phoebus after the object of the conspiracy had been obtained. The state having sought and obtained the advantage of an indictment

for conspiracy, must in fairness be subjected to its disadvantages. It cannot be permitted by splitting the single conspiracy in two to say one was criminal and the other meritorious; that in one the councilmen alone were involved, in the other "Harris" was also a party, when the fact is that "Harris" was a necessary party throughout. As the Supreme Court of the United States has recently said "the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *U. S. v. Patten*, 226 U. S. 525, 544, 33 S. Ct. 141, 57 U. S. (L. ed.) 333, 44 L.R.A. (N.S.) 325.

The case is analogous to the old case where a man arranged through a third party for a highway robbery to be committed upon himself, with a view to receiving a reward offered for the apprehension of highway robbers. It was held that the defendant could not be convicted, since the force requisite to constitute a highway robbery had not been used, the alleged victim having himself authorized it. *Rex v. M'Daniel, Foster* (Eng.) 121; *Rex v. Fuller, R. & R. C. C.* (Eng.) 408. On an indictment for burglary, the entry was [213] held not burglarious because made with assent of detectives who were in the occupancy and control of a bank with the consent of the owners. "This cannot be burglary," said the court, "in contemplation of law, however much the defendant was guilty in purpose and intent." *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126; *Reg. v. Johnson*, C. & M. 218, 41 E. C. L. 123. On an indictment for bribery where an officer first suggested his willingness to accept a bribe and apparently joined the defendant in a criminal act, suggested by the officer, merely to entrap the defendant, the case was held not within the spirit of the criminal code. *O'Brien v. State*, 6 Tex. App. 665. In larceny where the entrapment is by the owner or a detective or by his agent, their participation takes away the essential element of a conversion against the will of the owner. *Whart. Cr. L.* § 389.

These cases were decided upon the ground that an essential element of the crime was absent. We do not approve the distinction attempted in the Ohio case of *State v. Diegle*, 86 Ohio St. 310, 99 N. E. 1125, a report of which was furnished us by the prosecution, between an injury to a private citizen, as in the case of highway robbery, burglary or larceny, and an injury to the public, as in the case of bribery. All crimes alike, under our modern legal theories, are crimes against the public, and all are classified as public wrongs by Blackstone.

We have already stated the difficulty in the present case of holding that an agreement instigated by the state for the public

benefit can be changed into a criminal conspiracy by merely dropping out of sight the essential part played by the instigator without whom the conspiracy could not exist. Clear as this is in the case of Dougherty, it is still clearer in the case of Murtland. The principal part of the evidence against him was Reed's (alias Harris') testimony as to what Phoebus said. Phoebus had pleaded guilty, but was not called as a witness, so that he might be cross-examined. The testimony at best was only admissible against Murtland, if it was proved *aliunde* that he and Phoebus were co-conspirators; it could not of itself prove the fact of conspiracy. There was absolutely no proof that Murtland received any money. On [214] the contrary, Reed's testimony was that Murtland said he would not be satisfied to accept \$500, and demanded more, which Reed refused; whereupon Murtland said he would not interfere with the programme, but thought that Reed should remember him when he came to the contract. This is convincing evidence to prove that if Murtland was ever a party to the conspiracy charged, he withdrew as far as he could from that conspiracy before the overt act set forth in the indictment and relied upon by the state—the passage of the ordinance—and trusted to a hope of future favor or at worst entered by a tacit agreement into a new conspiracy with Reed (alias Harris). This, however, was, to put it most favorably for the state, a conspiracy with Reed alone, and a conspiracy which gave Murtland different rights from his fellow councilmen, in which they would be most unlikely to join, and did not in fact join. If Murtland withdrew from the original conspiracy before the overt act, a jury might well find him not guilty as charged. He cannot be guilty of a conspiracy with Reed alone, unless Reed also is guilty, since it requires at least two to make a conspiracy. Our statute under which this indictment is framed expressly enacts that any *two or more* persons who shall combine to commit any act for the perversion of the due administration of the laws, shall on conviction, be deemed guilty of a conspiracy. Comp. Stat. p. 1757, § 37. The attention of the learned trial judge was called to the failure to prove the charge in the indictment against Murtland; he said that he had no doubt that a conspirator might withdraw, but that the facts and circumstances surrounding the withdrawal might make it necessary to have a jury pass upon the question. With this we agree. He did not, however, submit to the jury the question whether Murtland had withdrawn, although the evidence to that effect was uncontradicted and from the mouth of the detective himself. The matter is most important, in view of evidence that was ob-

jected to. Hearsay statements by Phoebus to Murtland's detriment, made several weeks thereafter, and at a time when exposure had already come and Phoebus had "confessed," were admitted. We need not dwell on the danger of admitting, [215] under such circumstances, hearsay evidence of statements by a man who, at best, was an accomplice, and may have been a stool-pigeon. The importance for the present purpose is that the evidence was admitted on the theory that the conspiracy continued until Murtland got the compensation for which he had bargained. The Supreme Court in vindicating the admissibility of the hearsay report of Phoebus' statements, said that the conspiracy contemplated a contract to be given out under the ordinance for the work to be done, from which contract Murtland was to derive a personal benefit. Now if Murtland had distinctively repudiated the alleged contract for \$500 as seems undisputed, the joint relations between him and Phoebus certainly ceased as soon as the ordinance was passed, and hearsay evidence of what Phoebus said thereafter would be inadmissible. If Murtland entered into a new conspiracy with Reed alone involving a different compensation, Phoebus was not a co-conspirator in that and hearsay testimony of his statements would be inadmissible. We are not to be understood as holding that the testimony as to Phoebus' statements on May 31st was admissible under any aspect of the case. It was surely not admissible if Murtland had withdrawn from the conspiracy as charged prior to the overt act. The error was emphasized by the judge's charge. He called attention to Murtland's failure to testify. Murtland could not deny the fact that Phoebus had made the statement to Reed, since he was not present; it would have been idle for him to deny the truth of what Reed said Phoebus had said until there was other proof that he and Phoebus were co-conspirators; and he was not called on to deny Reed's testimony as to their conversation, since that tended to prove, if it did not prove, that he was no longer in the conspiracy charged in the indictment, and rendered inadmissible the evidence as to what Phoebus said thereafter. The harmfulness of the admission of this hearsay testimony is shown even more clearly by the fact that if Phoebus had appeared as a witness, he would not only have been sworn as such, but the defendants would have had the usual opportunity to cross-examine, [216] and the trial judge would undoubtedly have cautioned the jury against the acceptance of the testimony of an accomplice like Phoebus who had turned state's evidence, for he was none the less an accomplice and had none the less turned state's evidence because his testimony was reported in the form of mere hearsay and

even then came only from the mouths of hired detectives who had themselves originated the conspiracy of which they were trying to convict the defendants.

Both defendants were entitled to be acquitted. The judgment must be reversed and the record remitted, to the end that a *venire de novo* be awarded.

We ought to add a word of caution. We must not be supposed by our silence to indicate approval of the view expressed by the Supreme Court as to the meaning and effect of our ruling in *Bullock v. State* as to the withdrawal from the jury of evidence improperly admitted. It will be time enough for us to pass upon that question when it is necessarily involved. The same caution should be given as to the admissibility of testimony as to what Phoebe said before the alleged conspiracy was brought about and while Phoebe's status was wholly that of an agent of Harris in the attempt to get the defendants to conspire.

MINTURN, J. (*concurring*).—While I concur in the view expressed in the majority opinion, as to the illegality of this conviction, my views lead me to a reversal, upon the more fundamental ground that a conspiracy organized, doubtless with the best motives, by the prosecuting officers of the law, to create a fictitious conspiracy, to entrap public officers into the commission of crime, is *contra bonos mores*, and against sound public policy.

At the basis of our jurisprudence are certain well-defined maxims, borrowed from the civil law, upon which the relative rights and duties created and imposed by law rest in their application to the individual. Among these is *volenti non fit injuria*, which denies a remedy to one who is the super-inducing cause of his own injury, upon the theory that he [217] cannot properly complain of an alleged wrong or injury which he has invited upon himself.

It presents the fundamental concept of the doctrine of contributory negligence, and regulates and controls in daily application the rights of individuals.

The majority opinion cites instances where fundamentally, this principle was the cause of the court's refusal to recognize an alleged crime thought out and committed by one upon himself for an ulterior purpose. *Rex v. M'Daniel, Foster* (Eng.) 121; *O'Brien v. State*, 6 Tex. App. 665; *Whart. Cr. L.* 389.

So the civil law maxim, *ex dolo malo non oritur actio*, has supplied our courts of law and equity, with a basic principle regulative of the affairs of the individual in his business transactions, and which reduced to its simplest terms has become a common law axiom, that "fraud vitiates everything."

Chief Justice Wilmut, in *Collins v. Blanton*, 2 Wils. C. Pl. (Eng.) 341, referring

to the public policy inherent in this maxim, says, "the manner of the transaction was to gild over and conceal the truth, and whenever courts of law see such attempts made to conceal such wicked deeds they will brush away the cobweb varnish, and show the transactions in their true light." And again, "this is a contract to tempt a man to transgress the law to do that which is injurious to the community. It is void by the common law, and the reason why the common law says such contracts are void is for the public good. *You shall not stipulate for iniquity.* All writers upon our law agree in this—that no polluted hand shall touch the pure fountains of justice." See also *Paxton v. Popham*, 9 East (Eng.) 408; *Pole v. Harrobin*, 9 East (Eng.) 417; *Gas Light, etc. Co. v. Turner*, 5 Bing. N. Cas. 666, 35 E. C. L. 264; *Cuthbert v. Haley*, 8 T. R. (Eng.) 390, and cases cited in *Broom Leg. Max.* 659.

If these basic conceptions of law are to govern courts in the administration of law and equity, as between the people, upon what theory of consistent legal procedure it may be asked, is their application to be halted, when the state presents itself as a litigant at the bar? Except upon the exploded [218] theory that the state can do no wrong, I know of no principle of extenuation or exception, which can be held to relieve the state as the fountain head of justice, from the effect of the application of its own laws.

The cases which are reported both in support of such action of the state and those opposed to it, serve to indicate the extent of which this practice has been indulged, upon the theory that if a conspiracy can be concocted to induce officials, apparently quiescent and noncommittal, to violate the law, the courts *pro bono publico*, will recognize the legality of the act and impress a judicial *imprimatur* upon it.

The concoction of such a scheme is unnecessary to prove its purpose, viz., that some men are mercenary and venal. Criminal law is enacted upon the theory that such men exist. The dormant energy for transgression, more or less smouldering in human breasts, awaits only the opportunity presented by a more acute, energetic and subtle mind, supported by the apparent respectability, character and social standing of the tempter, to produce the leap that blasts hope and character, and spells moral destruction in an abyss of remorse and shame.

Cases from individual states cannot in my judgment moralize or legalize such procedure upon any laudable theory of public policy.

Rome applied it in the days of her disintegration. Richelieu made it a method of procedure to support his policies, and some modern states of Europe have tried it as a method to foment crime and blast it in its

inception, in order to anticipate popular insurrection. We have tried it where crime was conceded to exist, as in the cases of post-office larcenies, and where the purpose was to ensure the trapping of the guilty one. But except upon the universally condemned notion of the mediaeval casuists, that the end may justify the means, no support for the situation here presented can be extracted from the recognized maxims of the law, or from the fundamental concepts of moral philosophy, or from the precepts of the decalogue upon which such maxims in the last analysis are presumed to be based.

[219] For affirmance: The Chancellor, Trenchard, Black, Heppenheimer, Williams, JJ.—5.

For reversal: Garrison, Swayze, Bergen, Minturn, Terhune, Taylor, JJ.—6.

NOTE.

The fact that a conspiracy to pervert municipal government by the giving of bribes to secure the passage of an ordinance was based on an agreement with a detective who acted at the instance of the municipal authorities for the purpose of exposing or preventing the crime is held in the reported case to constitute a defense to a prosecution of the parties to the agreement, the absence of a criminal intent on the part of a party thereto precluding the existence of a conspiracy. The cases passing on the question whether inducement to commit a crime with a view to a prosecution therefor is a defense are collated in the notes to *State v. Littooy*, 17 Ann. Cas. 292; *State v. Salisbury Ice, etc. Co.* Ann. Cas. 1916C 728; and *State v. Hule*, 72 Am. St. Rep. 694. In the note to *State v. Salisbury Ice, etc. Co.* supra, is cited among other cases *State v. Dougherty*, 86 N. J. L. 525, 93 Atl. 98, reversed by the reported case.

HUSBAND

v.

LINEHAN ET AL.

Kentucky Court of Appeals—February 4, 1916.

168 Ky. 304; 181 S. W. 1089.

Fraudulent Conveyances — Good Faith of Transfer — Sufficiency of Evidence.

In an action by the assignee of a judgment to subject corporate stock and bonds

thereto, the evidence is held to show that the securities were sold in good faith by the judgment debtor, with indorsement and delivery, to interveners, his creditors.

Time to Attack Conveyance — Special Statutory Limitation.

Under Ky. St. § 1911, providing that all fraudulent and preferential transfers shall be subject to the control of courts of equity, upon petition filed within six months, where more than six months elapsed between the sale and transfer of corporate securities and the institution of an action by the assignee of the judgment creditor of the transferor, such sale and transfer cannot be thereafter attacked by the assignee.

Corporations — Transfer of Stock — Effect of Failure to Record.

That the buyers in good faith of corporate stock from a judgment debtor did not cause the certificates, as required by provisions on their back, to be transferred on the books of the corporation, did not invalidate the transfer, since the provision requiring transfer on the books was for the benefit of the corporation.

[See 21 Ann. Cas. 1394; Ann. Cas. 1917A 428.]

Conflict of Laws — Transfer of Corporate Stock.

The laws of Kentucky must determine the rights of a judgment creditor of the transferor of corporate stock in West Virginia to attach the stock in a suit in Kentucky, where no common law or statute of West Virginia invalidating the transfer is pleaded or proved.

[See note at end of this case.]

Same.

The method of transferring corporate stock is governed by the law of the state of incorporation, although the transfer is made in another state.

[See note at end of this case.]

Same.

Where neither common law nor statute of the state wherein corporate stock was sold and transferred is pleaded or proved in a suit in Kentucky attacking such transfer, the law of this state determines the validity of the transfer.

[See note at end of this case.]

Attachment — Property Subject — Corporate Stock.

At common law corporate stock is not subject to attachment, but is made so by Civ. Code Prac. §§ 202-236.

Manner of Levy on Stock.

An attachment cannot be levied upon negotiable mortgage coupon bonds, or a lien acquired thereon, by service of garnishment process upon the corporation owing them, : : they can only be attached by actual levy on the person in possession.

[See Ann. Cas. 1916B 984.]

Corporations — De Facto Dissolution — Failure to File Notice — Rights of Grantee.

Where a corporation going out of business assigned its assets to stockholders for their assumption of its debts, no creditor complain-

ing, the title of such stockholders to stock and bonds of another corporation, assigned them by the owner in part payment of his indebtedness to the dissolved corporation, was perfect against the assignee of the judgment creditor of the assignor of the securities, although no notice of dissolution of the corporation was filed with the secretary of state of the state of incorporation, as its statute required.

Appeal from Circuit Court, Madison county.

Action by F. M. Husband, plaintiff, against J. J. Linchan et al., defendants. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

J. A. Sullivan and Barclay, Orthwein & Wallace for appellant.

Burnam & Burnam for appellees.

[305] *SETTLE, J.*—The appellee, J. J. Linehan, and one C. J. Warnock, both residents of Pennsylvania, on January 8, 1909, borrowed from the State Bank & Trust Company, of Richmond, Kentucky, \$5,000.00, for which they executed their joint and several note, payable three months after date. Collateral security for its payment, consisting of a certificate for fifty shares of stock in the Big Hill Coal Company, issued to Linehan and Warnock jointly, was placed by them with the bank. Warnock died in August, 1909, testate, and his widow, Minnie C. Warnock, qualified as the executrix of his will. The note, which matured before Warnock's death, not having been paid, suit was brought thereon by the State Bank & Trust Company in the Madison circuit court against Linehan, and Warnock's executrix, September 7, 1909. Personal service of summons was obtained on Linehan, but Warnock's executrix was only constructively summoned. The bank recovered in the action a personal judgment against Linehan for \$5,000.00, the amount of the note, with interest, and for the enforcement of its lien upon the collateral pledged by the makers as security for its payment; the judgment directing a sale of the fifty shares [306] of stock in the Big Hill Coal Company for the debt. The master commissioner sold the fifty shares of stock May 28, 1910, as directed by the judgment, and the bank became the purchaser at the price of \$1,975.00, which sum was credited on the judgment. An execution later issued for the balance due on the judgment and was returned unsatisfied.

On July 6, 1910, the State Bank & Trust Company instituted a second action in the Madison circuit court against Linehan and Warnock's executrix, seeking to enforce the payment of the balance due on its judgment obtained in the first action; it being alleged

in the petition that Linehan owned 625 shares of stock in and \$3,100.00 of the bonds of the Wallsend Coal & Coke Company—a Kentucky corporation—which, by reason of the non-residence and insolvency of Linehan, should be subjected to the bank's judgment. To this end the bank caused an attachment to be issued, which was attempted to be levied on the stock and bonds in question by delivering a copy thereof, by way of process of garnishment, to the Wallsend Coal & Coke Company. Linehan and Warnock's executrix were only constructively summoned in this action. The court seems to have adjudged in this case that the State Bank & Trust Company was entitled to lien on the 625 shares of stock in and \$3,100.00 of the bonds of the Wallsend Coal & Coke Company described in the petition, for the payment of the balance due on its judgment against Linehan, which it directed its master commissioner to sell for the purpose of discharging the unpaid balance of its judgment. The commissioner advertised the sale of the stock and bonds for December 29, 1910, but before the sale the State Bank & Trust Company sold and assigned, in writing, all its interest in the unpaid judgment and all of its rights and equities acquired in the second action to the appellant, F. M. Husband. After his purchase of the judgment mentioned appellant discontinued the proceeding for the sale of the stock and bonds by the master commissioner and same were never sold by the latter.

Matters remained in this condition until May 17, 1911, on which date F. M. Husband instituted in the Madison circuit court, against Linehan and the Wallsend Coal & Coke Company the present action, stating in the petition the facts involved and steps taken in the two actions brought by the State Bank & Trust Company first mentioned: [307] his purchase of the unpaid part of the judgments and alleged lien obtained by the bank on the 625 shares of stock in and \$3,100.00 of the bonds of the Wallsend Coal & Coke Company in the second action; and further, that the Wallsend Coal & Coke Company had contracted to sell and was then about to convey all of its property to another corporation and dissolve. Linehan was proceeded against in this case as a non-resident and an injunction was sought therein by Husband against the Wallsend Coal & Coke Company to prevent any payment by it to Linehan on or for his stocks and bonds; and on May 19, 1911, Husband caused to be issued in the action an attachment against the property and effects of Linehan, including the stocks and bonds in question, which was shortly thereafter executed on the Wallsend Coal & Coke Company, which was also summoned to answer as garnishee.

The Wallsend Coal & Coke Company, answering as garnishee, in substance, alleged that on the date of the service of the attachment and for some time prior to the institution of the action, Linehan held, as shown by its books, 625 shares of its capital stock, of the par value of ten dollars a share; that on each of the certificates of stock there appeared the following printed statement: "Transferable only on the books of the corporation by the holder hereof in person, or by attorney, upon surrender of this certificate properly endorsed," and that this stock had not, to its knowledge, been sold or assigned. That at the time the attachment was served Linehan owned, as shown by its books, certain of its bonds to the amount and value of \$3,100.00, exclusive of unmatured coupons; and finally, that it, the Wallsend Coal & Coke Company, had no interest in the litigation and had sold all of its property and assets to a corporation known as the New Continental Coal Company, with a view to going out of business, and that the latter company had paid a part of the agreed consideration on such purchase.

After the filing of the answer of the Wallsend Coal & Coke Company, on the motion of the plaintiff, Husband, an order was entered by the circuit court requiring the defendant, Wallsend Coal & Coke Company, to hold enough of the purchase price of its property and assets to satisfy any judgment that might be awarded against Linehan or it in the case. Linehan filed an [308] answer in which he denied the right of Husband to subject to the payment of the judgment assigned him by the State Bank & Trust Company the stock in or bonds of the Wallsend Coal & Coke Company described in the petition; admitting, however, that he (Linehan) was at one time the owner of the stock and bonds, but alleging that before the institution, on July 6, 1910, of the second action brought by the State Bank & Trust Company against him and others, he had sold and delivered the stock and bonds to John B. Garden and others, whereby the latter became the owners of all the right, title and interest he had in and to same.

Shortly after the filing of Linehan's answer, the appellees, J. B. Garden, Richard Robertson, C. W. Welty, George E. House and Samuel Noyes filed an intervening petition and by virtue thereof were made defendants to the action. In the intervening petition they, in substance, alleged that they were all residents and citizens of West Virginia; that they became the owners of the stock and bonds in controversy by their purchase from Linehan and assignment and delivery thereof by him to them in October, 1909, such purchase having been made in due course and for value, and that Husband knew

of their purchase thereof "prior to his alleged purchase of the judgment of the State Bank & Trust Company." Subsequently the interveners filed an amended petition, in which they withdrew so much of the original petition as alleged that the certificates of stock and bonds of the Wallsend Coal & Coke Company sought to be subjected by Husband, as the property of Linehan, to the payment of his judgment, were purchased by them in October, 1909, and alleged that their purchase of the stock and bonds from Linehan was made "between the first of August, 1909, and 31st of October, 1909;" and further, that at the time of such purchase Linehan was owing \$28,000.00 to the Frozen Creek Lumber Company, a corporation of West Virginia, in which the interveners were stockholders and officers and which had shortly theretofore dissolved and quit business, but in doing so, by consent of all its stockholders, sold and delivered to the interveners all its assets, including the \$28,000.00 claim on Linehan, in consideration of their agreeing to assume and pay all the corporation debts; and that in August, September or October, 1909, Linehan sold, assigned and delivered to them the stock and bonds in [309] satisfaction *pro tanto* of his indebtedness to the Frozen Creek Lumber Company; and that they allowed him therefor \$9,350.00, which was credited on the \$28,000.00 claim against him they received from the Frozen Creek Lumber Company.

The affirmative matter of the answer of Linehan and of the original and amended petitions of Garden and others was controverted of record by a consent order of the circuit court. Following the taking of evidence and submission of the case the circuit court, by the judgment rendered, dismissed the plaintiff's petition, declared appellees, the interveners, to be the legal owners of the stock and bonds in controversy, and awarded the latter their costs. From that judgment Husband has appealed.

Appellant asks a reversal of the judgment upon the following grounds: (1) That the transaction had by Linehan with the interveners was no sale at all; (2) that the transaction was at most only an attempted preference, was fraudulent, and, therefore, is void as against the alleged attachment lien; (3) that the transaction being a foreign, partial assignment by a debtor to certain of his creditors of a portion of his estate, will not be given effect in Kentucky, because to do so would result in detriment to a local creditor; and because, also, a recognition of same would not be in accord with the spirit or policy of the laws of the latter State.

As to the first proposition advanced, it may be remarked that whatever may have been the character of the transaction by which the interveners, Garden and others, claimed to

have acquired, by purchase from Linehan, ownership of the 625 shares of stock in and \$3,100.00 of the bonds of the Wallsend Coal & Coke Company, it conclusively appears from the evidence that such transaction occurred prior to the institution of the second action by the State Bank & Trust Company, in which it was first attempted to subject to the payment of its judgment these stocks and bonds also prior to appellant's purchase of the judgment rendered therein. This is shown by the depositions of Garden, House and Noyes, three of the interveners, and the appellee, J. J. Linehan.

Although both Linehan and the executrix of Warnock were non-residents and only constructively summoned in the second action brought against them by the State Bank & Trust Company, the circuit court, despite the [310] requirement of section 126, sub-section 3, Civil Code, that allegations against a defendant constructively summoned must be proved, rendered therein a default judgment sustaining the attachment as to all the stocks and bonds alleged to be the property of Linehan. But as Linehan did not appeal from that judgment the error will not be reviewed.

The testimony of the appellees, Garden, House and Noyes, is to the effect, that prior to 1909 they and their co-interveners, Robertson and Welty, constituted all the stockholders of a corporation known as the Frozen Creek Lumber Company; that Linehan, as a lumber dealer in Pittsburg, Pennsylvania, had become indebted to the Frozen Creek Lumber Company to the amount of \$28,000.00; that the latter company went out of business prior to 1909, and that the interveners, as individuals, had paid all of its debts and taken over to themselves its assets, among which assets was the claim against Linehan; that in the fall of 1909 and more than a year before the institution of the action by the State Bank & Trust Company to subject to the payment of its judgment the stock in and bonds of the Wallsend Coal & Coke Company, therein alleged to be owned by Linehan, they, the interveners, in endeavoring to obtain from Linehan the payment of the claim they held against him and to enable him, so far as he could, to pay same, purchased of him the stock and bonds in question, and such stock and bonds were then received by them of Linehan, by his endorsement and delivery thereof, in discharge *pro tanto* of his indebtedness to them; and that by such endorsement and delivery of the stock and bonds they became the owners thereof and have ever since had possession of them.

It also appears from the testimony of J. B. Garden and S. M. Noyes that before F. M. Husband purchased from the State Bank & Trust Company the judgment against Line-

han, certain conferences were held between them and the appellant, F. M. Husband, the latter's brother, John Husband, being present at the time and assisting him, in which both were advised that appellees, the interveners, were the owners of the stock and bonds; and such information on the part of F. M. Husband before his purchase of the judgment is further shown by certain letters that passed between him or his brother John and S. M. Noyes, one of the interveners. These [311] letters also show that the purchase by Husband of the judgment from the bank was for the purpose of protecting 1,575 shares of stock held by C. J. Warnock's executrix in the Wallsend Coal & Coke Company, which the bank claimed to have attached in the action of July 6, 1910, brought by it.

The only contradiction attempted of the evidence referred to was furnished by certain letters from Linehan to Mrs. Warnock, executrix, with respect to the business of the Wallsend Coal & Coke Company, and meetings to be held to consider this business. It will be found, however, that these letters of Linehan are not contradictory of his having made the sale of the stock and bonds to appellees, Garden and others, interveners. They were written prior to the institution of the second action by the bank and contain no claim that he was then the owner of the stock or bonds.

In view of what has been said of the testimony we think it safe to say that it shows beyond doubt the *bona fides* of the transaction between Linehan and the interveners; in other words, that there was a sale in good faith by the former to the latter of the stock in and bonds of the Wallsend Coal & Coke Company owned by him, attended by the endorsement and delivery of same; and that such sale passed to the interveners the title to the stock and bonds, which must have the legal effect to defeat the attachment of appellant unless, as contended by his counsel, the sale of both the stock and bonds was a fraudulent preference.

If the evidence here could be regarded sufficient to establish such fraudulent preference, it is manifestly too late for the transfer of the stock and bonds to be successfully attacked by appellant. An action for that purpose must be brought within six months of the date of the preferential transaction. Kentucky Statutes, section 1911; *Citizens' L. Ins. Co. v. Owensboro Sav. Bank, etc. Co.* 146 Ky. 118, 142 S. W. 376; *Turner v. Farmers' Bank*, 148 Ky. 692; *Granberry v. Pierce*, 151 Ky. 795, 152 S. W. 938. Such attack is not made by the petition in this case, nor was it made in either of the actions instituted by the State Bank & Trust Company against Linehan and others, and as more

than six months elapsed between the sale and transfer of the stock and bonds and the institution of the second action of the bank by the attachment and judgment in which appellant claims to have [312] acquired a lien on the stock and bonds transferred, it is now immune from such attack.

What has been said equally applies to appellant's contention that the failure of appellees, Garden and others, to cause the stock certificates to be transferred to them on the books of the Wallsend Coal & Coke Company, as provided by the writing on the back of each, prevented the title to the stock from passing to them. In this jurisdiction the validity of the sale and transfer in good faith of stock in a corporation cannot be attached by a creditor, by virtue of an attachment levied after such transfer was made, on the ground that the transfer of the stock was not made on the books of the corporation; it being held that this provision is mainly for the benefit of the corporation, and to enable it to identify the holders of its stock. As between the parties to the contract the question of title cannot be affected by the non-appearance of the transfer on the books of the corporation. *Bushnell v. Hall*, 9 Ky. L. Rep. 684; *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145; *American Wire-Nail Co. v. Bayless*, 91 Ky. 94, 15 S. W. 10. It is true the sale and transfer took place in West Virginia, but that fact does not, as claimed by appellant, make it necessary for its validity to be tested by the law of that State. As neither the common law of that State nor any statute thereof that would make the transfer invalid, was pleaded or proved by the appellant, its validity must be determined by the laws of Kentucky. This is also true as to such rights, if any, as may be asserted by appellant on account of the attachment in this case. At the common law stock in a corporation is not subject to attachment, for which reason there is no common law on the subject. *Cook on Corporations*, vol. 2, 481; *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938, 57 L.R.A. 670. The right to attach stock, as here attempted, is a remedy given by the Civil Code of this State (sections 202-236, inclusive), and necessarily the remedy and all rights incident thereto must be governed by the laws of this State. *Bowman v. Breyfogle*, 145 Ky. 443, Ann. Cas. 1914B 938, 140 S. W. 694. Moreover, it is a well recognized rule that the method of transferring stock in a corporation is governed by the law of the State under which it was incorporated, although the transfer is made in another State. 10 Cyc. 593; *Horton v. Sherrill-Russell Lumber Co.* 147 Ky. 226, 143 S. W. 1053; *Masury v. Arkansas Nat. Bank*, 87 Fed. 381; *Yellow Poplar Lumber Co. v. Ford*, 141 Ky. 5, 131 S. W. 155.

[313] We think it will be found, however, that the law of West Virginia with respect to the sale of stock in a corporation and the manner of effecting its transfer, is the same as the law of Kentucky. Thus, in *Lipscomb v. Condon*, supra, it is said:

"Where there is no statute expressly or impliedly forbidding a sale of stock without registration, it is generally, if not universally, held that the purchaser takes the legal title without a transfer of the stock on the books. Even in those jurisdictions in which the statute declares that the stocks shall be transferable only on the books of the corporation it is held that an unregistered transfer or assignment gives the purchaser a perfect equitable title as between him and the assignor and any person claiming under the latter."

As the contentions of appellant with reference to the sale and transfer from Linehan to appellees apply only to the stock, further discussion as to the validity of the sale and transfer of the bonds is unnecessary, except to say that it seems well settled that an attachment cannot be levied upon negotiable, mortgage, coupon bonds, or a lien acquired thereon by process of garnishment served upon the corporation owing but not holding them. The corporation is not the custodian of the bonds, and the bonds here involved were not in the possession of the Wallsend Coal & Coke Company when the attachment of appellant was served upon it. Such bonds, like a negotiable note or money, pass by delivery and can only be attached by actually locating them and serving the attachment upon the person having possession of them. In *Cook on Corporations*, 5th ed. vol. 3, section 765, it is said:

"Bonds after issue may be taxable, attachment may be levied on them at the place where they actually are, although not at the place where the corporation is and they are not. . . . Negotiable bonds held outside of the jurisdiction of the court cannot be attached by serving the attachment on the corporation which issued the bonds. *Von Hesse v. Mackaye*, 55 Hun 365, affirmed 121 N. Y. 694. The garnishee process does not lie against a nonresident company on bonds, since the debtor may have sold them. *Junction R. Co. v. Cleneay*, 13 Ind. 161."

We discover no merit in appellant's final contention that the evidence shows the Frozen Creek Lumber Company [314] to be the legal owner of the stock and bonds in question, and that it fails to show that that corporation has been legally dissolved. The latter proposition is attempted to be sustained by a certificate from the Secretary of State of West Virginia appearing in the record, in which it is stated that his record does not show that the corporation had been dissolved. This certificate, in our opinion, does not mill-

tate against the contention of appellees that the corporation had been dissolved. The notice of such dissolution required to be given the Secretary of State is doubtless for the benefit of the public, as, like any other record, it would presumptively inform everybody that the corporation no longer existed as such. But this does not show that the corporation, though not formally dissolved according to the law of that State, had not gone out of business. It may be conceded that a corporation cannot quit business and distribute its assets among the stockholders without paying its debts, or without making the stockholders receiving such assets liable for such debts, but in this case it clearly appears from the evidence that the Frozen Creek Lumber Company had in fact gone out of business before the settlement was made between appellee and Linehan, whereby the former became the owners of the latter's stock in and bonds of the Wallsend Coal & Coke Company: that appellees had prior thereto assumed and paid the debts of the defunct corporation and with the consent of the stockholders received from it all its assets, including its debt of \$28,000.00 against Linehan, to reimburse them for the sums they expended in discharging the debts of the corporation. It is not made to appear that any creditor of the Frozen Creek Lumber Company is complaining of the arrangement referred to, and certainly appellant, who is not a creditor, cannot complain thereof. We see in the transaction nothing to invalidate the title of appellees to the stock and bonds sold and transferred them by Linehan. In sustaining the validity of the transfer of the stock and bonds made in West Virginia, we do not violate the public policy of this State.

As we concur in the conclusions reached by the circuit court, the judgment is affirmed.

NOTE.

Law Governing Transfer of Corporate Stock.

As a general rule the law governing the transfer of stock of a corporation is the law of the place in which the company was incorporated. *Williams v. Colonial Bank*, 38 Ch. Div. (Eng.) 388, 57 L. J. Ch. 826, 59 L. T. N. S. 643, 36 W. R. 625, *affirmed* in *Colonial Bank v. Cady*, 15 A. C. (Eng.) 267, 60 L. J. Ch. 131, 63 L. T. N. S. 27, 39 W. R. 17; *Black v. Zacharie*, 3 How. 483; *Shaw v. Goebel Brewing Co.* 202 Fed. 408, 120 C. A. 470, 45 L.R.A.(N.S.) 1090; *Dow v. Gould, etc. Silver Min. Co.* 31 Cal. 629. See also *State v. Dunlap*, 28 Idaho 784, 156 Pac. 1141; *Horton v. Sherrill-Russell Lumber Co.* 147 Ky. 226, 143 S. W. 1053. And see the reported case.

Thus in *Black v. Zacharie*, *supra*, the transfer of stock involved was made by one Black,

a resident of Louisiana, to one Chapman, a resident of South Carolina, and was attached, after the transfer, for Black's debts. The corporation, the ownership of whose stock was in issue, was chartered in Louisiana. After reviewing the facts, the court said: "We admit that the validity of this assignment to pass the right to Black in the stock attached depends upon the law of Louisiana and not upon that of South Carolina. From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that state, and not by the local law of any foreign state."

In *Shaw v. Goebel Brewing Co.* 202 Fed. 408, 120 C. A. 470, 45 L.R.A.(N.S.) 1090, it appeared that shares of stock in a British corporation having a local office in Detroit, Michigan, were transferred by the original holder to the appellant, but not in conformity with the provisions of the Companies' Act of Great Britain. A suit in equity was brought to compel the reissuance of the stock and the payment of accruing dividends to the appellant. The court held that "since Grant and Shaw were consciously dealing with shares of stock in an English corporation, which involved certificates that admittedly could not be replaced by new ones, with a transfer on the register of members, except in London, it is plain enough that Shaw's right to the relief prayed is to be tested in large measure by such laws of England as were designed to form part of appellee's charter."

In *Williams v. Colonial Bank*, 38 Ch. D. (Eng.) 388, 57 L. J. Ch. 826, 59 L. T. N. S. 643, 36 W. R. 625, wherein it appeared that the parties to a transfer of stock in an American corporation all resided in England, the court said: "The law of America, in my opinion, is properly referred to for the purpose of deciding what would be the effect of a valid effectual transfer of the certificates on the title to shares in an American company."

In *Dow v. Gould, etc. Silver Min. Co.* 31 Cal. 629, the question arose as to the ownership of stock in the defendant company, a corporation organized under California law. The stock was purchased by the plaintiff's husband in her name as a gift to her, and he later assigned the stock to a third person, acting as attorney in fact for his wife and signing her name to the instrument of transfer. The plaintiff repudiated this act of her husband and brought suit to recover the dividends accruing since the date of the supposed transfer. The defendant pleaded that "the alleged gift did not change the title, because her (plaintiff's) husband resided in Nevada, and at common law then and there in force, he could not make a gift directly to his wife." The court said: "Contracts respecting pub-

lic funds or stock, bank stock and other property of that incorporeal character which owes its existence to, or is regulated by, peculiar local laws, must be made and carried into execution according to those laws. They constitute exceptions to the rule requiring the validity of contracts respecting most other sorts of personal property to be determined by the *lex domicilii* or the *lex loci contractus*, as the case may require. . . . It is obvious that there may be peculiar reasons, and to which the law will give heed, why the stock of a mining corporation should be assigned in a certain mode, as by an instrument in writing, or by transfer upon the books of the corporation, or in any other mode prescribed by the local law."

However, in *Bridgeport Bank v. New York, etc. R. Co.* 30 Conn. 231, it was held that the validity of a transfer of corporate stock under a blank power of attorney attached to the stock certificate was governed by the *lex loci* of the transfer, to wit, the place where the transfer was performed. In that case it appeared that the assignment of the stock was made in New York to the plaintiff, a corporation located in Connecticut and organized under the laws of that state. The corporation, the ownership of whose stock was in litigation, was created by the law of Connecticut. The court ruled as follows: "But we feel relieved from embarrassment in holding this power sufficient, by the fact that the transfer was to be made under it in the state of New York, where, it is admitted by the defendant's counsel, the law is settled by the highest judicial authority in favor of the validity of a blank power of attorney. As the power was to be executed there, it is certainly sufficient that it was a valid one under the law prevailing there." No reference was made in the opinion of the court or in the arguments of counsel to the possible application of the law of the state in which the corporation was chartered.

WHITE

v.

MAYOR AND CITY COUNCIL OF NASHVILLE.

Tennessee Supreme Court—May 8, 1916.

134 Tenn. 638; 185 S. W. 721.

Municipal Corporations — Actions for Personal Injury — Requirement of Notice of Injury — Validity.

Acts 1913, c. 55, entitled "An act to prescribe the method of bringing suits and to

limit the time of bringing suits against municipal corporations on account of injuries to persons or property resulting from the negligence of the officers or employees of such corporations," and declaring that no suit shall be brought against any municipal corporation on account of personal or property injuries resulting from defective conditions of any street, alley, sidewalk, or highway unless within 90 days after such injury has been inflicted, a written notice shall be served upon the mayor of the municipality, stating the time and place where such injury was received and the general nature of the injury, and that failure to give notice shall be a valid defense against any and all liability. It is held that as the act is general in its application and the classification is not unreasonable or capricious, the act is not invalid under Const. art. 11, § 8, or Const. U. S. Amend. 14, § 1 (9 Fed. St. Ann. 392) as class legislation.

Officer to Whom Notice Must Be Given.

Under such statute, the fact that plaintiff pointed out to the legal officers of the municipality the place of her injuries and gave them verbal notice thereof, does not excuse a failure to give the written notice, the purpose of the act being to provide written notice to the mayor and municipality, and it not appearing that the law officers of the municipality were authorized to waive such notice.

[See note at end of this case.]

Appeal from Circuit Court, Davidson county: RUTHERFORD, Judge.

Action by Mary White, plaintiff, against Mayor and City Council of Nashville, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

G. S. Moore for appellant.

A. G. Ewing, Jr., and Frank M. Garard for appellee.

[690] BUCHANAN, J.—This was an action for damages in the circuit court of Davidson county, based on the alleged negligence of the city in allowing an obstruction to remain in the street at the intersection of Crawford street and Fourth avenue. The obstruction was a cedar post six or eight inches in diameter, extending about six inches above the surface of the street. Plaintiff stumbled over this obstruction and sustained injuries, and her suit was to recover damages therefor. The defendant demurred to the declaration, interposing as one of its grounds of demurrer that plaintiff had failed to allege that she had complied with chapter 55 of the Acts of 1913. See page 166 of the Public Acts of that year. The demurrer was overruled, whereupon defendant filed its plea of the general issue, and also its special plea based on the noncompliance by the plaintiff with the provisions of chapter 55 of the Acts of 1913, whereupon the plaintiff demurred to

the special plea, and her demurrer was overruled. Plaintiff then replied to the special plea as follows:

"That she gave notice of her injuries to defendant, but not in writing, with description of time and place, together with the nature of said injuries, within ninety days of the date said injuries were inflicted. The plaintiff, about four weeks after the injuries, went to the place on Crawford street where she was hurt, with A. G. Ewing, Jr., attorney for defendant city, and John [691] Barksdale, special agent of the city law department, and there, in reply to questions from them, showed them where she was hurt, the defects in the street, when and how the injury occurred," etc.

Plaintiff averred, by her replication, that the acts of the city attorney and the special agent of the law department of the city aforesaid amounted, in law, to a waiver by the city of the notice required by chapter 55 of the Acts of 1913.

Defendant demurred to plaintiff's replication as an insufficient reply to its special plea. This demurrer was sustained by the circuit court, and plaintiff's suit was dismissed at her cost. Plaintiff moved for a new trial. The court overruled the motion, and plaintiff appealed.

The first question necessary to be considered under plaintiff's assignment of errors is the constitutionality of chapter 55 of the Acts of 1913. The act is as follows:

"An act entitled 'An act to prescribe the method of bringing suit, and to limit the time of bringing suit against municipal corporations on account of injuries to persons or property resulting from the negligence of the officers or employees of said municipal corporations.'

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that no suit shall be brought against any municipal corporation in this State on account of injuries received by person or property on account of the negligent condition of any street, alley, [692] sidewalk, or highway, of such municipality, unless within ninety days after such injury to the person or property has been inflicted; a written notice shall be served upon the mayor of said municipality stating the time and place where said injury was received, and the general nature of injury inflicted. The failure to give the notice prescribed in this act within the time set out shall be valid defense against any and all liability of the city which might otherwise exist on account of the defective or negligent condition of said street, alley, sidewalk, or highway; and provided, further, that proof of registered letter by registry receipt addressed to the mayor setting forth the injury and place of injury complained

of shall be a complete compliance with this act.

"Sec. 2. Be it further enacted, that this act take effect on September 1, 1913."

Appellant insists that the act violates article 11, section 8, of our State Constitution, and section 1 of the Fourteenth Amendment of the Constitution of the United States. The statute is general in its application. It applies to "any municipal corporation in this State," and to all plaintiffs seeking redress against such corporations for injuries received on account of the negligent condition of any city, alley, sidewalk, or highway of such municipality. The classification is not unreasonable, arbitrary, or capricious.

We think the act is constitutional legislation under our authorities: *Scott v. Marley*, 124 Tenn. 388, 137 S. W. 492; *Davis v. State*, 3 Lea (Tenn.) [693] 379; *Condon v. Maloney*, 108 Tenn. 82, 65 S. W. 871; *State v. Schlitz Brewing Co.* 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; *Demoville v. Davidson County*, 87 Tenn. 215, 10 S. W. 353; *Cook v. State*, 90 Tenn. 407, 16 S. W. 471, 13 L.R.A. 183; *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 490, 19 S. W. 618; *Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75; *Dugger v. Mechanics*, etc. Ins. Co. 95 Tenn. 245, 32 S. W. 5, 28 L.R.A. 796; *Henley v. State*, 98 Tenn. 607, 41 S. W. 352, 1104, 39 L.R.A. 126; *Dabardelaben v. State*, 99 Tenn. 649, 42 S. W. 684; *Knoxville, etc. Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115, 53 L.R.A. 921; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, 183 U. S. 21, 22 S. Ct. 1, 46 U. S. (L. ed.) 55; *Dayton Coal, etc. Co. v. Barton*, 103 Tenn. 604, 53 S. W. 970, *affirmed* by the supreme court of the United States, 183 U. S. 23, 22 S. Ct. 5, 46 U. S. (L. ed.) 61; *Leeper v. State*, 103 Tenn. 500, 53 S. W. 962, 48 L.R.A. 167; *Neas v. Borches*, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851.

The next, and final, question to be considered under plaintiff's assignment of errors is her insistence that her replication disclosed a waiver by the city of the notice required by chapter 55 of the Acts of 1913. We think this position is unsound. The act does not require verbal notice, nor is there anything in the act indicating that verbal notice would suffice; nor does the act require notice to the city attorney; or the special [694] agent of the city law department, and there is no indication in the act that its terms are to be met by showing such employees of the city the place where plaintiff's injuries were sustained, and the particular defect in the street, and telling them how the injury occurred. On the other hand, the act requires a written notice, and that it shall be served upon the mayor, and that

it shall state the time and place where the injury was received, and the general nature of the injury inflicted. The purpose of this requirement was that there might be, in the office of the mayor, a written record of the plaintiff's claim. The act requires the notice to be given within ninety days after the injury. The purpose of this requirement is manifest, and in all respects reasonable. It was not within the power or authority of the city attorney or special agent to waive the notice required by the act. The act provides that the failure to give the notice prescribed within the time shall be a valid defense against any and all liability of the city which might otherwise exist, and in the concluding portion of the act is the provision:

"That proof of registered letter by registry receipt addressed to the mayor setting forth the injury and place of injury complained of shall be a complete compliance with this act."

In the provision just quoted there is found a plain and easy method of accomplishing the service of the written notice on the mayor required by an earlier provision of the act.

[695] Of such statutes it is said, in McQuillan on Municipal Corporations, volume 6, section 2714, that they have been construed, in some jurisdictions, as mandatory, citing, to sustain the text, *Starling v. Bedford*, 94 Ia. 194, 62 N. W. 674; *Trost v. Casselton*, 8 N. D. 534, 79 N. W. 1071, and that such provisions are in some jurisdictions construed to be conditions precedent to the right to sue, citing *Mitchell v. Worcester*, 129 Mass. 525; *Schmidt v. Fremont*, 70 Neb. 577, 97 N. W. 830; *Forseyth v. Oswego*, 107 App. Div. 187, 95 N. Y. S. 33; *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704; *Luke v. El Paso (Tex.)* 60 S. W. 363; *Hay v. Barbaboo*, 127 Wis. 1, 105 N. W. 654, 3 L.R.A.(N.S.) 84, 115 Am. St. Rep. 977. In the same section of such provisions the author says: They are "universally upheld, and the general rule is that even the municipality itself cannot waive a compliance with such a requirement, although, as to the latter, the authorities are conflicting." The manifest purpose of the legislature, as indicated by the terms of the act, was "that no suit shall be brought, etc., unless" the notice required by the act should have been given within the time mentioned, and in the manner prescribed by the act.

The purpose of the act was not to benefit the mayor of municipalities, or municipal

officers. Its purpose was the protection of municipal bodies corporate. The replication does not aver a waiver by the mayor, for the municipal corporation. The power of the mayor or the corporation to waive the benefits of the act is [696] therefore not presented. We simply decide that the replication did not disclose a waiver by the city of the benefits of the act.

In *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257, 34 L.R.A.(N.S.) 1166, Ann. Cas. 1913A 344, a waiver was relied on where the charter required the claim to be presented to the city council and filed with the clerk. The claim was not so presented, and the supreme court of Washington, in disposing of the question, said, in part:

"The decided weight of authority sustains us in holding that provisions of this character are reasonable, and that notice to some other person than the person or body designated in the law is not a sufficient compliance therewith"—citing *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704; *Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098; *Dorsey v. Racine*, 60 Wis. 292, 18 N. W. 928; *Whalen v. Bates*, 19 R. I. 274, 33 Atl. 224; *Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80; *Seamons v. Fitts*, 21 R. I. 236, 42 Atl. 863; *Bancroft v. San Diego*, 120 Cal. 432, 52 Pac. 712; *Bausher v. St. Paul*, 72 Minn. 539, 75 N. W. 745; *Dalton v. Salem*, 139 Mass. 91, 28 N. E. 576; *Harris v. Fond du Lac*, 104 Wis. 44, 80 N. W. 66; *McKenna v. Bates*, 19 R. I. 610, 35 Atl. 580, 36 Atl. 1133; *Doyle v. Duluth*, 74 Minn. 157, 76 N. W. 1029.

Plaintiff's declaration averred the date of the injury for which she sues, and this date was subsequent to the time when the act went into effect.

There is no error in the judgment, and it is affirmed.

NOTE.

The reported case holds that a notice of injury required to be given to a particular officer of a municipality as a condition precedent to an action for personal injuries against the municipality cannot be waived by any other officer. Applying that rule, it is held that verbal notice of an injury to the legal department of a municipality does not cure a failure to comply with a statute requiring notice to the mayor. The question to whom a claim against a municipality may be presented is considered in the note to *Cole v. Seattle*, Ann. Cas. 1913A 344.

FENSKY

v.

MARYLAND CASUALTY COMPANY.

Missouri Supreme Court—March 2, 1915.

264 Mo. 154; 174 S. W. 416.

Corporations — Liability for Slander.

A corporation is liable for a slander uttered by its agent while acting in the scope of his employment, and in the actual performance of the duties thereof touching the matter in question, though the corporation had no knowledge and did not ratify the act of the agent.

[See note at end of this case.]

Same.

A corporation is as well liable for slander by an agent committed in the course of his employment as for a slander by an officer or manager of the corporation.

[See note at end of this case.]

Libel and Slander — Pleading — Office of Innuendo.

It is not the purpose of an innuendo, in a petition for slander, to enlarge the words actually used, but its office is to state in what meaning the language was used.

Necessity of Colloquium.

If words used are not actionable per se, the pleader, by way of colloquium, must state such extrinsic facts as will show the slanderous meaning of the words used.

Actionable Words — Imputation of Forgery — Language Construed.

To say to an attorney, "the contract you claim to have with this man was not signed by him, and he is here to tell you," is not actionable per se, as imputing a forgery.

Sufficiency of Colloquium — Showing Imputation of Forgery.

A petition by an attorney for slander, alleging, by way of colloquium, that plaintiff was asserting rights under a contract signed by M, and that this contract evidenced a lien which plaintiff had on a cause of action on which M had against a corporation, and that defendant was vitally interested in such cause of action as indemnitor, and that defendant had knowledge of plaintiff's contract, and that agents of defendant, in the course of their employment, while calling on plaintiff in reference to the contract, stated that "the contract you claim to have with this man was not signed by him, and he is here to tell you," is sufficient to show a charge of forgery or a claim of right under a known forged instrument, and hence states a cause of action.

Appeal from St. Louis Circuit Court:
ALLEN, Judge.

Action by Charles Fensky, plaintiff, against Maryland Casualty Company, defendant. From judgment rendered, plaintiff appeals.

The facts are stated in the opinion. REVERSED.

Charles Fensky and Henry E. Haas for appellant.

Holland, Rutledge & Lashly for respondent.

[157] GRAVES, P. J.—This is an action for slander. In the trial court the plaintiff was cast upon a general demurrer, charging that his petition failed to state facts sufficient to constitute a cause of action. That is the sole question here. The petition reads:

"Plaintiff states that he is and was at all times herein mentioned a regularly licensed attorney at law and has been practicing his profession in the city of St. Louis, Missouri, for the past fifteen years:

"That the defendant, Maryland Casualty Company, is a foreign corporation doing business in the State of Missouri and is engaged, among other things, in carrying employers' liability insurance.

"Plaintiff further states that on the 8th day of May, 1911, he was employed by one Eugene May, colored, to prosecute his claim for damages against the Polar Wave Ice & Fuel Company, a corporation, doing [158] business in the city of St. Louis, on account of personal injuries sustained by the said Eugene May while in the employ of said Polar Wave Ice & Fuel Company on or about the 29th day of April, 1911, at its plant at or near Cook and Channing avenues in said city of St. Louis; that plaintiff's contract of employment was in writing duly signed by the said Eugene May and that by reason thereof plaintiff had a property right in said cause of action to the extent of his statutory lien; which said contract is herewith filed and marked 'Exhibit A.'

"Plaintiff further states that the said defendant, Maryland Casualty Company, was assurer for said Polar Wave Ice & Fuel Company and had contracted and agreed to hold the said Polar Wave Ice & Fuel Company harmless from any and all liability by reason of damage suits, and was by reason of said contract of assurance vitally interested in the outcome of the claim of said Eugene May.

"Plaintiff further states that he duly notified the Polar Wave Ice & Fuel Company of his employment in writing by said Eugene May and of his statutory lien on the cause of action, and that the said Polar Wave Ice & Fuel Company in turn notified the said Maryland Casualty Company.

"Plaintiff further states that on or about the 19th day of May, 1911, two agents of the defendant corporation, whose names, to the best knowledge and belief of plaintiff, are Fred Kraemer and — Hulbert, having in their company the said Eugene May, called on plaintiff at his office in the Times Build-

ing in the city of St. Louis, Missouri, and said Fred Kraemer, agent of defendant, while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question, in the presence and hearing of this plaintiff and of divers other persons, falsely, wantonly, and maliciously spoke of and concerning the [159] plaintiff the following false, malicious, and defamatory words, to wit: "The contract you (meaning plaintiff) claim to have with this man (meaning May) was not signed by him and he (meaning May) is here to tell you so. Furthermore, the day on which this contract is alleged to have been signed, I saw May and his hand was so badly hurt and bandaged that he could not have signed his name if he wanted to," then and there intending to charge and impute, and then and there charging and imputing, to plaintiff that he had in his possession and was asserting a right under a forged instrument, knowing the same to be forged, which said charge, if true, constitutes a felony under the laws of the State of Missouri and would subject plaintiff to degrading punishment.

"Plaintiff further states that at the time of uttering said false, malicious, and defamatory words as aforesaid, and with a view of intensifying said slander, the said Fred Kraemer, agent of said defendant, while acting within the scope of his employment and in the actual performance of the duties assigned to him by this defendant procured the said Eugene May, under promise of pecuniary reward, to then and there deny his signature in the presence and hearing of plaintiff and divers other persons; that the false and slanderous language so spoken of and concerning the plaintiff, together with the denial of said Eugene May, so procured as aforesaid, was understood and believed by the persons in whose presence and hearing the same was uttered to mean that plaintiff had in his possession and was asserting a right under a forged contract, and that he, the plaintiff, then and there knew the same to be forged.

"Plaintiff further says that the false and slanderous words so spoken of and concerning the plaintiff by defendant's said agent while acting in the scope of his employment, greatly humiliated plaintiff and has greatly prejudiced him in his good name, fame [160] and reputation and has greatly injured him in his profession and business as an attorney at law, to his damage in the sum of fifty thousand dollars, in actual damages in the sum of twenty-five thousand dollars and in exemplary or punitive damages in the sum of twenty-five thousand dollars.

"Wherefore, the premises considered, plaintiff prays judgment against defendant for twenty-five thousand dollars actual damages

and for twenty-five thousand dollars punitive damages and for his costs in this behalf sustained."

I. The demurrer being a general one we are not advised upon what theory the trial court held this petition bad. In the brief of appellant it is said that the trial court took the view that there was no agency in slander, and a corporation was not liable for the slanderous statements of its agent. We admit that a rule thus broad is announced by Townshend on Slander and Libel (4 ed.) sec. 265, whereat it is said:

"As a corporation can act only by or through its officers or agents (sec. 261) and as there can be no agency to slander (sec. 57), it follows that a corporation cannot be guilty of slander; it has not the capacity for committing that wrong. If an officer or an agent of a corporation is guilty of slander, he is personally liable, and no liability results to the corporation."

This rule has long since been exploded, and rightfully so. The more recent and better rule is well worded in 5 Thompson on Corporations (2 ed.) sec. 5441, whereat it is said:

"The general rule makes the corporation liable for a slander uttered by its agent while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question, though the slander was not uttered with [161] the knowledge of the corporation or with its approval and though it did not ratify the act of the agent."

To like effect is 1 Clark and Marshall on Private Corporations, page 627:

"It has been said that a corporation cannot be liable for a slander or oral defamation by its officers or agents, as 'there can be no agency to slander;' and the opinion has also been expressed that a corporation, because of its impersonal nature, cannot commit torts involving the element of malice, since, to support an action for such a tort, 'it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind.' This reasoning, however, is unsound. A corporation, it is true, has no mind, and cannot itself entertain malice, but its officers and agents may, and their mental attitude, including their malice, may, like their consent to a contract or their physical acts, be imputed to the corporation. It is well settled, therefore, for this reason, that a corporation may, to the same extent as a natural principal, be liable for the malicious wrongs of its officers or agents, if committed in the course of a transaction which is within the scope of their authority."

And on page 628 the same authority says: "Thus, it has been held that a corporation may, to the same extent as an individual, be

liable in an action for libel, or, it seems, for slander, or in an action for malicious criminal prosecution or malicious false arrest or imprisonment, for malicious prosecution of a civil action, attachment, or other proceeding, for malicious interference with the business of another, for making a false return to a writ, as a writ of mandamus, for example, and for conspiracy, all of which offenses involve a mental element."

Further in a note on page 629, the same authority adds: "While it is true that a corporation cannot itself speak and therefore cannot itself slander, neither [162] can a corporation itself make false representations, and yet a corporation may be liable for the false representations of its agent. For the same reason, it may be liable for a slander by its agents."

In the recent case of *Hypes v. Southern R. Co.* 82 S. C. l. c. 317, 17 Ann. Cas. 620, 64 S. E. 395, 21 L.R.A.(N.S.) 873, Mr. Justice Jones says:

"It is established that corporations as well as natural persons are liable for the wilful tort of an agent acting within the general scope of his employment, without previous express authority or subsequent ratification. [*Rucker v. Smoke*, 37 S. C. 377; *Williams v. Tolbert*, 76 S. C. 217; *Schumpert v. Southern R. Co.* 65 S. C. 332; *Gardner v. Southern R. Co.* 65 S. C. 342; *Riser v. Southern Ry. Co.* 67 S. C. 419; *Dagnall v. Southern Ry. Co.* 69 S. C. 115; *Fields v. Lancaster Cotton Mills*, 77 S. C. 549, 11 L.R.A.(N.S.) 822.]

"The old doctrine that a corporation, having no mind, cannot be liable for acts of agents involving malice has been completely exploded in modern jurisprudence. While a corporation is nonpersonal in its formal legal entity, it represents natural persons and must necessarily perform its duties through natural persons as agents, hence must spring the correlative responsibility for the acts of its agents within the scope of their employment.

"The liability of a corporation for malicious libel published by its agent in the course of his employment is generally recognized. *Philadelphia, etc. R. Co. v. Quigley*, 21 How. 202, 16 U. S. (L. ed.) 73; *Johnson v. St. Louis Dispatch Co.* 65 Mo. 539, 27 Am. Rep. 293; *Bacon v. Michigan Cent. R. Co.* 55 Mich. 224, 54 Am. Rep. 372; *Maynard v. Firemen's Fund Ins. Co.* 34 Cal. 48, 91 Am. Dec. 672; *Fogg v. Boston, etc. R. Corp.* 148 Mass. 513, 12 Am. St. Rep. 583; *Missouri Pacific Ry. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794; 10 Cyc. 1215; 18 Am. & Eng. Enc. of Law (2d ed.) 1058.

"We do not regard the distinction between written and unwritten slander to be of sufficient importance [163] to warrant the application of a different rule. The written

slander is not always or necessarily more public than the spoken, and if it may indicate more deliberation and hence warrant more easily the inference of malice, the difference is merely in degree, not in kind."

So too, in the case of *Rivers v. Yazoo, etc. R. Co.* 90 Miss. l. c. 211, 43 So. 471, 9 L.R.A. (N.S.) 931, *Whitfield, C. J.*, says:

"The doctrine has long been exploded that a corporation is not liable for slander because, as it was ridiculously expressed, there could be 'no agency to slander.' The true doctrine is that set forth in *Clark & Marshall on Corporations*, vol 1, pp. 627-629."

The learned jurist then quotes from the text as we have quoted supra.

In our own State this modern rule as to slander is fully recognized. *Payton v. People's Credit Clothing Co.* 136 Mo. App. 577, 118 S. W. 531.

There can be no sound reason for saying that a corporation may be liable for libel (a doctrine long recognized) and yet not liable for slander—unwritten libel or defamation of character. Under the modern rule the corporate shell will not shield the corporation from the ill effects of the slanderous tongue of its agent, if at the time the agent was transacting for the corporation the business of the corporation, and the slander was uttered in the course of such business—and in connection therewith. As an individual I cannot go to another individual to adjust an account with him, and in the course of so doing publicly denounce him as a thief. Nor should a corporation, through its agents, be able to thus denounce a citizen, and escape liability. This phase of the case, i. e., the character of the agent, we discuss later. It is sufficient to say at this juncture that the corporation is not relieved from liability upon the theory that there "is no agency to slander." If this was the theory [164] *visi*, and there were no other questions in the case, the judgment cannot be sustained.

II. The first point in defendant's brief is stated in this language:

"The utterance referred to in appellant's petition is not slanderous. The words contained therein being ordinary English words free from ambiguity they may not be enlarged upon or added to by the allegations contained in the *innuendo*."

All this may be granted, and yet the action of the trial court is not necessarily right. It is not the purpose of an *innuendo* in a petition for slander to enlarge the words actually used, but the office of that part of a slander petition is to state in what sense or meaning the language was used.

If the words used are not actionable *per se*, the pleader by way of colloquium must state such extrinsic facts, as will show the slanderous meaning of the words used. In

the early case of *Curry v. Collins*, 37 Mo. l. c. 328, we said:

"Since the statute (R. S. 1855, p. 1240, sec. 55), there need be no colloquium of extrinsic facts for the purpose of showing the application of the defamatory matter to the plaintiff, more than the words were spoken of and concerning him. *Stieber v. Wensel*, 19 Mo. 513. And when the slanderous words are actionable in themselves, it is not necessary to make any prefatory averments as to the circumstances to which they refer; but if the words do not, *per se*, convey the meaning which the plaintiff would assign to them, the petition must contain a statement of the extrinsic matter necessary to show that they are actionable, and what is necessary to be stated must be proved."

We have set out the petition in full, and we may admit that the language alleged to have been spoken by the agent Kraemer, if taken as standing alone does [165] not charge an indictable offense, and thus would not be actionable *per se*. In such case it devolves upon the pleader by way of colloquium to state such extrinsic facts as will show that the words were used in an actionable sense. Does this petition state such extrinsic facts? We think so. It is rather inartificially drawn, but we believe there are such extrinsic facts pleaded as to show the words to have been used in an actionable sense. The plaintiff's petition, as to these extrinsic facts, show (1) that plaintiff was asserting rights under a contract purporting to have been signed by May, (2) that this contract evidenced a lien which plaintiff had upon a cause of action which May had against the Ice Company, (3) that May in fact had a claimed cause of action against the Ice Company, (4) that defendant was vitally interested in such claimed cause of action by May, because it had indemnified by insurance the said Ice Company against such claims; (5) that defendant had knowledge of plaintiff's said contract; (6) that these agents of defendant in the course of their business for the defendant called upon plaintiff with reference to the claim of May and this contract of plaintiff with May; (7) that whilst looking after the alleged liability of defendant upon the very claim, and the claim of plaintiff under the contract with May, the language mentioned was used. The foregoing is a fair statement of the facts pleaded, or clearly inferable, in plaintiff's petition. The question then is, do these incidental facts show the language to have been used in an actionable sense? We think so. It is clear that if they do not show that they charge plaintiff with having forged May's name to the contract, they do at least show that plaintiff was claiming valuable rights under a contract, knowing it to have been forged. In

either sense the language as thus used was actionable, and the petition would state a good cause of action. So that we say that whilst this petition is quite inartificially drawn, yet the facts pleaded [166] and the clear inference to be drawn from the pleaded facts, show the words charged to have been spoken were in fact spoken in the sense attributed to them in the *immundo*. So viewing the petition it states a good cause of action, if Kraemer's relation to the company was such that the company would be liable for his slanderous remarks. That question we take next.

III. The next contention of the defendant is that the petition only charges that Kraemer was the agent of defendant, and that the defendant is not liable for the slanderous language of a mere agent, and for that reason the petition is bad. The contention of the defendant seems to be that only an officer or manager of a corporation can make the corporation liable for slander. There is language in *Payton v. People's Credit Clothing Co.* 136 Mo. App. 577, 118 S. W. 531, which lends support to this view. The doctrine is unsound.

The petition in this case charges that Kraemer was the agent of the corporation, it charges that what he said and did was said and done "while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question." The extrinsic facts, by way of colloquium, and the reasonable inference from those facts, show that this allegation of being in the line of duty is true. The facts show that this agent was looking after this claim against the defendant, and it of necessity required the agent to investigate the contract of plaintiff which gave plaintiff an interest in the claim. Whatever was done and said was done and said in the very performance of the agent's duty to his master. In effect, when this agent approached plaintiff, the plaintiff not only asserted that there was a valid claim against the agent's principal, but further that by reason of the contract, he, plaintiff, had a half interest in that claim. To this the agent in effect said, yes, you claim under that contract, [167] but that contract is a forgery and you know it, and we have the man right here with us to prove that it is a forgery. If ever words of slander were uttered by an agent, to use the language of Judge Thompson, quoted supra, "while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question," this is one of the cases.

Under our paragraph one we have cited the authorities which hold that the corporation may be liable for the slanderous language of the agent. These authorities do not

confine the word agent to an officer or general manager, as defendant would have us do and as the Kansas City Court of Appeals seemingly has done in the Payton case, *supra*. On the contrary, the vast weight of modern authorities places the liability upon the ground that the language was used by an authorized agent in the line of his employment and in connection with the very thing he was looking after for his corporation. The law draws no distinction between the classes of agents as to whether high or low in authority. The things to be looked to are, (1) was the person an authorized agent of the corporation? and (2) if so, was he acting within the scope of his employment, when he used the slanderous language? and (3) was such language used in the actual performance of his duties, and touching the matter in question? If so, then the corporation is liable, whether such authorized agent be high or low in class (so he was duly authorized and was acting within the scope of his authority), and is liable, to again quote from Judge Thompson, "though the slander was not uttered with the knowledge of the corporation or with its approval, and though it did not ratify the act of the agent."

This doctrine is right in principle. An individual could not have gone to the plaintiff and charged him with knowingly exacting money under a forged contract and escape liability, if such charge was false. [168] Nor should a corporation which sends out an agent who would do the same thing be permitted to escape liability.

The doctrine of "no agency to slander" and "the corporation can't slander because it can't talk" having been fully exploded, it is liable in slander just the same as for any other tort. It is not liable for any tort which is not committed in the course of the agent's employment.

We think a liberal construction of this petition (which construction we are entitled to give it upon a mere general demurrer) shows that a cause of action was stated and the trial court erred in sustaining the demurrer thereto. The judgment *nisi* is reversed and the cause remanded. All concur.

NOTE.

Liability of Corporation for Libel or Slander.

Scope of Note, 967.

Liability for Libel, 967.

Liability for Slander, 968.

Scope of Note.

This note collects the more recent cases discussing the liability of a corporation for

libel or slander. The earlier cases are reviewed in the notes to *Sawyer v. Norfolk*, etc. R. Co. as reported in 9 Ann. Cas. 440 and 115 Am. St. Rep. 716, and *Hypes v. Southern R. Co.* 17 Ann. Cas. 620.

Liability for Libel.

The recent cases are agreed that a corporation is liable for a libel committed by its agents and servants while acting within the scope of their employment.

In *Citizens L. Assur. Co. v. Brown* [1904] A. C. (Eng.) 423, 73 L. J. P. C. 102, it appeared that the plaintiff had been an insurance agent for the defendant. One Fitzpatrick was the superintendent of agencies for the defendant. After leaving the defendant's employ the plaintiff obtained a position with another insurance company, and while so employed he endeavored to induce policyholders in the defendant corporation to become policyholders of the second company. Fitzpatrick learned of this and sent out a circular letter libeling the plaintiff. It was held that the defendant was liable. The court said: "If it is once granted that corporations are for civil purposes to be regarded as persons, i. e., as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the Acting Chief Justice in this case that, if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged: and not being privileged the letter must be treated as any other libel written and published by an officer of the company. . . . He [Fitzpatrick] had no actual authority, express or implied, to write libels nor to do anything legally wrong: but it is not necessary that he should have any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said: 'Although the particular act which gives the cause of action may not be

authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this Board (in *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394; *Swire v. Francis* (1877) 3 App. Cas. 106), and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth v. Glasgow Bank* (1880) 5 App. Cas. at p. 326, and has been followed in numerous other cases. Such being the evidence, their Lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write to policyholders in order to counteract the mischief which Brown was doing to the business of the company; and although Fitzpatrick went too far and made charges against Brown which he knew were not true, their Lordships are of opinion that the company are legally responsible for what he wrote."

In *Case v. Steel Coal Co.* 162 Ky. 68, 171 S. W. 993, L.R.A.1915D 867, the court said: "In a case for libel by the servant of a corporation, however, the question of the latter's liability will not turn upon whether it expressly consented to, directed or authorized the libel. It will be responsible for the libel if it was published by the servant in execution of the authority, express or implied, given by the corporation, or in the performance of the service for which the servant was engaged, or the act was one within the apparent scope of his employment." See also *Roemer v. Jacob Schmidt Brewing Co.* 132 Minn. 399, 157 N. W. 640, L.R.A.1916E 771, wherein the court said: "Although admitting the well-established rule that a corporation is responsible for the torts of an agent or servant committed in the course of his employment and while engaged in furthering the business of his principal or master, and that a libel published by an agent or servant falls within the rule, defendant contends that a slander spoken by an agent or servant is governed by a different rule, and that a corporation is not liable therefor unless it expressly authorized, ratified or approved the defamatory statement."

In *Kharas v. Collier*, 171 App. Div. 388, 157 N. Y. S. 410, it was said: "This principle has been repeatedly recognized, and a corporation held liable for tortious acts of its servants, even where a malicious and evil intent must be present as an element of the cause of action. A citation of authorities

is unnecessary, but a multitude of cases will be found where corporations have been held liable for false representations, libels, and assault. This court has held that a corporation may be indicted and convicted of criminal libel."

Liability for Slander.

The weight of recent authority is to the effect that a corporation is liable for a slander committed by its agent or servant while acting within the scope of his employment. *Grand Union Tea Co. v. Lord*, 231 Fed. 390, 145 C. C. A. 384; *Waters-Pierce Oil Co. v. Bridwell*, 103 Ark. 345, Ann. Cas. 1914B 837, 147 S. W. 64; *United Cigar Stores Co. v. Young*, 36 App. Cas. (D. C.) 390; *Roemer v. Jacob Schmidt Brewing Co.* 132 Minn. 399, 157 N. W. 640, L.R.A.1916E 771; *Kharas v. Collier*, 171 App. Div. 388, 157 N. Y. S. 410; *Citizens' Gas, etc. Co. v. Black* (Ohio) 115 N. E. 495; *Southwestern Tel. etc. Co. v. Long* (Tex.) 183 S. W. 421. And see the reported case. See also *Rosenberg v. Underwriters Salvage Co.* 190 Ill. App. 64, wherein the court said: "The test inquiry concerning the liability of a corporation for slander is, did the one uttering the slander do so in endeavoring to promote the corporation's business, within the scope of the actual or apparent authority conferred upon him for that purpose?" *Compare Lindsey v. St. Louis, etc. R. Co.* 95 Ark. 534, 129 S. W. 807.

In *United Cigar Stores Co. v. Young*, supra, it appeared that Young was a salesman for the United Cigar Stores Company, in one of its stores in Washington, D. C. A burglary having been committed in that store, the manager of the defendant in that district falsely accused the plaintiff of its commission. It was held that the defendant was liable. The court said: "As to the count in slander, the court said in part: 'Now, this fourth count of the declaration claims that the defendant corporation, through its manager, falsely charged the plaintiff with the crime of larceny. Whether or not you find that the manager did charge the plaintiff with the crime of larceny, the liability of the defendant to respond to it would depend upon the same considerations that I have already given you: that is to say, whether the authority that manager was discharging in the city of Washington, which had been committed to his hands by the corporation, to discharge there, was so broad as to commit to him the right to speak on behalf of the corporation concerning the guilt or the innocence of its employees. If it did, it would be responsible for what he did. Otherwise, not.' . . . There was no specific exception to the action of the court in submitting to the jury the question of the responsibility of the defendant

for the slander uttered by Steincke, and no exception to the charge of the court in reference thereto; therefore, in view of our finding that defendant's motion for a directed verdict was not well taken, we do not deem it necessary to pass upon that question."

In *Grand Union Tea Co. v. Lord*, 231 Fed. 390, 145 C. C. A. 384, it appeared that Lord was a salesman in one of the stores owned by the Grand Union Tea Company. One Van Allen, who was the general manager, made an inventory of the store in which Lord acted as salesman. He found a shortage in both money and goods. Thereafter he said to a third person that Lord had acted peculiarly, and that he was short in his accounts. It was held that the defendant was liable. The court said: "The defendant contends that a verdict should have been directed in its favor for reasons which will be briefly considered. It is argued, in the first place, that defendant, a corporation, is not liable for the alleged slander because the statement concerning Lord was not made by Van Allen in the scope of his employment or in the performance of his duties, and particularly because it was not authorized by the corporation. We deem it unnecessary to review the numerous cases involving the liability of a corporation for the tortious acts of its agent, because the law is well settled that a corporation is liable for the slanderous words of its agent if the agent at the time is transacting the business of the corporation, and the slanderous words were spoken in the course of such business and in connection therewith. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 19 S. Ct. 206, 43 U. S. (L. ed.) 543; *Stewart v. Wright*, quoting many cases, 147 Fed. 321, 77 C. C. A. 499; *Waters-Pierce Oil Co. v. Bridwell*, 103 Ark. 345, 147 S. W. 64, Ann. Cas. 1914B 837; *Hypes v. Southern R. Co.* 82 S. C. 315, 64 S. E. 395, 21 L.R.A.(N.S.) 873, 17 Ann. Cas. 620; *Fensky v. Maryland Casualty Co.* 264 Mo. 154, 174 S. W. 416; *Sun L. Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692. Van Allen was concededly engaged in the business of defendant and acting in its behalf when the words complained of were spoken, and the words themselves had reference to the act of Lord in the work for which he was employed. Under the decisions quoted, and many others which have been examined, we are clearly of opinion that the defendant should be held responsible for the language of Van Allen on the occasion in question."

In *Roemer v. Jacob Schmidt Brewing Co.* 132 Minn. 399, 157 N. W. 640, L.R.A.1916E 771, it appeared that the plaintiff had charge of one of the branch offices of the defendant. The defendant appointed an accountant to check up and audit the plaintiff's accounts. The accountant falsely charged the plaintiff

with having embezzled \$6,000 from the defendant. It was held that the defendant was liable. The court said: "In *Barrett v. Minneapolis, etc. R. Co.* 106 Minn. 51, the court, speaking in a case involving the liability of a corporation, say that it is now the 'well-settled rule of this court, whatever may be the rule in other jurisdictions, that a master is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of the master's business, and not for a purpose personal to himself, whether the same be done negligently or wilfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instructions of the master. Any statement to the contrary in the *Brevig* case is overruled.' None of the cases above cited were based upon slander, but we can see no substantial reason why the same rule which imposes liability upon a corporation when its agent commits an assault, makes a false arrest, institutes a malicious prosecution, commits a malicious trespass, or maliciously causes injury to another, should not also impose liability upon it when the agent slanders another. We think there is sound distinction between the liability for slander and the liability for the torts considered in the above cases. In the present case there is evidence to the effect that Sullivan had authority to adjust and settle plaintiff's account, and the finding of the jury that he uttered the slanderous words while engaged in the performance of that duty and while acting within the scope of his employment cannot be disturbed."

In *Kharas v. Collier*, 171 App. Div. 388, 157 N. Y. S. 410, the court said: "The true rule, in my opinion, is that a corporation is liable for torts committed by its officers or agents when acting within the actual or implied scope of their employment, or by ratification may become responsible for such acts when committed in excess of their authority. Within the content of this rule a corporation may be held liable for a slander."

In *Citizens, Gas, etc. Co. v. Black* (Ohio) 115 N. E. 495, it appeared that the plaintiff was a consumer of electricity supplied by the defendant corporation. The local manager of the company accused the plaintiff of having obtained electricity by stealth and without paying for it. It was held that the corporation was liable for the slander regardless of whether it expressly authorized the same. The court said: "There is no claim that any express authority was conferred on Adams to utter a slander in connection with his agency, at Lorain, nor was there any evidence of a ratification by the corporation of the agent's action. The only question presented is whether, in the absence of express authority or ratification, the defendant could be held

liable under an implied authority conferred by reason of the general scope of employment under which Adams was then acting in the furtherance of the corporate business. Stated broadly, it may be that there is no 'agency to slander' arising from the mere fact of an agent's employment; but, under the current of modern authority, if a corporate servant, who has been fully delegated with plenary authority to act upon a matter in his master's stead and to whom has been committed a full discretion as to the manner of its performance, utters a slander while engaged in the furtherance of the master's business, so delegated, the master may be held liable."

In *Southwestern Tel. etc. Co. v. Long* (Tex.) 183 S. W. 421, it appeared that the plaintiff, a young lady, was an employee of the defendant. The local manager charged the plaintiff with lewd and lascivious conduct and later discharged her. It was held that the defendant was liable. The court said: "It is but just to the learned counsel for appellant to say that they have not suggested in their able brief herein that a corporation may not be held liable for other torts committed by their agents by implied authority, but their contention is that this legal principle does not apply to slander. If it appears that there is no sound reason for this distinction, then the exception fails, and slander is governed, in this regard, by the general principle above announced. There are decisions which support appellant's contention. These rely principally upon grounds: (1) That as malice is a necessary ingredient of slander, a corporation, having no mind, cannot entertain malice, and therefore cannot be guilty of slander; (2) that slander is usually the voluntary act of the speaker, committed under the immediate influence of sudden passion, and therefore the law ascribes it to the personal malice of the agent, rather than to an act performed in the course of his employment, and in furtherance of the business of the employer. As to the ground that a corporation has no mind: It is true that for many purposes a corporation is held to be a separate entity from the natural persons who compose it, yet it is, in fact, but the aggregation of such persons, and the mind of such of them as are chosen to manage its affairs is its mind. . . . The admission implied in appellant's proposition that a corporation may be held liable for slander where it expressly authorizes the same is itself an answer to the doctrine that a corporation cannot be held liable for malice; for a corporation, being an incorporeal entity, must necessarily act through agents where it expressly authorizes such action. . . . As to the second proposition that slander is the voluntary act of the speaker, committed under immediate

influence of sudden passion, the same may be said, in some instances, of libel. A slander may be, and in some instances undoubtedly is, uttered with deliberate and preconceived malice, while the publication of a libel may be, and in some instances undoubtedly is, made under the influence of sudden passion. If this distinction should be recognized it would not be true, as a matter of law, that a corporation could not be held liable for the utterance of a slander, but its liability would depend upon the degree of malice which actuated the agent in uttering the defamatory words. If defamatory words are falsely uttered with malice, it is slander, regardless of whether the same be done with express or implied malice, and the same is true of libel. It has never been held that a corporation was not liable for a libel if published without deliberation and under the influence of sudden passion. In both libel and slander, express malice may be a material consideration in assessing the damages, but it is immaterial as to fixing liability. Another reason which has been suggested for holding the principal liable in libel, but not in slander, is the greater publicity given to the printed matter. This may or may not be true in a given case. A libel may consist in a written statement in a letter seen by only one person, while a slander may be uttered in the presence and hearing of a thousand or more people. Here again, as in the case of express or implied malice, the degree of publicity might be taken into consideration in assessing the amount of damage, but not in fixing liability. The damage would be greater to a man of statewide business or social relations if a libel concerning him was published in a paper of 100,000 circulation than if published in a paper of very limited circulation and confined to a given locality; but the one would be as much a libel as the other. In slander and in libel, neither the extent of the publication nor the degree of malice is a determinative factor. . . . We also overrule said assignment for the further reason that appellant is liable to appellee for the slander uttered by its superintendent, by reason of the contractual relation existing between appellant and appellee. That such liability exists on the part of railroads is recognized in *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, and this is undoubtedly the law. *San Antonio Traction Co. v. Lambkin* (Tex.) 99 S. W. 574; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781; *Galveston, etc. R. Co. v. La Prelle*, 27 Tex. Civ. App. 496, 65 S. W. 488; *Texas, etc. R. Co. v. Tarkington*, 27 Tex. Civ. App. 353, 66 S. W. 137. See also authorities cited in note to *Davis v. Houghtelin*, 14 L.R.A. 738. We do not see why the telephone company was not under as much obligation to the

young ladies employed by it to protect them from insults and slander by its manager in the conduct of its business as is a railway company to protect its passengers from insults or slander by its conductor. It is true that a railway company is required to exercise the highest degree of care to prevent injury to its passengers. But in cases of wilful assault or malicious insult by a conductor, the question of the degree of care is not involved. This principle of law is applicable only when upon a given state of facts the issue is whether or not the railroad company was guilty of negligence."

In *Waters-Pierce Oil Co. v. Bridwell*, 103 Ark. 345, Ann. Cas. 1914B 837, 147 S. W. 64, it appeared that several of the defendant's agents went to customers of the plaintiff and said to them that the plaintiff was selling oil that could not stand the inspection test, and that it was contrary to penal law to sell such oil. It was held that the defendant was liable for the slander committed by its agents. The court said: "There is some conflict of authority in respect to the liability of a corporation for slander; but inasmuch as a corporation must transact its business and perform its duties through natural persons, it is now well settled that a corporation is liable in damages for slander as it is for other torts. To establish its liability the utterance of the slander must be shown to have been made by its authority, or ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he is employed. . . . In section 279 of *Wood on Master and Servant*, the author says: 'The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for if he did not, either in fact or in law, he cannot be made chargeable for its consequence, because, not having been done, under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it.' And again the same author, in section 307, says: 'The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By "authorized" is not meant authority expressly conferred, but whether the act was such as was incident to

the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders.' In the case before us there is no evidence of express authority to utter the defamatory words given to the agents by the corporation, nor of any subsequent ratification on the part of the corporation. Of course, the mere utterance of the defamatory language cannot authorize the inference that they were done by the agents in the course of their employment. It is not necessary, however, that there be some evidence of authority, express or implied, given to the agent to make the defamatory statements; but there must be some evidence from which an authority might be implied on the part of the agent to represent the corporation as within the apparent scope of his employment in regard to the defamatory statements. The issue of whether authority to utter the slander should be implied becomes one of fact for the jury, where the facts and circumstances in proof would induce a reasonable person to infer that the act is within the scope of the agent's authority; but if only one inference should be drawn from the evidence, and that is a want of authority, the question becomes one of law for the court."

But see *Lindsey v. St. Louis, etc. R. Co.* 95 Ark. 534, 129 S. W. 807, wherein it appeared that the plaintiff was a station agent for the defendant. Two other employees of the defendant charged the plaintiff with having stolen fourteen bales of cotton. It was held that the defendant was not liable unless it authorized, approved, or ratified the slander of the two employees. The court said: "The appellant objected to the instruction numbered 4, and given at the instance of the defendant, because a corporation could not, according to it, be held liable for a slander uttered by its agent, 'unless it authorized, approved, or ratified the act of the agent in uttering the particular slander complained of, or the agent was acting within the scope of his employment.' Is this a correct declaration of law? Slander is unlike other torts. It is the individual act of him who utters it, and often arises entirely out of his momentary feelings and passions, without forethought on the speaker's part. It is such an act as cannot be anticipated, and for that reason cannot be impliedly authorized in advance. Hence it has been held that the utterance of slanderous words by an agent of a corporation must be ascribed to the personal malice of the agent who uttered them, 'rather than to the act performed in the course of his employment and in aid of the interest of his employer.' And the corporation must be exonerated, 'unless it authorized, approved or ratified the act of the agent in uttering the particular slander.' Mere proof of agency

will not be sufficient to prove such authority or ratification."

However, in a few jurisdictions the rule is that a corporation is not liable for slanderous words uttered by its agents or servants unless the corporation expressly authorizes the slander or ratifies the same. *McIntyre v. Cudahy Packing Co.* 179 Ala. 404, 60 So. 848; *Jackson v. Atlantic Coast Line R. Co.* 8 Ga. App. 495, 69 S. E. 919; *Stewart Dry Goods Co. v. Heuchtker*, 148 Ky. 229, 146 S. W. 423; *Flaherty v. Maxwell Motor Co.* 187 Mich. 62, 153 N. W. 45; *Southern Ice Co. v. Black*, 136 Tenn. 391, 189 S. W. 861. See also *Republic Iron, etc. Co. v. Self*, 192 Ala. 403, 68 So. 328, L.R.A.1915F 516, wherein the court said: "It is well settled in this jurisdiction that a corporation will not be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company and within the scope of his duties, unless it be proved that the corporation expressly ordered and directed that officer to say those very words, for a slander is the voluntary and tortious act of the speaker. *McIntyre's Case*, 179 Ala. 404, 60 So. 848; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 43 So. 210, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90."

In *McIntyre v. Cudahy Packing Co.* 179 Ala. 404, 60 So. 848, it appeared that the plaintiff was a salesman for the defendant. Customers of the defendant were presented with a bill for certain goods claimed by the defendant to have been shipped to them by the plaintiff, but which they did not receive. A representative of the defendant charged the plaintiff with embezzlement in the presence of other people. It was held that the defendant was not liable. The court said: "It is well settled in this jurisdiction, as well as others, that a corporation cannot commit slander, and can only become liable for the utterances of its agents by expressly authorizing the slanderous utterance, or by approving or ratifying the said utterance. In the case of *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 43 So. 210, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90, this court, speaking through *Tyson, C. J.*, said: 'By reason of the fact that the offense of slander is the voluntary and tortious act of the speaker, and is more likely to be the expression of momentary passion or excitement of the agent, it is, we think, rightly held that the utterance of slanderous words must be ascribed, "to the personal malice of the agent, rather than to an act performed in the course of his employment and in the aid or the interest of his employer, and exonerating the company unless it authorized or approved or ratified the act of the agent in uttering the particular slander.'" 10 Cyc. 1221. *Mr. Odgers*, in his work on *Libel and Slander*, states the doctrine in this

language: "A corporation will not, it is submitted, be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company, and within the scope of his duties, unless it be proved that the corporation expressly ordered and directed that officer to say those very words; for a slander is a voluntary and tortious act of the speaker.'" The trial court did not err in sustaining the demurrers to these counts."

In *Stewart Dry Goods Co. v. Heuchtker*, 148 Ky. 228, 146 S. W. 423, it appeared that the plaintiff was a sales girl for the defendant corporation. Its manager, in the presence of other people, said to the plaintiff: "Here is a stack of goods which you have stolen." It was held that the defendant was not liable unless it expressly authorized the slander or ratified the same. The court said: "In the case of *Duquesne Distributing Co. v. Greenbaum*, 135 Ky. 182, we had before us the question when a corporation is liable for a verbal slander uttered by one of its agents, and after pointing out the difference between a verbal slander and a libel, and referring to many authorities, we thus stated our conclusion in the matter: 'And so we think that when it is sought to charge the master or principal in any state of case with liability for defamatory utterances of the servant or agent, it is not sufficient to aver or prove that the servant or agent at the time was engaged in the service of the master or principal, or acting within the scope of his employment, in the ordinary use of that word. But it must be further averred and shown that the principal or master directed or authorized the agent or servant to speak the actionable words, or afterwards approved or ratified their speaking.'"

To the same effect see *Jackson v. Atlantic Coast Line R. Co.* 8 Ga. App. 495, 69 S. E. 919, wherein it appeared that one of the defendant's agents accused the plaintiff with charging for work which he had not performed. The charge was false. It was held that the defendant was not liable.

In *Flaherty v. Maxwell Motor Co.* 187 Mich. 62, 153 N. W. 45, it appeared that the plaintiff was an employee of the defendant. The chief office man for the defendant and its chief stockkeeper, falsely charged the plaintiff in the presence of other persons with having stolen a few articles belonging to the defendant. It was held that the defendant was not liable unless it expressly authorized the slanderous statements or ratified them. The court said: "The record does not show affirmatively that there was any expressed authorization or ratification by the corporation of the alleged slander, and the appellant does not so contend in his brief. It is, however, urged that the slander occurred in the presence of the general manager of this plant in

his office, and that the words were uttered by Cousins, whose duty it was, together with Wallace, to recover lost or stolen stock, which plaintiff insists was a sufficient showing that the slander was authorized and ratified. We do not understand the foregoing to be the law applicable to slander by a corporation; in other words, slander by a corporation cannot rest upon inference."

In *Southern Ice Co. v. Black*, 136 Tenn. 391, 189 S. W. 861, it appeared that the plaintiff was an employee of the defendant corporation. The foreman employed by the defendant said of and concerning the plaintiff: "I have located the man who stole the tickets. It is Joe Black, and I have discharged him." He further said, speaking to the plaintiff: "You are a damned thief." It was held that the corporation was not liable for the slanderous words of the foreman unless it expressly authorized or ratified them. The court said: "It is a matter of common knowledge that corporations must employ many servants, and that many of them do not weigh their words and are easily provoked to anger. It would be an extreme hardship to hold a corporation liable for the slanderous words spoken by each servant in its employ who may speak them in connection with the duties which he is employed to perform. To apply the ordinary rule governing the relationship between master and servant, and governing the liability of the master for the torts of his servants, would be to hold the corporation liable for torts which were not contemplated when the contract of employment was made. The same would often be true of private individuals. To hold that the master is liable for slanderous words spoken in the same manner that he is liable for other torts of his servant would be to extend the law of oral slander far beyond what the facts and the contemplation of the parties include. If one employs a servant about his household, it certainly is not contemplated that the servant will slander those with whom he may be brought in contact while performing his duties. We do not say that a corporation or an individual would not be held liable in particular cases for the slanderous words uttered by a servant; but to make a case of liability the plaintiff must show either that the master expressly authorized the speaking of the slanderous words, or that it would be necessary to speak them in the course of the performance of the duty assigned to the servant, or that it had been ratified by the master." In the same case the court drew the distinction between the liability of a corporation for the slander of an employee and its liability as to others, saying: "The precise question presented is the liability of a corporation for damages for oral slander spoken by one servant of another

while acting within the scope of his authority and in the interest of the master, but who was not actually authorized to speak the slanderous words. We do not think speaking the slanderous words would fall reasonably within the contemplation of the parties when they made the contract of employment, either that the master impliedly authorized the foreman to speak the words, or that he so agreed to indemnify his other servant against such conduct. . . . What we have said, of course, does not apply to a third party to whom the master owes a special duty. It does not apply to the case of a passenger on a public conveyance nor to a customer invited on the premises of the owner, nor to any other one to whom the master actually or impliedly owes a special duty."

ADAMS ET AL.

v.

TANNER ET AL.

United States Supreme Court—June 11, 1917.

244 U. S. 590; 37 S. Ct. 662.

Employment Agencies — Validity of Regulation.

The enforcement by the attorney general and county prosecuting attorney of the provisions of the Washington employment agency law (Wash. Laws 1915, chap. 1), making it criminal to collect fees from workers for furnishing them with employment or with information leading thereto, may be restrained by a court of equity at the instance of persons conducting employment agencies under municipal licenses who assert that their business will be destroyed, contrary to U. S. Const. 14th Amend. (9 Fed. St. Ann. 392) by the enforcement of such statute.

[See note at end of this case.]

Same.

Prohibition, not regulation, is what is accomplished by the provisions of the Washington agency law (Wash. Laws 1915, chap. 1), making it criminal to collect fees from workers for furnishing them with employment or information leading to such employment, although fees may still be collected from those seeking workers.

[See note at end of this case.]

Same.

The right of the individual under U. S. Const. 14th Amend. (9 Fed. St. Ann. 392) to engage in a useful and lawful business is unwarrantably infringed by the provisions of the Washington employment agency law (Wash. Laws 1915, chap. 1), enacted in the purported exercise of the police pow-

er, which make it criminal to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee for furnishing such person with employment or with information leading thereto.

[See note at end of this case.]

Appeal from United States District Court, Eastern District of Washington.

Action by Joe Adams et al., plaintiffs, against W. V. Tanner et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. REVERSED.

Dallas V. Halverstadt, George Ferris, Edward J. Cannon and Samuel H. Piles for appellants.

L. L. Thompson and W. V. Tanner for appellees.

[591] McREYNOLDS, J.—Initiative Measure Number 8—popularly known as “The Employment Agency Law”—having been submitted to the people of Washington at the general election, received a majority vote and was thereafter declared a law, effective December 3, 1914, as provided by the state constitution. (Laws of Washington, 1915, 1.) It follows:

“Be it enacted by the People of the State of Washington:

“Section 1. The welfare of the State of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

“The State of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

“Section 2. It shall be unlawful for any employment agent, his representative, or any other person to demand or receive either directly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

“Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than one hundred dollars and imprisonment for not more than thirty days.”

In *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, the Supreme Court held school teachers were not “workers” within the quoted

measure and that it did not apply to one conducting an agency patronized only by such teachers [592] and their employers. And in *State v. Rossman*, 93 Wash. 530, 161 Pac. 349, L.R.A.1917B 1276, the same court declared it did not in fact prohibit employment agencies since they might charge fees against persons wishing to hire laborers; that it was a valid exercise of state power; that a stenographer and book-keeper is a “worker;” and that one who charged him a fee for furnishing information leading to employment violated the law.

As members of co-partnerships and under municipal licenses, during the year 1914 and before, appellants were carrying on in the City of Spokane well established agencies for securing employment for patrons who paid fees therefor. November 25, 1914, in the United States District Court, they filed their original bill against W. V. Tanner, Attorney General of the State, and George H. Crandall, Prosecuting Attorney for Spokane County, asking that Initiative Measure Number 8 be declared void because in conflict with the Fourteenth Amendment, Federal Constitution (9 Fed. St. Ann. 392) and that the defendants be perpetually enjoined from undertaking to enforce it. On the same day they presented a motion for preliminary injunction supported by affidavits which were subsequently met by countervailing ones. Appellees thereafter entered motions to dismiss the original bill because: (1) “Said bill of complaint does not state facts sufficient to warrant this court in granting any relief to the plaintiffs; (2) that plaintiffs have a plain, speedy and adequate remedy at law; (3) that this court has no jurisdiction over the persons of these defendants or either of them, or of the subject-matter of this action.” A temporary injunction was denied. The motions to dismiss were sustained and a final decree to that effect followed.

Considering the doctrine affirmed in *Truax v. Raich*, 239 U. S. 33, Ann. Cas. 1917B 283, 36 S. Ct. 7, 60 U. S. (L. ed.) 131, L.R.A. 1916D 545, and cases there cited, the record presents no serious question in respect of jurisdiction.

The bill alleges “that the employment business consists [593] in securing places for persons desiring to work” and unless permitted to collect fees from those asking assistance to such end the business conducted by appellants cannot succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants’ occupation as agent for workers cannot exist unless the latter pay for what

they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. "You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live."

We have held employment agencies are subject to police regulation and control. "The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them," *Brazee v. Michigan*, 241 U. S. 340, 343, Ann. Cas. 1917C 522, 36 S. Ct. 561, 60 U. S. (L. ed.) 1034. But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. In *Spokane v. Macho*, 51 Wash. 322, 324, 98 Pac. 755, 130 Am. St. Rep. 1100, 21 L.R.A. (N.S.) 263, the Supreme Court of Washington said: "It cannot be denied that the business of the employment agent is a legitimate business, as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world it may be said to be a necessary adjunct in the prosecution of business enterprises." Concerning the same subject, *Ex p. Dickey*, 144 Cal. 234, 236, 1 Ann. Cas. 428, 103 Am. St. Rep. 82, 66 L.R.A. 928, the Supreme Court of California said: "The business in which this defendant is engaged is not only innocent and [594] innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety or morals." And this conclusion is fortified by the action of many States in establishing free employment agencies charged with the duty to find occupation for workers.

It is alleged: "That plaintiffs have furnished positions for approximately ninety thousand persons during the last year, and have received applications for employment from at least two hundred thousand laborers, for whom they have been unable to furnish employment. . . . That such agencies have been established and conducted for so long a time that they are now one of the necessary means whereby persons seeking employment are able to secure the same." A suggestion in behalf of the State that while a pursuit of this kind "may be beneficial to some particular individuals, or in specific cases, economically it is certainly non-useful, if not vicious, because it compels the needy and

unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work," while possibly indicative of the purpose held by those who originated the legislation, in reason, gives it no support.

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the [595] fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

In *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 S. Ct. 427, 41 U. S. (L. ed.) 832, we held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the State for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

"If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth v. Illinois*, 184

U. S. 425, 429, 22 S. Ct. 425, 46 U. S. (L. ed.) 623.

"It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when [596] exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself. The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. . . . If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail." *McLean v. Arkansas*, 211 U. S. 539, 547, 548, 29 S. Ct. 206, 53 U. S. (L. ed.) 315.

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious

business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted." *Murphy v. California*, 225 U. S. 623, 628, 32 S. Ct. 697, 56 U. S. (L. ed.) 1229.

We are of opinion that Initiative Measure Number 8 as [597] construed by the Supreme Court of Washington is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the Fourteenth Amendment, to engage in a useful business. It may not therefore be enforced against them.

The judgment of the court below is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

McKenna, J., dissents upon the ground that under the decisions of this court—some of them so late as to require no citation or review—the law in question is a valid exercise of the police power of the State, directed against a demonstrated evil.

BRANDEIS, J. (*dissenting*).—To declare the statute of a State, enacted in the exercise of the police power, invalid under the Fourteenth Amendment, is a matter of such seriousness that I state the reasons for my dissent from the opinion of the court.

The statute of the State of Washington, commonly known as the "Abolishing Employment Offices Measure" was proposed by Initiative Petition No. 8, filed July 3, 1914, and was adopted November 3, 1914, at the general election; 162,054 votes being cast for the measure and 144,544 against it. In terms the act merely prohibits the taking of fees from those seeking employment.¹

[598] Plaintiffs, who are proprietors of private employment agencies in the City of Spokane, assert that this statute, if enforced, would compel them to discontinue business

¹ "An Act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof.

"Be it enacted by the People of the State of Washington:

"Section 1. The welfare of the State of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The State of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Section 2. It shall be unlawful for any

employment agent, his representative, or any other person to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Section 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than one hundred dollars and imprisonment for not more than thirty days." *Ann. Cas. 1917D 676*.

The Supreme Court of Washington has twice passed upon the scope of the act: holding in *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, that it is not applicable to teachers and in *State v. Rossman*, 93 Wash. 530, 161 Pac. 349, L.R.A.1917B 1276, that it is applicable to stenographers and bookkeepers.

and would thus, in violation of the Fourteenth Amendment, deprive them of their liberty and property without due process of law. The act leaves the plaintiffs free to collect fees from employers; and it appears that private employment offices thus restricted are still carrying on business.² But even if it should prove, as plaintiffs allege, that their business could not live without collecting fees [599] from employees, that fact would not necessarily render the act invalid. Private employment agencies are a business properly subject to police regulation and control. *Brazee v. Michigan*, 241 U. S. 340, Ann. Cas. 1917C 522, 36 S. Ct. 561, 60 U. S. (L. ed.) 1034. And this court has made it clear that a statute enacted to promote health, safety, morals or the public welfare may be valid, *although* it will compel discontinuance of existing businesses in whole or in part. Statutes prohibiting the manufacture and sale of liquor present the most familiar example of such a prohibition. But where, as here, no question of interstate commerce is involved, this court has sustained also statutes or municipal ordinances which compelled discontinuance of such businesses as (a) of manufacturing and selling oleomargarine, *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 U. S. (L. ed.) 253; (b) of selling cigarettes, *Austin v. Tennessee*, 179 U. S. 343, 21 S. Ct. 132, 45 U. S. (L. ed.) 224; (c) of selling futures in grain or other commodities, *Booth v. Illinois*, 184 U. S. 425, 22 S. Ct. 425, 46 U. S. (L. ed.) 623; (d) of selling stocks on margin, *Otis v. Parker*, 187 U. S. 606, 23 S. Ct. 168, 47 U. S. (L. ed.) 323; (e) of keeping billiard halls, *Murphy v. California*, 225 U. S. 623, 32 S. Ct. 697, 56 U. S. (L. ed.) 1229; (f) of selling trading stamps, *Rast v. Van Deman, etc. Co.* 240 U. S. 342, 368, Ann. Cas. 1917A 455, 36 S. Ct. 370, 60 U. S. (L. ed.) 679.

These cases show that the scope of the police power is not limited to regulation as distinguished from prohibition. They show also that the power of the State exists equally, whether the end sought to be attained is the promotion of health, safety or morals or is the prevention of fraud or the prevention of general demoralization. "If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or

transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'" *Otis v. Parker*, 187 U. S. 606, 609, 23 S. Ct. 168, 47 U. S. (L. ed.) 323; *Booth v. Illinois*, 184 U. S. 425, 429, 22 S. Ct. 425, 46 U. S. (L. ed.) 623. Or as it is so frequently expressed, the action of the legislature is final, unless the measure adopted appears clearly to be arbitrary [600] or unreasonable or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.

It is necessary to enquire therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other States or countries in this connection? But these enquiries are entered upon, not for the purpose of determining whether the remedy adopted was wise or even for the purpose of determining what the facts actually were. The decision of such questions lies with the legislative branch of the government. *Powell v. Pennsylvania*, 127 U. S. 678, 685, 8 S. Ct. 992, 1257, 32 U. S. (L. ed.) 253. The sole purpose of the enquiries is to enable this court to decide, whether in view of the facts, actual or possible, the action of the State of Washington was so clearly arbitrary or so unreasonable, that it could not be taken "by a free government without a violation of fundamental rights." See *McCray v. U. S.* 195 U. S. 27, 64, 1 Ann. Cas. 561, 24 S. Ct. 769, 49 U. S. (L. ed.) 78.

1. The Evils.³

The evils with which the people of Washington were confronted arose partly from the abuses incident to the [601] system of private

² See Report of the State of Washington Bureau of Labor (1915-1916) pp. 120-1.

"The free agencies, we are pleased to be able to say, are growing in popularity, and while they do not advertise their business with the same thrift that the other fellows did, they are coming into general service. There are three services of this kind: The private agency that receives all compensation from employers, either by the month, year, or per the service rendered; the federal Ann. Cas. 1917D—62.

agency, and the municipal agency; these latter two have offices in the larger places and are doing good work and the service is free to both employee and the employer. In the smaller cities and towns the federal is the prevailing agency and the postmaster of the place is usually the local representative."

³ The evils incident to private employment agencies first arrested public attention in America about 1890. During the fifteen years preceding the enactment of the Washington

employment agencies and partly from its inequacy.

(a) *The abuses.*

These are summarized in a report published by the United States Bureau of Labor in October, 1912,^{3a} thus:

"Private employment agencies, which charge a fee for their services, are found in every city of any size in the United States. The nature of their business is such as to make possible most iniquitous practices. Their patrons are frequently men and women with only a dollar or two, which they are eager to give up for the opportunity of earning more. They are often of small intelligence and easily duped. Stories of how these agencies have swindled and defrauded those who sought employment through them are heard universally. Some of the more common of the fraudulent methods said to be used by these agencies are the following:

"1. Charging a fee and failing to make any effort to find work for the applicant.

"2. Sending applicants where no work exists.

"3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.

"4. Collusion between the agent and employer, whereby the applicant is given a few days work and then discharged to make way for new workmen, the agent and employer dividing the fee.

"5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.

"6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee, and get a 'better job.'

[602] "Other evils charged against employment agents are the congregating of persons for gambling or other evil practices, collusion with keepers of immoral houses, and the sending of women applicants to houses of prostitution; sometimes employment offices are maintained in saloons, with the resulting evils."

In the report to Congress of the United States Commission on Industrial Relations, created by Act of August 23, 1912, c. 351, 37 Stat. 415 (Fed. St. Ann. 1914 Supp. p. 238) which gave public hearings on the subject of employment offices, in May, 1914, the abuses are found to be as follows: ⁴

law there were repeated investigations, official and unofficial, and there was much discussion and experimentation. See *Free Public Employment Offices in the United States*; U. S. Bureau of Labor Bulletin No. 68, p. 1; *Statistics of Unemployment and the Work of Employment Offices*, U. S. Bureau of Labor Bulletin No. 109, p. 5; *Subject Index of the U. S. Bureau of Labor Statistics*, Bulletin

"23. There are many private employment agents who try to conduct their business honestly, but they are the exception rather than the rule. The business as a whole reeks with fraud, extortion, and flagrant abuses of every kind. The most common evils are as follows:

"Fees are often charged out of all proportion to the service rendered. We know of cases where \$5, \$9, \$10, and even \$16 apiece has been paid for jobs at common labor. In one city the fees paid by scrubwomen is at the rate of \$24 a year for their poorly paid work. Then there is discrimination in the charges made for the same jobs. Often, too, men are sent a long distance, made to pay fees and transportation, only to find that no one at that place ordered men from the employment agent. A most pernicious practice is the collusion with foremen or superintendents by which the employment agent 'splits fees' with them. That is, the foreman agrees to hire men of a certain employment agent on condition that one-fourth or one-half of every fee collected from men whom he hires be given to him. This leads the foreman to discharge men constantly in order to have more men hired through the [603] agent and more fees collected. It develops the 'three-gang' method so universally complained of by railroad and construction laborers, namely, one gang working, another coming to work from the employment agent, and a third going back to the city.

"Finally, there is the most frequent abuse—misrepresentation of terms and condition of employment. Men are told that they will get more wages than are actually paid, or that the work will last longer than it actually will, or that there is a boarding house when there really is an insanitary camp, or that the cost of transportation will be paid, when it is to be deducted from the wages. They are not told of other deductions that will be made from wages; they are not informed about strikes that may be on at the places to which they are sent, nor about other important facts which they ought to know. These misrepresentations, it must be said, are often as much the fault of the employer as of the labor agent. Also the employer will place his call for help with several agents, and each will send enough to fill the whole order, causing many to find no jobs. Labor agents and laborers alike are guilty of the misuse of free transportation furnished by employers to

No. 174, pp. 85-87; Munro, *Bibliography of Municipal Government*, pp. 379-381.

^{3a} *United States Bureau of Labor Bulletin* No. 109, p. 36.

⁴ *Final Report and Testimony submitted to Congress by the Commission on Industrial Relations created by the Act of August 23, 1912, 64th Cong. 1st sess. Doc. 415, vol. I, pp. 109-111. See also vol. II, pp. 1165-1440.*

prospective help. And it is true also that many applicants perpetrate frauds on the labor agents themselves, as, for example, causing them to return fees when positions actually were secured. This is the result of the general feeling that the whole system of paying fees for jobs is unjust; and if they must pay in order to get work, then any attempt to get the fee back is justifiable."

(b) *The Inadequacy.*

But the evils were not limited to what are commonly called abuses—like the fraud and extortion described above. Even the exemplary private offices charging fees to workers might prove harmful, for the reason thus stated in the report to Congress of the United States Commission on Industrial Relations, cited *supra*.

[604] "18. . . . Investigations show, however, that instead of relieving unemployment and reducing irregularity, these employment agencies actually serve to congest the labor market and to increase idleness and irregularity of employment. They are interested primarily in the fees they can earn, and if they can earn more by bringing workers to an already overcrowded city, they do so. Again, it is an almost universal custom among private employment agents to fill vacancies by putting in them people who are working at other places. In this way new vacancies are created and more fees can be earned.

"19. They also fail to meet the problem because they are so numerous and are necessarily competitive. With few exceptions, there is no co-operation among them. This difficulty is further emphasized by the necessity of paying the registration fees required by many agencies; obviously the laborer cannot apply to very many if he has to pay a dollar at each one.

"20. The fees which private employment offices must charge are barriers which prevent the proper flow of labor into the channels where it is needed and are a direct influence in keeping men idle. In the summer, when employment is plentiful, the fees are

as low as 25 cents, and men are even referred to work free of charge. But this must necessarily be made up in the winter, when work is scarce. At such times, when men need work most badly, the private employment offices put up their fees and keep the unemployed from going to work until they can pay \$2, \$3, \$5, and even \$10 and more for their jobs. This necessity of paying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity.

"21. An additional injustice inevitably connected with labor agencies which charge fees is that they must place [605] the entire cost of the service upon those least able to bear it. Employment agents say that employers will not pay the fees; hence they must charge the employees. Among the wage earners, too, however, those who are least in need and can wait for work, pay the least for jobs and even get them free, while those who are most in need make up for all the rest and pay the highest fees. The weakest and poorest classes of wage earners are therefore made to pay the largest share for a service rendered to employers, to workers, and to the public as well."

2. *The Remedies.*

During the fifteen years preceding 1914 there had been extensive experimentation in the regulation of private employment agencies. Twenty-four States had attempted *direct* regulation under statutes often supplemented by municipal ordinances.⁵ Nineteen States had attempted *indirect* regulation through the competition of state offices, and seven others through competition of municipal [606] offices.⁶ Other experiments in indirect regulation through competition were made by voluntary organizations, philanthropic, social and industrial.⁷ The results of those experiments were unsatisfactory.

⁵ "It is not necessary here to enter into the relative merits of governmental regulation and governmental operation. Suffice it to say that twenty-four States and the District of Columbia have attempted to regulate private employment agencies and have made a miserable failure of it. The business lends itself easily to fraud and imposition and it is far more true of the private agencies than of the public offices that they have been frauds as well as failures."

Public Employment Offices—W. M. Leiserson, 29 *Political Science Quarterly* (March, 1914) p. 36.

"The United States possesses at the present time no adequate system, either state or national, for the regulation of private employment agencies, either from the point of view

of the content of the laws, affording regulations of the business and restrictions as to how the business shall be carried on, or as to proper methods of enforcement." [Labor Laws and Their Enforcement, edited by Susan M. Kingsbury (Boston, 1911), p. 366. See Chapter VI of this work for a study of the regulation of private employment agencies by Mabelle Moses. See also Chapter 663, Laws of 1913, State of Wisconsin.]

⁶ Proceedings of the Association of Public Employment Offices (Sept. 25, 1914), U. S. Dept. of Labor, Bureau of Labor Statistics Bulletin No. 192, p. 61.

⁷ Unemployment and Work of Employment Offices, Bulletin of U. S. Bureau of Labor No. 109, pp. 5, 37 (Oct. 1912).

The abuses continued in large measure; and the private offices survived to a great extent the competition of the free agencies, public and private. There gradually developed a conviction that the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment. And many believed that such charges were the root of the evil.

On September 25, 1914, the American Association of Public Employment Offices adopted at its annual meeting the following resolutions:

"Resolved, That this association go on record as favoring the elimination as soon as possible, of all private employment agencies operating for a profit within the United States, and that it recommends to the consideration of the United States Commission on Industrial Relations and Congress and the various State legislatures legislation having this end in view."

The United States Commission on Industrial Relations declared in its report to Congress: ⁸

"24. Attempts to remove these abuses by regulation have been made in 31 States, but with few exceptions they have proved futile, and at most they have served only to promote a higher standard of honesty in the business and have not removed the other abuses which are inherent [607] in the system. Where the States and cities have spent much money for inspectors and complaint adjusters there has been considerable improvement in the methods of private employment agencies, but most of the officers in charge of this regulation testify that the abuses are in 'the nature of the business' and never can be entirely eliminated. They therefore favor the total abolition of private labor agencies. This is also the common opinion among working people, and in the several States attempts have already been made to accomplish this by law."

But the remedies proposed were not limited to the suppression of private offices charging fees to workers, and the extension of the systems of state and municipal offices. The conviction became widespread that for the solution of the larger problem of unemployment the aid of the Federal Government and the

utilization and development of its extensive machinery was indispensable. During the seven years preceding 1914 a beginning had been made in this respect. The Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, 909 (Fed. St. Ann. 1909 Supp. p. 161) created within the Bureau of Immigration and Naturalization a Division of Information, charged with the duty of promoting "a beneficial distribution of aliens." The services rendered by this division included, among others, some commonly performed by employment agencies. While it undertook to place in positions of employment only aliens, its operations were national in scope. The Act of March 4, 1913 (Fed. St. Ann. 1914 Supp. p. 241) creating the Department of Labor, resulted in a transfer of the Bureau of Immigration, including the Division of Information, to that department. (37 Stat. 736.) By this transfer the scope of the division's work was enlarged to correspond with the broad powers of the Labor Department. These were declared by Congress to be: "to foster, promote and develop the welfare of the wage earners of the United States, to improve their [608] working conditions, and to advance their opportunities for profitable employment."

Then its efforts "to distribute" (that is both to supply and to find places for) labor were extended to include citizens as well as aliens; and much was done to develop the machinery necessary for such distribution. In the summer of 1914, and in part before the filing in the State of Washington of the proposal for legislation here in question, action had been taken by the Department of Labor which attracted public attention. It undertook to supply harvest hands needed in the Middle West and also to find work for the factory hands thrown out of employment by the great fire at Salem, Massachusetts, June 25, 1914.⁹ The division was strengthened by co-operation with other departments of the Federal Government (Agriculture, Interior, Commerce, and the Post Office with its 60,000 local offices) and with state and municipal employment offices. As early as June 13, 1914, the United States Department of Labor had also sought the co-operation in this work of all the leading newspapers in America including those printed in foreign languages.¹⁰

⁸ Made in August, 1915, and cited *supra*, p. 602, note 1. Between 1914 and this date six States had legislated on the subject. See Unemployment Survey, 1914-1915. 5 American Labor Legislation Review, p. 560.

⁹ The fire was so extensive that the Congress appropriated \$200,000 for relief of all sufferers. Act of August 1, 1914, c. 223, 38 Stat. 681.

¹⁰ Annual Report of the Secretary of Labor, 1914, pp. 48-55; Monthly Review of the U.

S. Bureau of Labor Statistics, July, 1915, p. 8. See also Annual Report of the Secretary of Labor, 1915, p. 36: "*Inter-departmental coöperation*.—Through the coöperation of the Post Office Department it became possible to bring to the aid of this labor-distribution service some 60,000 post offices and thereby to create a network of communication between employers needing help without knowing where to get it and workers wanting employment without knowing where to find it. Either

3. Conditions in the State of Washington.

[609] The peculiar needs of Washington emphasized the defects of the system of private employment offices.

(a) *The evils.*

The conditions generally prevailing are described in a report recently published by the United States Department of Labor, thus: 11

"In no part of the United States perhaps is there so large a field for employment offices as in the Pacific States. As has been noted, industrial conditions there favor inconstancy of employment. Much of the business activity is based upon the casual, short-time job. This in itself means the frequent shifting of workers from place to place. And the shifting is the more difficult, as much of the work offered is in more or less remote districts of the country. . . .

"The necessity laid upon so many workers of constantly seeking new jobs opens a peculiarly fertile field for their exploitation by unscrupulous private employment agencies. There is much testimony to the fact and frequency of such exploitation. The most striking evidence of this is that in the State of Washington private agencies made themselves so generally distrusted that in 1915 their complete abolition was ordered by popular vote. . . .

"Prior to 1914 there was practically no legislation regarding private employment agencies, and there had been no attempt at State supervision of their conduct. But [610] distrust of such agencies was constantly increasing and culminated in the year mentioned in the passage by popular initiative of an act aiming at the total suppression of all private employment agencies of the commercial type."

The reports of the Washington State Bureau of Labor give this description:

"The investigations of the Bureau show that the worst labor conditions in the state are to be found on highway and railroad construction work, and these are largely because the men are sent long distances by the em-

ployment agencies, are housed and fed poorly at the camps, and are paid on an average of \$1.75 to \$2.25 a day, out of which they are compelled to pay \$5.50 to \$7.00 per week for board, generally a hospital fee of some kind, always a fee to the employment agency and their transportation to the point where the work is being done. The consequence is that they usually have but little money left when the work is finished and if, as frequently happens, they work only a week or two and are then discharged they are in as bad a situation as they were before they went to work, and sometimes worse, if they do not have enough money to get back to the place from which they started." 12

"That the honest toiler was their victim there is no question: not alone of a stiff fee for the information given but a systematic method was adopted in order to keep the business going. Managers of agencies and managers of jobs, their superintendents, foremen or sub-foremen, were in this scheme for fleecing the workman. Men in large numbers would be sent to contract jobs and if on the railroads 'free fare' was part of the inducement, or perhaps the agency would charge a nominal fee if the distance was great and this, too, would become a perquisite of the [611] bureau to finally go through the clearing house. In many cases men would be unsatisfactory, at least they would be told so, discharged in a few days and sent adrift as poor, maybe poorer, than when they came there. New men would have to be secured, and thus the thing would go on revolving. So it went until at last it became so obnoxious that the public indignation was at length aroused, resulting in the passing of a law doing away with them." 13

The abuses and the inadequacy of the then existing system are also described by state officials in affidavits included in the record.

(b) *The remedies.*

Washington had not tried direct regulation of private employment offices; but that method was being considered as late as 1912. 14 Its people had had, on the other hand, ex-

employer or workman may obtain at any post office in the United States a blank application supplied by this department which, after filling out and signing it, he may deposit in the mails anywhere free of postage." *Employment bulletins.*—The bulletins contain a statement of unmatched applications, no matter what part of the country they may come from. It is not expected, of course, that applications for work of a minor character will ordinarily be matched by applications for workers of that kind from distant stations. It is assumed, however, that bulletined applications may possibly be matched through the coöperation of near-by stations within a reasonable radius. The bulletins are also systematically sent to such

newspapers as have indicated their desire to receive them for possible publication as news matter of interest to their respective readers."

11 Labor Laws and their Administration in the Pacific States. United States Department of Labor, Bureau of Labor Bulletin No. 211 (1917), pp. 17-18.

12 Washington State Bureau of Labor. Report 1913-14, pp. 27-28.

13 Washington State Bureau of Labor. Report 1915-16, p. 120.

14 Washington State Bureau of Labor, 1911-1912. Report of Commissioner, p. 16: "It has been demonstrated that state control of employment agencies is the most effective way to properly regulate them. I would earnestly recommend a state law similar to the

ceptional opportunities of testing public employment offices. The municipal employment office established at Seattle in 1894 under an amendment of the city charter is among the oldest public offices in the United States. Takoma established a municipal office in 1904, Spokane in 1905 and Everett in 1908.¹⁵ The continuance and increase of these municipal offices indicate that their experience in public employment agencies was at least encouraging. And the low cost of operating them was extraordinary. In Spokane the fees charged by private agencies ranged from \$1 upward and were usually about [612] \$2.¹⁶ In the Seattle free municipal agency the cost of operation, per position filled, was reduced to a trifle over 4 cents.¹⁷ The preliminary steps for establishing "Distribution Stations" under the federal system, including one at Seattle, had been taken before the passage of the Washington law.¹⁸ Later branch offices were established in thirteen other cities.¹⁹

one in Illinois that went into effect July 1, 1911, and has proven to be the best law for this purpose in this country."

¹⁵ The first free public employment office in the United States was the municipal agency established in Cleveland in 1890. Then followed (in 1893) the Los Angeles office. Bulletin of United States Bureau of Labor No. 68, p. 1 (Jan. 1907).

¹⁶ Washington State Bureau of Labor Report 1913-14, p. 291.

W. D. Wheaton, Labor Agent.—"The complaint against the private office is almost universal. The experience of this office is that private agencies charge all that the traffic will bear and that in hard times, when work is scarce and the worker poverty stricken, the fee is placed so high as to be almost prohibitive, and the agencies take longer chances, sometimes sending men on only a rumor, depending on their financial straits to make it impossible to return.

"The fees charged run from \$1.00 for the poorest job of uncertain duration to as high as 10 per cent of the first year's salary in educational lines, and 30 per cent of the first month's salary in office or mercantile lines. Most of the agencies catering to the better class of positions charge a registration fee which is worked to the limit—or rather without limit. Advertisements for attractive positions are placed with the newspapers and registration is made of all that apply, irrespective of whether the position has been filled or not, and generally at a fee of \$2.00 or more. This registration fee is always followed by a percentage of the earnings when a position is secured, but only a small proportion of those registering are placed in positions.

"The average charge per position in all agencies will run high, and yet the applicant cannot have a feeling of security in the position obtained for the reason that the great majority of private agencies are primarily interested in the fee and are not as careful

4. The Fundamental Problem.

[613] The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment—perhaps the gravest and most difficult problem of modern industry—the problem which, owing to business depression, was the most acute in America during the years 1913 to 1915.²⁰ In the State of Washington the suffering from unemployment was accentuated by the lack of staple industries operating continuously throughout the year and by unusual fluctuations in the demand for labor with consequent reduction of wages and increase of social unrest.²¹ Students of the larger problem of unemployment appear to agree that establishment of an adequate system of employment offices or labor exchanges²² is an indispensable [614] first step toward its solu-

in placing applicants as they would be did the possibility of another fee not exist."

¹⁷ United States Bureau of Labor Bulletin No. 109, p. 136.

"The extremely low cost of each position filled is noteworthy, as is the large number of positions secured. A total of 37,834 positions were filled in 1906, and in 1909, 38,846. The cost per position was lowest in 1906, only 4.03 cents. Only twice since 1897 has the average cost gone above 6 cents."

¹⁸ See Report of Secretary of Labor, 1914, p. 51.

¹⁹ Aberdeen, Bellingham, Custer, Everett, Friday Harbor, Lynden, Noosack, North Yakima, Port Angeles, Port Townsend, Spokane, Takoma, Walla Walla. Monthly Review of U. S. Labor Statistics, July, 1915, p. 9. See Report of Secretary of Labor, 1915, p. 36; 1916, p. 54. Hearings Committee on Labor, on H. R. 5783, to establish a National Employment Bureau. 64th Cong. 1st sess. February, 1916, p. 49.

²⁰ The Unemployment Crisis of 1914-1915, 5 American Labor Legislation Review, p. 475.

²¹ Washington State Bureau of Labor Report 1913-1914, pp. 13, 16-17. Unemployment Survey, 5 American Labor Legislation Review, 482, 483 (1915).

²² Recent Advances in the Struggle against Unemployment, by Prof. Charles R. Henderson, 2 American Labor Legislation Review, 105, 106 (1911). "The point of starting ameliorative effort is the employment agency or 'labor exchange.'"

"When we compare the ordinary employment office with the board of trade for cotton or grain, or with the bankers' clearing-house, we begin to realize how belated, rudimentary and primitive our present labor exchange is. Yet the issues at stake are quite as vital in the case of demand and supply in the labor market as in the stock and grain exchange."

A Problem of Industry, 4 American Labor Legislation Review, p. 211:

tion. There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice;²³ but that they considered the elimination of the practice a necessary [615] preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.²⁴

It is facts and considerations like these which may have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work. And weight should be given to the fact that the statute has been held constitutional by

the Supreme Court of Washington and by the Federal District Court (three judges sitting)—courts presumably familiar with the local conditions and needs.

In so far as protection of the applicant is a specific purpose [616] of the statute—a precedent was furnished by the Act of Congress, December 21, 1898, 30 Stat. 755, 763 (See 6 Fed. St. Ann. 920) (considered in *Patterson v. The British Barb Eudora*, 190 U. S. 169) 26 S. Ct. 821, 47 U. S. (L. ed.) 1002 which provides, among other things:

"If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as

"The labor market is unorganized, resulting in confusion, waste and loss to employers and employees. It means suffering to individual workers and their families, a lowering of the standard of living, impaired vitality and efficiency, and a tendency for the unemployed to become unemployable, dependent, degraded. In fact, the demoralizing effect of unemployment upon the individual is matched only by its wastefulness to society."

The Prevention of Unemployment, 5 American Labor Legislation Review, p. 176:

"An essential step toward a solution of the problem of unemployment is the organization of the labor market through a connected network of public employment exchanges. This is vitally important as a matter of business organization and not of philanthropy. It is of as much importance for the employer to find help rapidly and efficiently as it is for the worker to find work without delay. The necessity of organized markets is recognized in every other field of economic activity, but we have thus far taken only timid and halting steps in the organization of the labor market. The peddling method is still, even in our 'efficient' industrial system, the prevalent method of selling labor. Thus a purely business transaction is carried on in a most unbusiness-like, not to say medieval manner."

Public Employment Bureaus, Charles B. Barnes, 5 American Labor Legislation Review, p. 195:

"Unemployment is no longer intermittent in this country; it has come to be a chronic condition which needs to be dealt with in a regular and systematic manner. The first step in properly dealing with this situation is the establishing of a series of cooperating public employment bureaus."

The Unemployed in Philadelphia, Department of Public Works (1915), p. 113.

What is done for the Unemployed in European Countries, U. S. Bureau of Labor Bulletin No. 76, pp. 741-934; The British System of Labor Exchanges, U. S. Bureau of Labor Statistics, No. 206.

²³ Washington State Employment Agency Referendum, by W. M. Leiserson, 33 Survey, 87 (October 24, 1914):

"Any one who knows the employment agency business and every one who has tried earnestly to regulate private agencies will testify to the futility of regulation."

"But the inherent justice of the proposed Washington act can be shown in a better way. Ask the employment agent to whom he rendered the service and he will answer 'to employer and to employee.'"

"Then why don't you charge the employer?"

"It is impossible. If we depended upon employers for our fees, we would have to go out of business. They simply will not pay."

"Every time this question is put to employment agents the answer is the same: 'We charge the worker because we can get the fee from him and we cannot get it from the employer.'"

"This is the downright wrong against which Washington initiative No. 8 is directed."

²⁴ General Discussion on Unemployment, 5 American Labor Legislation Review, p. 451; T. S. McMahon, Univ. of Washington.

"The people of the state of Washington are not indifferent to the problem of unemployment nor do they show any tendency to offer charitable penances as a permanent remedy. They are trying to work out some constructive policy, and as a preliminary step have made it illegal for employment offices to charge fees for jobs."

"A bill will be presented to the next legislature for the establishment of a network of public employment offices all over the state. This will make possible the complete organization of the labor market, which we hope is the first step toward the organization of industry itself."

"The aggressive attitude of the leaders among the workers has impressed upon the mind of the people the fact that the problem will have to be met in another way than by providing food and clothing for a period of distress such as we are passing through at the present time."

"I believe that this attitude on the part of the working people, which is characteristically western, will do more towards the solution of this problem than perhaps we, who discuss it in a theoretical way, can accomplish. They do have some plan of action, and some definite program. Either we shall have to work out some program of ultimate solution of unemployment, or we will have to accept the solution they are offering us. The one they are offering us is socialism."

seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offence be liable to a penalty of not more than one hundred dollars."

In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington Workmen's Compensation Law (sustained in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 S. Ct. 260) whereby the financial burden of industrial accidents is required to be borne by the employers.

As was said in *Holden v. Hardy*, 169 U. S. 366, 387 [18 S. Ct. 383, 42 U. S. (L. ed.) 780]:

" . . . in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly to the new relations between employers and employes as they arise."

In my opinion, the judgment of the District Court should be affirmed.

Holmes and Clarke, JJ., concur in this dissent.

NOTE.

The reported case involves a statute of the state of Washington forbidding any employment agent to receive a fee for his services from any person seeking employment. In *Huntworth v. Tanner*, 87 Wash. 670, reported in full ante, this volume, at page 676, the act was construed as being restricted to persons securing employment for laborers and to have no application to an agency procuring employment for school teachers. In the reported case it is held that the act in question, as construed by the supreme court of Washington, is unconstitutional. The discussion in the reported case goes beyond the discrimination introduced by the state decision referred to. The court holds that while employment agencies are subject to police regulation and control, the business is lawful and useful and is not inherently immoral or dangerous to the public welfare. It is therefore, the court declares, not subject to legislative prohibition, and the statute under consideration is held to be prohibitory in its nature, the suggestion that fees may be exacted of the employer being considered and said to be without weight. The statutory regulation of employment agencies is dis-

cussed in the notes to *People v. City Prison*, 5 Ann. Cas. 325; *Watts v. Com.* Ann. Cas. 1914B 738; and *Hager v. Walker*, 129 Am. St. Rep. 238. See also *Brazee v. Michigan*, 241 U. S. 340, Ann. Cas. 1917C 522.

OKLAHOMA CITY

v.

TUCKER.

Oklahoma Criminal Court of Appeals—January 20, 1915.

11 Okla. Crim. 266; 145 Pac. 757.

Municipal Corporations — Prosecution for Violation of Ordinance — Right of Municipality to Appeal.

(a) The right of the state to appeal from an adverse judgment rendered in a criminal prosecution is controlled by statute, and exists only by specific statutory authority.

(b) The right of the state to appeal on a question reserved by the representatives of the state in the trial court is based on section 5990, Revised Laws of 1910; but this statute does not confer the same right on municipalities.

[See note at end of this case.]

Same.

A legislative act granting the state the right to appeal does not by implication grant the same right to municipalities existing under state law. The right of the sovereign to appeal must be authorized.

[See note at end of this case.]

Appeal and Error — Dismissal — Unauthorized Appeal.

An appeal which is not authorized by law will, upon proper motion, be dismissed by this court.

(Syllabus by court.)

Appeal from County Court, Oklahoma county: HAYSON, Judge.

Prosecution for violation of municipal ordinance. Howard A. Tucker convicted in police court and judgment reversed by County Court. City appeals. The facts are stated in the opinion. DISMISSED.

J. W. Johnson and V. V. Hardcastle for appellant.

Wright & Blinn for appellee.

[267] ARMSTRONG, J.—This action was begun in the police court in Oklahoma City in May, 1913, by the filing of a complaint in the name of said city against Howard A. Tucker,

charging, or attempting to charge, the violation of a city ordinance. A judgment was given adverse to Tucker and an appeal taken by him to the county court of Oklahoma county, as provided by law. When the cause came on for hearing in the county court, a motion to set aside the complaint was filed on behalf of Tucker and sustained by the court. From this judgment of the county court the city of Oklahoma City has attempted to appeal to this court. A motion to dismiss the appeal was filed by counsel for the defendant in error Tucker on the ground that the law in this jurisdiction does not confer the right on the city of Oklahoma City to appeal from an adverse judgment of the court below. Other grounds are set out in the motion, but they are without merit. The only question presented is: Has the city of Oklahoma City the right to maintain the appeal under the law as it now exists in this state?

Section 5990, Rev. Laws 1910, is as follows:

"Appeals to the Criminal Court of Appeals may be taken by the state in the following cases and no other: First. Upon judgment for the defendant on quashing or setting aside an indictment or information. Second. Upon an order of the court arresting the judgment. Third. Upon a question reserved by the state."

This section of the statute specifically grants to the state the right to appeal in certain cases, but fails to confer any such rights on municipalities. It is a well-settled rule of law that the state has no right to appeal from adverse judgments unless such right is specifically granted by either constitutional or legislative provisions. Except for the foregoing statute, the state itself would not have the right to appeal in this jurisdiction. This provision, however, does not authorize the municipalities existing under state law to exercise the right of appeal from adverse judgments rendered in prosecutions of persons charged with violating any provision of city ordinances.

[268] Counsel for the plaintiff in error urge this court to construe section 1819, Rev. Laws 1910, to authorize this appeal. This section of the statute is as follows:

"Appeals and proceedings in error shall be taken from the judgments of county courts direct to the Supreme Court and Criminal Court of Appeals in all cases appealed from justices of the peace, and in all cases appealed from the police judges, and in all criminal cases of which the county court is vested with jurisdiction, and in all civil cases originally brought in the county court, in the same manner and by like proceedings as appeals are taken to the Supreme Court from judgments of the district court."

We are unable to read into this provision language granting any such right. The pur-

pose and intent of this section is clear, and a construction thereof which would grant authority to cities to appeal from adverse judgments in cases prosecuted under city ordinances is in no wise warranted. The Legislature may pass such a law, but this court has no power to do so. This section of the statute was not intended to confer any special power or right upon municipalities. It confers no right on the state to appeal. It simply declares the law allowing appeals to litigants and persons charged with violating city ordinances. It clearly did not contemplate anything else. Under this provision of the statute the state would have no right to appeal from an adverse judgment. The state's right rests wholly on section 5990, *supra*.

It appears to be a well-settled rule that, although the statute may authorize the state to take an appeal in certain cases, this right cannot be exercised by cities or municipalities in prosecutions under municipal ordinances unless the statute specifically so provides.

In *People v. Jackson*, 8 Mich. 78, the Supreme Court of Michigan said:

"Although the recorder of Detroit may have power to reserve for our opinion questions which arise upon the trial of reserve such as arise upon the trial of complaints for the breach of city ordinances."

[269] The question here under discussion was considered by the Supreme Court of Kansas in the case of *Salina v. Wait*, 56 Kan. 283, 43 Pac. 255. In this case Wait was prosecuted in the police court of Salina for violating an ordinance regulating the use of hacks, etc. He was convicted in that court, and from the judgment he appealed to the district court. In that court he challenged the validity of the ordinance, and upon his motion the district court quashed the complaint, and discharged him from custody. We quote at length from that court, as follows:

"Does an appeal lie, and has this court jurisdiction to review the ruling of the district court? A negative answer must be given to both of these questions. The defendant is entitled to take an appeal to the district court from the judgment of the police court (Gen. St. 1889, Par. 854), but we find no provision authorizing the city to appeal from the judgment of the police court. In prosecutions by the city for an act of a criminal nature, and which is an offense against the laws of the state, the defendant may appeal to the Supreme Court from any judgment rendered against him in the district court. Cr. Code, sec. 281. We have no statutory provision, however, expressly giving the right of appeal to a city in any prosecution brought in its name. Appeals to the Supreme Court can only be taken by the state in three cases: 'First, upon a judgment for the defendant, on quashing or setting aside an indictment or information; second, upon an or-

der of the court arresting judgment; third, upon a question reserved by the state.' Id. sec. 283. Without this provision no appeal could be taken by the state, and we find no such provision authorizing an appeal by the city. It has been assumed that the city might appeal in cases where the act sought to be punished was an offense against the public at large, criminal in its nature, and such as might be or is punishable under the criminal laws of the state. Whether such right exists in the city without express legislation to that effect it is unnecessary to determine at this time. The prosecution in this instance is for the violation of a mere municipal regulation. There is no provision which expressly or impliedly gives the city a right to an appeal in such cases, and, without a statutory authority, no right of appeal exists. This court is therefore without jurisdiction to review the ruling of the district court, and therefore the appeal will be dismissed."

[270] See also *St. Louis v. Marchel*, 99 Mo. 475, 12 S. W. 1050; *St. Louis v. White*, 99 Mo. 477, 12 S. W. 1050.

We are of opinion that the city of Oklahoma City is granted no right to appeal from an adverse judgment rendered in a prosecution for the breach of its ordinances.

It follows, therefore, that the motion to dismiss should be sustained, and the appeal dismissed. It is so ordered.

Doyle, P. J., and Furman, J., concur.

NOTE.

Right of Municipality to Appeal from Judgment in Prosecution for Violation of Ordinance.

Introductory, 986.

Particular Jurisdictions:

Alabama, 986.
 Colorado, 986.
 Georgia, 987.
 Illinois, 987.
 Iowa, 987.
 Kansas, 987.
 Kentucky, 987.
 Michigan, 988.
 Minnesota, 988.
 Mississippi, 988.
 Missouri, 988.
 New York, 989.
 Ohio, 989.
 Oklahoma, 989.
 Oregon, 989.
 Washington, 990.
 West Virginia, 990.
 Wisconsin, 990.
 Wyoming, 990.

Introductory.

This note considers the right of a municipality to appeal from a judgment in a prosecution for a violation of an ordinance. The cases are presented by jurisdictions since many of them depend on statutory peculiarities. So far as any single consideration is controlling it is the nature of the proceeding as civil or criminal. The nature of a proceeding for the violation of a municipal ordinance is discussed in the notes to *Fortune v. Wilburton*, 5 Ann. Cas. 287, and *People v. Pacific Gas, etc. Co.* Ann. Cas. 1917A 328, that question being referred to in the present note only with respect to its application to the right of the municipality to appeal. As a general rule, if the proceeding is regarded as civil the municipality may appeal, while if it is regarded as criminal there can be no appeal by the municipality except by express statutory authority.

Particular Jurisdictions.

ALABAMA.

The general rule in Alabama was laid down in *Brighton v. Miles*, 153 Ala. 673, 45 So. 160, wherein it was held that the right to appeal in a prosecution for the violation of an ordinance is by statute given to the defendant alone and not to the municipality. To the same effect see *Bessemer v. Smith*, 155 Ala. 157, 46 So. 467.

The municipality may, however, exercise the right of appeal, where the issue involved is the validity of the ordinance. *Birmingham v. Ridgeway*, 164 Ala. 598, 51 So. 303; *Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944.

In *Camden v. Bloch*, 65 Ala. 236, a distinction seems to have been drawn between criminal and quasi-criminal prosecutions; and the contention that to a municipality as to the state, the right of appeal in criminal prosecutions is denied by statute, was apparently denied. The court said: "This is only a quasi-criminal case, and the appellant here is not the state. The practice in this court has uniformly permitted such appeals, and we are not disposed to disturb it."

COLORADO.

In Colorado the municipality may appeal in a prosecution for the violation of an ordinance. *Durango v. Reinsberg*, 16 Colo. 327, 26 Pac. 820, wherein it was said: "A prosecution under a municipal ordinance for an offense not punishable by general statute is not a criminal proceeding, but a civil action; and that a judgment in such an action against the municipality may be reviewed by this court upon a writ of error." To the

same effect see *Greeley v. Hamman*, 12 Colo. 94, 20 Pac. 1. See also *Hummel v. Ouray*, 38 Colo. 322, 88 Pac. 582, wherein it was said, that the statute (Mills Ann. St. § 4444) gives the right of appeal to the municipality in all cases where an appeal lies.

GEORGIA.

In Georgia a municipality is not entitled to appeal or bring error in a proceeding for the violation of an ordinance. *Hawkinsville v. Ethridge*, 96 Ga. 326, 22 S. E. 985. In that case the defendant in error was convicted for violating an ordinance, and took the case by certiorari to the superior court; on a motion by the municipality to dismiss the same, the court denied the motion, whereupon a writ of error was brought complaining of the refusal of the superior court to dismiss the certiorari. The supreme court in dismissing the writ of error said: "Prosecutions under municipal ordinances are quasi-criminal causes, and partake so far of the nature of a criminal prosecution as must prevent a review of a judgment in favor of the defendant. 72 Ga. 89. The code provides, in express terms, that either party in a civil case, and the defendant in a criminal proceeding, in the superior court of this state, may except to any sentence, judgment or decree. The right of exception is limited to the defendant in criminal cases. This court can only review the judgment of the lower court by a bill of exceptions; and inasmuch as no provision is made by the law by means of which the state can present and have transmitted here a bill of exceptions in a criminal cause, if there were no other legal or constitutional impediment to the reversal of a judgment rendered in favor of the defendant in the court below, this one difficulty is insurmountable." To the same effect see *Macon v. Wood*, 109 Ga. 149, 34 S. E. 322.

It has been held on certiorari by a city after an accused was held and discharged, that a proceeding for the violation of an ordinance is criminal in its nature and therefore an appeal by the city will not lie. *Cranston v. Augusta*, 61 Ga. 572, wherein the court said: "In municipal government, no less than in more general government, it is the power of the state that acts upon the citizen. The state will not herself, in her own direct prosecutions, harass the citizen after acquittal; and certainly she has not expressly employed the city of Augusta to do so in municipal prosecutions. We can see no reason for holding that the power ought to be or can be implied. As the law now stands, the city, like the state, must acquiesce in judgments of discharge rendered on final trial in police or criminal proceedings. Let the certiorari be dismissed."

ILLINOIS.

In Illinois a proceeding for the violation of an ordinance is held to be civil or at most quasi-criminal, and the municipality may appeal. The fact that the warrant issued against the defendant below runs in the name of the people charging him with the violation of a village ordinance, does not change the character of the action. *Knowles v. Wayne City*, 31 Ill. App. 471, wherein it was held that there is no doubt that an action brought to recover the penalty provided for violating the provisions of an ordinance is a civil suit, in which either party has the right of appeal. In *Partridge v. Snyder*, 78 Ill. 519, it was held that an action to recover a penalty provided by an ordinance for obstructing a public highway is a civil suit allowing either party to appeal.

IOWA.

In Iowa a right of appeal in proceedings for the violation of an ordinance is by statute given to both parties. *Burlington v. Unterkircher*, 99 Ia. 401, 68 N. W. 795. But the rights of the defendant are in no manner affected thereby. The court can do no more than settle the law for future cases. *Scranton v. Henson*, 151 Ia. 221, 130 N. W. 1079.

KANSAS.

In Kansas it is held that in the absence of a charter provision expressly or impliedly giving the city a right to appeal from a judgment acquitting an offender for violating a municipal ordinance, an appeal so taken will be dismissed for want of jurisdiction. *Salin v. Wait*, 56 Kan. 283, 43 Pac. 255. Thus in *Lyons v. Wellman*, 56 Kan. 285, 43 Pac. 267, wherein the defendant was charged with being drunk in violation of a city ordinance, and was found guilty and fined in the police court, which conviction was reversed on appeal, it was held in dismissing an appeal by the city that to allow the city to appeal without any statutory provision was much in the nature of judicial legislation, and that such an appeal might not be taken by virtue of a statute authorizing the state to appeal in criminal cases. Compare *Leavenworth v. Weaver*, 26 Kan. 392, and *Junction City v. Keeffe*, 40 Kan. 275, 19 Pac. 735, wherein the court seemed to assume that the city might exercise the right given by a statute to the state.

KENTUCKY.

In Kentucky to test the validity of a city ordinance either party may appeal. *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18. See also *Owensboro v. McFall*, 152 Ky. 628, 153 S. W. 969. But in no other case is an appeal

by the city authorized. *Com. v. Ingraham*, 7 Bush (Ky.) 106.

MICHIGAN.

In Michigan it has been held that where a defendant was acquitted on the merits in a prosecution for the violation of an ordinance prohibiting the sale of spirituous and intoxicating liquors, which ordinance provided for criminal methods of accusation and trial, the acquittal was beyond any right on the part of the municipality to review. *Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068, wherein it was said: "There can be no doubt that in an action authorized to be commenced by summons or by civil warrant for the collection of penalties, and which is so prosecuted, in the nature of an action for debt, the case would be entirely a civil action, and the municipality as well as the defendant would be entitled to all the rights of appeal and retrial, as other parties in civil actions. But the prosecution in the present case has proceeded entirely by complaint and warrant as in criminal cases, and upon which the defendant was arrested, and by the provisions of the ordinance, and the statute under which the prosecution was had, could have been imprisoned in the common jail of the county for a term not exceeding ninety days. It is claimed that imprisonment in such cases is not by way of punishment as for a crime or misdemeanor, but simply for the enforcement of the penalty. Yet the statute authorizes and the ordinance provides for imprisonment as well as fine, or both, in the discretion of the court; and upon a conviction the offender may suffer as long a term of imprisonment, as well as adjudged to pay a fine, as in any case of misdemeanor cognizable by a justice of the peace that is criminal in its nature. It is true that the proceedings for the enforcement of ordinances have always been regarded as civil actions, but where, under the statute, the enforcement is sought by a resort to proceedings which are carried forward in all respects as criminal cases are prosecuted, by complaint and warrant, and where the court is authorized to inflict upon the offender not only the fine, and imprisonment for its nonpayment, but also imprisonment aside from a pecuniary fine, I have no doubt that upon a trial on the merits the offender has been as much in jeopardy, within the meaning of that term, as though the proceedings were strictly criminal."

MINNESOTA.

In Minnesota it is held that a proceeding for the violation of a municipal ordinance which "prohibits the furnishing of food by licensed liquor dealers in connection with intoxicating liquors or beverages" and provides

that the offending party shall be punished by a fine or imprisonment, is a criminal proceeding and in the absence of any statutory provision no appeal can be taken by the city. *St. Paul v. Stamm*, 106 Minn. 81, 118 N. W. 154.

MISSISSIPPI.

In Mississippi it is held that a statute whereby the state is given the right to appeal in certain criminal cases where the defendant has been acquitted, does not give the right of appeal to a municipality in a criminal prosecution for the violation of an ordinance. *Water Valley v. Davis*, 73 Miss. 521, 19 So. 235.

MISSOURI.

In Missouri the municipality may appeal from an acquittal in a proceeding for the violation of an ordinance. Thus in *St. Louis v. Bender*, 248 Mo. 113, 154 S. W. 88, 44 L.R.A. (N.S.) 1072, the defendant was charged with engaging in the plumbing business without a license in violation of a city ordinance, and was acquitted. In allowing an appeal by the city from the judgment of acquittal, the court said: "We have differently defined the suit as civil or quasi-civil. We have applied in a way the criminal procedure to such actions, but we have always entertained an appeal by the city where the defendant was discharged of liability. When a defendant is acquitted in a criminal case upon a trial either before court or jury (as in a misdemeanor he could be so tried by court, if he waived a jury), we have looked upon such acquittal as the end of the case. The state in such case is debarred of an appeal. But as stated above when the municipality loses in one of these city actions to recover a penalty, the courts of Missouri have always entertained such an appeal. If the case is such as could be reviewed upon appeal we can see no good reason for saying that it could not be reviewed upon a writ of error."

In *Kansas City v. Clark*, 68 Mo. 588, affirmed in 69 Mo. 28, it was held on an appeal by the city from a judgment acquitting the defendant in a prosecution under a city ordinance against gaming that a proceeding for the violation of the ordinance under consideration was a civil action, and as such the city had the right of appeal. To the same effect see *Kansas City v. Muhlback*, 68 Mo. 638, and *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 678.

Though the action is brought under a penal ordinance, it is not a criminal prosecution, and by express provision of the charters of cities of the third class an appeal may be taken by either party in cases arising under city ordinances. *Poplar Bluff v. Hill*, 92 Mo.

App. 17. See also *St. Louis v. Marchel*, 99 Mo. 475, 12 S. W. 1050. In *St. Louis v. White*, 99 Mo. 477, 12 S. W. 1050, which was an action by a city to recover a penalty for the violation of an ordinance, the action was treated as a civil action so far as concerned the plaintiff's right to a review of the judgment. In dismissing an appeal by the city from a judgment discharging the defendant in the court of criminal correction, it was said: "Neither the charter of St. Louis nor the legislative act governing proceedings in the St. Louis court of criminal correction expressly authorizes an appeal from judgments in favor of defendants in such cases. The latter provides for an appeal by defendant, but the only means of a review given to a plaintiff by that statute is writ of error. R. S. 1879, Appendix, p. 1515, sec. 26. The general law allowing appeals to the state in criminal causes does not apply, because this action is not of that nature, and even if it could be so regarded this appeal would not come within its terms. R. S. 1879, sec. 1986. While the legislature may not properly deprive litigants of their right to have such causes reviewed by this court as fall within its constitutional jurisdiction (*Blunt v. Shepard*, 1 Mo. 219), yet the mode to be pursued in obtaining such review is (speaking generally) a proper subject of legislative regulation. Where, as here, a convenient and efficient one, by a writ of error, is available, no constitutional right of plaintiff is infringed by the omission of the legislature to provide for an appeal. The present appeal must, therefore, be dismissed as having been erroneously allowed." See also *St. Louis v. Pahl*, 114 Mo. 32, 21 S. W. 448; *State v. Smith*, 141 Mo. 1, 41 S. W. 906.

NEW YORK.

In New York where the proceedings of the case follow the methods of criminal procedure and in no way conform to the practice in civil actions, no appeal will lie from a judgment acquitting the defendant for a violation of a city ordinance. *Hudson v. Granger*, 23 Misc. 401, 52 N. Y. S. 9.

OHIO.

In Ohio an appeal by the municipality is allowed. The violation of a municipal ordinance is not strictly speaking a crime, nor is it a criminal proceeding, but quasi-criminal only. The offender does not offend against the dignity of the state, but against the municipal corporation whose ordinance he has violated. He is not prosecuted by the state's attorney but by the solicitor of the village or city, or by a city prosecutor in the police court. The municipal corporation is liable for costs in case of acquittal, while the state

is not. *State v. Rouch*, 47 Ohio St. 478, 25 N. E. 59. To the same effect see *Van Wert v. Brown*, 47 Ohio St. 477, 25 N. E. 59.

OKLAHOMA.

An Oklahoma statute giving to the state the right to appeal on a question reserved in a criminal case is held in the reported case not to extend a like right to a municipality to appeal in a prosecution for the violation of an ordinance.

OREGON.

In Oregon the acquittal of one prosecuted by complaint and warrant in a proceeding for the violation of a city ordinance is beyond the reach of any process by review. *Portland v. Erickson*, 39 Ore. 1, 62 Pac. 753, wherein the court said: "Where, under the statute and ordinances, enforcement is sought by resort to proceedings authorized and carried on in all respects as criminal cases are prosecuted—by complaint and warrant—and where the court is empowered to inflict upon the accused not only a fine, which may be followed by imprisonment for its nonpayment, but also imprisonment aside from any pecuniary penalty or forfeiture, such proceeding becomes so far criminal in its nature, and the violation of the ordinance such an offense, that a person acquitted thereof cannot be again put in jeopardy for the same offense: *Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068; *People v. Vinton*, 82 Mich. 39, 46 N. W. 31. Ordinance No. 7133, under which the complaint is preferred, empowers the municipal court to impose a fine upon the offender of not less than \$25 nor more than \$100, or to imprison him for a term of not less than ten nor more than forty days, and to cancel any license he may have to engage in business under the ordinance. Now, while the civil action may extend to an enforcement of the fine and forfeiture, yet, when the court is authorized to go beyond this, and imprison the accused, without affording an opportunity to discharge the judgment by pecuniary recompense, then there is the creation of such an offense as comes within the inhibition of the constitution. By section 62 of the city charter the municipal court is given 'jurisdiction of all crimes defined by ordinances of the City of Portland, and of all actions brought to enforce or recover any forfeiture or penalty declared or given by any such ordinance;' and by section 65 it is provided that 'all proceedings before the court or judge thereof, including all proceedings for the violation of any city ordinance, are governed and regulated by the general laws of the state applicable to the justices of the peace, or justices' courts in like or similar cases, except as in this act otherwise provided.' The proce-

dures in the Justices' Code is by complaint, which is deemed an indictment, and by warrant for the arrest and detention of the accused until tried: Hill's Ann. Laws, §§ 2132-2135, inclusive. Under the charter, this becomes the procedure for the municipal court (Ex p. McGee, 33 Ore. 165, 54 Pac. 1091), so that we have here the precise conditions upon which *Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068, and *People v. Vinton*, 82 Mich. 39, 46 N. W. 31, are founded; and we are disposed to follow them, as they extend the protection of the constitution to all cases affecting the life, limb, or liberty of the person, according to its true intentment. It was 'founded,' says Mr. Justice Nisbet in *State v. Jones*, 7 Ga. 422, 'in the humanity of the law, and in a jealous watchfulness over the rights of the citizen when brought in unequal contest with the state.'"

WASHINGTON.

In Washington a review by certiorari is apparently allowed to the municipality. In *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053, the city brought certiorari to the superior court to review an order discharging a defendant for violating an ordinance. The judgment of the lower court was set aside, and on appeal by the defendant, the right of the city to review the proceedings of the lower court was upheld. The court said: "The first contention of appellant is that certiorari does not lie in a case of this kind; that the ordinance, being quasi-civil in its nature, the respondent, the city of Seattle, had a remedy by appeal. We think, under the best authorities, this is not a quasi-civil action, but that it is either criminal or quasi-criminal."

WEST VIRGINIA.

In West Virginia a municipality is not entitled to review an acquittal had in a proceeding for the violation of an ordinance though it is based on the invalidity of the ordinance. *Philippi v. Kittle*, 56 W. Va. 348, 49 S. E. 238.

WISCONSIN.

In Wisconsin a municipality is not entitled to appeal from an acquittal in a proceeding for violating an ordinance. *Platteville v. McKernan*, 54 Wis. 487, 11 N. W. 798, wherein the rule was stated as follows: "Where a city or village ordinance prohibits that which is a crime or misdemeanor, and punishable at common law or by statute, and prescribes a penalty for its violation by a fine, and, conditionally, imprisonment, the action to recover such penalty is quasi-criminal, and cannot be brought to this court by appeal on

behalf of the plaintiff." To the same effect see *Boscobel v. Bugbee*, 41 Wis. 59.

WYOMING.

In Wyoming a prosecution for the violation of an ordinance is so far criminal that no review at the instance of the municipality is allowed. *Sheridan v. Cadle* (Wyo.) 157 Pac. 892.

STATE EX REL. ATTORNEY GENERAL.

v.

PRATT.

Alabama Supreme Court—April 3, 1915.

192 Ala. 118; 68 So. 255.

Public Officers — Removal — Intoxication.

Where an officer of the kinds enumerated in Const. 1901, §§ 173, 175, relating to impeachments, is an habitual drinker, he is subject to removal under the provision of section 173 that "intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties," shall authorize his removal from office.

[See note at end of this case.]

Same.

"Intemperance," as the term is used in Const. 1901, § 173, providing that such intemperance in the use of intoxicating liquors or narcotics, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, shall be ground for his removal from office, means such immoderate use of intoxicants or narcotics, in view of the dignity of the office and of the nature and importance of its duties, as unfits the officer for the discharge of such duties, and hence must vary with the grade of the office and nature and importance of its duties.

[See note at end of this case.]

Same.

Proof that a judge of probate has been for many years during his incumbency of the office an almost constant alcoholic drinker, that such indulgence has injuriously affected his mental and moral faculties and normal sensibilities, that his personal conduct evidences a well-nigh reckless disregard of or indifference to his own welfare and the dignity of his position, authorizes his removal from office under Const. 1901, § 173.

[See note at end of this case.]

Original petition by State, on relation of W. L. Martin, Attorney General, against W. L. Pratt, probate judge of Bibb county to impeach and remove respondent from office. The facts are stated in the opinion. ORDER OF REMOVAL.

W. L. Martin, W. H. Mitchell and J. F. Thompson for petitioner.

Hill, Hill, Whiting & Stern, W. H. Cooper, J. T. Fuller and J. F. Ellison for respondent.

[119] McCLELLAN, J.—The respondent, W. L. Pratt, is the judge of probate of the county of Bibb. Pursuant to the recommendation of the grand jury of that county, presented under and in virtue of Code, § 7124, 7125, the respondent's impeachment is sought by the state of Alabama, on the relation of its Attorney General.

(1) The single charge preferred against the officer is grounded in this provision of section 173 of the Constitution of 1901: "Intemperance in the use of intoxicating liquors or narcotics of such an extent, in view of the dignity of the office, and the importance of its duties, [120] as unfits the officer for the discharge of such duties."

The quoted provision of the organic law was the expression of a particular intent to establish a different grade of intemperance, for the purpose authorizing and requiring the impeachment of officers, to that of habitual drunkenness, as prescribed in the Constitution of 1875. *State v. Latham*, 174 Ala. 281, 61 So. 351. It appears from the minority report of the committee on impeachment of the constitutional convention of 1901 (*Journal*, pp. 708-711) that the majority report of the committee recommending the adoption of what is now section 173 of the Constitution intended by the quoted provision thereof to remedy the condition made by the decision of this court in *State v. Robinson*, 111 Ala. 482, 20 So. 30, interpreting and applying the provision of the Constitution of 1875 wherein habitual drunkenness was constituted a ground of impeachment. Since the departure wrought by the stated change thus made in the present Constitution eliminates habitual drunkenness as the essential degree of intemperance requisite to impeach an officer, it is no longer specially important to consider the subject with reference thereto, except to say that, of course, if an officer of the kinds enumerated in sections 173 to 175 of the present Constitution, is shown to be an habitual drunkard, he is within the quoted provision of section 173, and is due to be removed from office.

(2) In the *Latham* case, cited above, this court entered upon the interpretation of the quoted provision of the organic law; and the following propositions were therein estab-

lished by the unanimous judgment of this court as then constituted: (a) That a less degree of intemperance in the use of intoxicants or of narcotics by an officer will now require the removal of the offending [121] officer than was requisite when habitual drunkenness was the prerequisite to removal because of intemperance; (b) that an occasional lapse into intoxication, however reprehensible it may be, "does not reach the degree of obliquity aimed at by the Constitution;" (c) that an officer's intemperance may be such as to render him removable therefor, even though he has never been what is commonly called "drunk;" (d) that, within the contemplation and effect of the quoted provision of the Constitution, an officer may deserve removal from his office even though it cannot be said he is incompetent to perform its duties, and that "unfitness," within the purview of that provision, is not synonymous with "incompetency" to discharge the duties of the office (see *Lowe's Case*, defining "incompetency," as set out in *State v. Martin*, 180 Ala. 467, 468, 61 So. 491); (e) that the unfitness contemplated by the quoted provision of the Constitution may be manifested, and may occur by reason of an intemperance of the officer whereby he, through himself, brings "into disrepute the administration of the high office which he holds, or presents before the people a man so debauched by the [use of] drugs or liquors as to be unfit to discharge the duties, or as to render him liable, . . . to fail to rise to the dignified discharge of the duties of his office;" (f) and, according to the quoted provision of the Constitution, that the intemperate use of intoxicants or narcotics by an officer may render him unfit for the discharge of the duties of his office if thereby his mental or moral faculties have become degraded.

The quoted provision of the Constitution graduates the degree of intemperate use of intoxicants and narcotics, requiring removal from office, according to the dignity of the office and the nature and importance of its duties. This is manifest from the language of the [122] provision. In no event does it authorize removal of an officer whose intemperance has not rendered him unfit for the discharge of his duties, as the want of fitness has been stated on the authority of *Latham's* case, as reaffirmed herein above. Intemperance of the officer, as that affects his fitness to perform the duties of the particular office, is the basic idea in the provision; and it is against intemperance, in that relation and with the defined effect, that the Constitution directs and must be given its force. Neither an abstract definition of "intemperance" nor of "capability" to discharge the duties of the particular office can be fully, unrestrictedly availed of in the interpretation or in the

practical administration of this provision of the organic law; for the expression is of a composite idea, and the method and means of that expression effect to qualify and to interrelate the terms constituting the provision. The intemperance contemplated as being essential to the authority to remove an officer is made by the provision to depend in character and in degree (not below unfitness for the discharge of the duties of the office under inquisition) upon the dignity of the office and the nature and the importance of its duties. It is hence established by the provision that the intemperance requisite to removal must vary with the grade of the office and the nature and the importance of its duties; and, in necessary consequence, the degree of intemperance which will authorize removal decreases as the dignity of the office and the nature and the importance of its duties are elevated and stand in the scale of rank in official service; but the decrease of the degree of intemperance, in inverse order to the elevation of the dignity of the office and of the nature and the importance of its duties, cannot descend below the point where the intemperance indulged does not render the officer unfit [123] for the discharge of the duties of his office. "Intemperance," as employed in this provision of the Constitution, means, as the provision, in substance, says, such immoderation in the use of intoxicants or narcotics, in view of the dignity of the office and of the nature and the importance of its duties, as unfits the officer for the discharge of its duties.

(3) As stated, the officer here on trial is a judge of probate. In the Latham case the respondent was a sheriff, the highest purely executive officer of a county. Under our laws the office of judge of probate is the most exalted of county offices. Its functions and duties are important in a very high sense. These functions and duties are multiform and manifold. Among them are those of a strictly judicial nature; those of an executive nature and those of a legislative nature. Some of these duties and functions may appropriately be stated: The judge of probate has jurisdiction in his county of matters of administration of estates of decedents and of orphans, and of those under disabilities; of the trial of certain grades of criminal offenses of the trial of contests of wills; proceedings with respect to the establishment of public roads; and of proceedings having in view the creation of stock-law districts. The judge of probate has duties with respect to the holding of various kinds of elections, and, in some instances, the hearing of contests thereof. He is generally, as in this instance, a member of, and presides over, the county governing body. This body has large and important functions and duties, particularly

with reference to the fiscal affairs of the county. He is the issuer of warrants of the county to discharge the county's properly audited or existing obligations. The county governing body also usually determines the disposition to be made of county convicts, and the contracts under which such [124] convicts are let or are employed. That body also usually has under its care the construction, repair, and maintenance of the public roads, and the supervision, care, and repair of the public property of the county. The judge of probate is the custodian of the registration books of the county, and his duty is to see that the registration of instruments that may be recorded are recorded. He is the officer authorized to issue various kinds of licenses, and to collect and to remit to the proper officer license fees. He is the distributor of warrants for pensions awarded to those entitled thereto. He is obliged to perform vitally important duties with respect to the system for the assessment of taxes and for the collection thereof in certain cases of delinquency where sales of property are decreed by him; and, in addition, he has further duties in respect of the redemption and of the purchase of lands sold for taxes. He is also a conservator of the peace. He is the custodian of the jury box. Other of the duties and functions of a judge of probate might be enumerated. Those indicated will readily suffice to disclose the high dignity and the great importance and the serious nature of the duties of the office. Such powers, duties, and functions as are attached to the office by law necessarily reflect upon an incumbent thereof a dignity and an honor and an importance, generally noted and entertained, that deserves to be, and must be, maintained and sustained by the incumbent in order that the trust to which he is related and which is committed to him may be justified, and not degraded or impaired.

It has been conclusively proven, if, indeed, not really conceded by the respondent, that Judge Pratt has been for many years, during his incumbency of this office, which began in the year 1898, a very constant alcoholic drinker. The evidence leaves no doubt that this [125] character of continued indulgence has had its effect upon the respondent's mental and moral faculties and more normal sensibilities. According to the evidence, his personal conduct, even in recent months, evincing a well-nigh reckless disregard of, or indifference to, his own welfare and the dignity of his position in the community, and of the most obvious proprieties, confirms the conclusion that the respondent's long-continued use of intoxicants has had a profound and unfortunate effect upon him. Under this condition of established fact in respect of the personal habits and conduct of the man,

the only remaining inquiry, under the issues made by the charge against the officer, is whether the respondent's intemperance is of the degree defined in the Constitution, entailing the effect to unfit him for the discharge of the duties of the office.

One hundred and fourteen witnesses have testified before the court on the issues stated. A detailed discussion of the evidence is as unnecessary as it is undesirable. It has been carefully considered. The opinion prevails, and that without any reasonable doubt, that the respondent is so intemperate in the use of intoxicants, in view of the dignity of the office of judge of probate and of the nature and importance of its duties, as to unfit him for the discharge thereof. The charge is sustained, and the respondent must, under the Constitution's mandate, be removed from the office of judge of probate.

Anderson, C. J., and Somerville, Gardner, and Thomas, JJ., concur.

SAYRE, J. (*dissenting*).—I am not disposed to raise any question about the statement of the law to be found in the majority opinion. It suffices for my [126] purpose to repeat the language of the Constitution, which is not of difficult comprehension. That instrument says: That a judge of the probate court "may be removed from office for wilful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith."

The sole charge brought against defendant, by the information and the evidence in support of it, is that he has been guilty of intemperance in the use of intoxicating liquors to such an extent, in view of the dignity of his office and the importance of its duties, as unfits him for the discharge of its duties; and the question of fact involved is whether the evidence shows beyond a reasonable doubt that he has been guilty as charged.

We know nothing of Judge Pratt or the manner in which he has discharged the duties of his office, except as we have learned these things from the testimony taken on the trial.

A large majority of the witnesses, a numerous, substantial, and honest-looking body of his neighbors, men who have on frequent occasions had official business with him, have testified to facts which show to my entire satisfaction that during the 17 years of his incumbency in the office of probate judge the actual duties of that office, manifold and important as they are, have been discharged by defendant with dignity and a high—I

Ann. Cas. 1917D—63.

believe I may safely say with an uncommon—degree of intelligence, faithfulness, and efficiency. Quite a number of the witnesses have laid peculiar stress upon the considerate care defendant has given to the business of widows and orphans in his [127] court. As I recall the testimony, only three or four of the cloud of witnesses who testified on either side found any fault with his actual discharge of any of the duties of the office. Two of these, lawyers, who had been disappointed in the result of their cases, gave their opinion that defendant's rulings on a certain occasion in the county court were improper and absurd; but, so far as I could see upon the whole evidence touching that particular occasion, the judge had good and substantial reasons for the rulings of which these witnesses complained. Two or three others testified to some alleged derelictions which could only be magnified into importance by the narrow and partisan judgment of witnesses harboring petty grievances. Notwithstanding what these few out of more than a hundred witnesses have testified, it is, in my judgment, established by the overwhelming weight of the evidence that defendant has, in fact, and down to the day of his trial, discharged the duties of his office with a becoming degree of dignity, intelligently, faithfully, and efficiently. How, then, is he unfit within the meaning of the Constitution?

It is conceded that an officer may by his conduct, apart from the duties of his office, render himself morally unfit. It is also conceded that the evidence in this case goes to show that defendant is an habitual drinker, and has been ever since, and perhaps before, he was put into office, but not habitually to excess. The answer to the accusing force of this habit is the fact that he has nevertheless discharged the duties of his office in the manner stated above. And that fact, in my judgment, goes far towards establishing defendant's moral fitness. However, on some 10 or 12 occasions defendant has been obviously intoxicated to a degree that impaired his mental and physical faculties. Proof of these [128] instances has been the outcome of an investigation that some motive has spurred to extraordinary diligence, and which seems to have followed every detail of defendant's life at home and abroad for the last seven years. About half of them appear to have occurred while defendant was on visits to Montgomery and Tuscaloosa. Some of them seem to have found occasion in the anger and irritation caused by the preparation of this prosecution, which has been on foot for some time, and which defendant has unwisely, and, I think, unfortunately for himself, met with stubborn resentment, rather than with prudent policy. Charity of opinion as to these lapses from propriety and

dignity need not be unstrained; there is no wholly sufficient excuse for any of them; they are reprehensible, and appear particularly so when brought in mass under critical judgment and without due regard to the time over which they have been spread. It is clear upon the whole evidence that defendant has not the habit of intoxication. *State v. Latham*, 174 Ala. 281, 61 So. 351. It is clear to my mind also that defendant has not undergone any profound change of mental or moral constitution. I am of the opinion that he is as well fit for the office as he ever was. Considering, then, his fine record in the actual performance of the duties of his office the detached nature of his indiscretions which have been scattered over a number of years, and that occasional lapses, however reprehensible, do not reach the degree of obliquity aimed at by the Constitution, as this court has said (*State v. Latham*, supra), I have not been able to reach an abiding conviction that defendant's mental or moral character has been so impaired or degraded by intoxication as to render him unfit for the official duties which have been repeatedly committed to him by his fellow citizens of Bibb county and on these considerations [129] have felt constrained to differ from the majority of the court, and to vote for an acquittal, as I believe the whole court did in a case very much like this (*State v. Latham*, supra).

I am authorized to say that Judge Mayfield concurs in these views.

NOTE.

The reported case applies a constitutional provision differing somewhat from the general rule as to the degree of intemperance which will warrant the removal of a public officer, and authorizing a removal for intemperance "to such an extent in view of the dignity of the office and the importance of its duties as unfits the officer for the discharge of such duties." The court holds that the evidence before it establishes the use of intoxicants by a judge of probate to an extent requiring his removal under that provision. The cases discussing intoxication as a ground for the removal of a public officer are collated in the note to *State v. Henderson*, Ann. Cas. 1912A 1286.

GRIFFIN

v.

RUSSELL.

Georgia Supreme Court—November 12, 1915

144 Ga. 275; 87 S. E. 10.

Automobiles — Personal Injury — Liability of Owner for Negligence of Son.

A petition alleged, in brief, as follows: A woman owned an automobile, and had a minor son. She allowed her son to run and operate the car. On a day named the minor son was the chauffeur in charge of the car, operating it for his mother, the owner, and running it on the public road with the knowledge and consent of his mother. The boy, "who was the agent of the said [owner], as hereinbefore alleged, driving said car," negligently caused it to collide with a buggy in which the plaintiff was riding, causing injury to him and to the buggy and harness. The injury was caused by the carelessness and negligence and by acts and omissions to act on the part of the mother and on the part of the son, "her agent and chauffeur in charge of said car." By amendment the plaintiff added the following: "Defendant kept said automobile for the comfort and pleasure of her family, including Jim Russell [the son], a member of said family. He was driving said automobile at the time of the injury herein complained of, and was driving the same for the comfort and pleasure of himself and friends, who were riding with him, by and with the consent of the owner of said car, the defendant." It is held that such petition was not subject to general demurrer.

[See note at end of this case.]

Damages — Pleading Special Damage.

A paragraph in a complaint for personal injuries which alleges that the plaintiff's expenses for physician and surgeon and medicine were "\$——" is defective.

Words and Phrases — Business.

The word "business" is commonly employed in connection with an occupation for livelihood or profit, but is not limited to such pursuits.

Error to Superior Court, Crisp county: GEORGE, Judge.

Action by G. E. Griffin, plaintiff, against Mrs. A. E. Russell, defendant. Judgment for defendant. Plaintiff brings error. REVERSED.

[276] G. E. Griffin filed a suit against Mrs. A. E. Russell, to recover damages, alleging, among other things, as follows: The defendant is the owner of an automobile, which she allows her minor son to run and operate. On a day named the defendant's son was the

chauffeur in charge of the car, operating it for the defendant, the owner thereof, and running it on the public road with the knowledge and consent of the owner. While the plaintiff was traveling in his buggy along the public road, the defendant's minor son, who was her agent, driving the car, negligently caused it to run against the buggy, injuring the plaintiff, the buggy, and the harness. The damage done to the buggy was \$75, and that done to the harness was \$15. The plaintiff's expenses for physician and surgeon and medicine were \$——. He has been permanently injured, and lays his damages at \$2500. The defendant was negligent in the following respects: In allowing her minor son to operate the car on the public road; in allowing him to operate and run the car at a high and dangerous rate of speed; in allowing him, her agent and chauffeur in charge of the car, to operate it on a public highway at such a rate of speed as was obviously dangerous to the plaintiff and other travelers on the public road; in allowing him, while operating the car by and with her consent, to run it at such a rate of speed and in such a manner as was obviously dangerous to the plaintiff and other travelers, and in utter disregard of their rights; in allowing him, her agent and chauffeur in charge of and operating the car by and with her consent, wilfully and wantonly, in utter disregard of the plaintiff's rights, to run the car against the plaintiff's buggy at such a rate of speed as was obviously dangerous.

The defendant demurred generally and specially to the petition. A number of the grounds of the demurrer merely alleged that each of certain paragraphs in the petition, specifying them by number, did not set out a cause of action. Certain paragraphs were demurred to on the ground that it was not stated what were the duties of the plaintiff's minor son as her agent, or what duties he was performing for her at the time of the alleged negligent injury. [277] The paragraph containing the allegation as to the expenses for physician and surgeon and medicine in the sum of \$—— was demurred to because it did not allege the amount paid as doctor's bills and to whom paid; and the paragraph alleging the damage to the buggy and harness was demurred to because it did not specify or itemize the damage alleged to have been done to them. The plaintiff amended his petition by adding two paragraphs. The first was as follows: "Defendant kept said automobile for the comfort and pleasure of her family, including Jim Russell, a member of said family. He was driving said automobile at the time of the injury herein complained of, and was driving the same for the comfort of himself and friends, who were riding with him, by and with the consent of the owner

of said car, the defendant." The second was as follows: "The defendant kept said automobile for the purpose of hire, and the said Jim Russell, who was in charge of said car at the time of the injury herein complained of, was acting as chauffeur and driver of said car, and did act as chauffeur and driver of said car by and with the consent and knowledge of defendant herein when said car was hired for the purpose of carrying passengers, and said Jim Russell was at all times in charge of said car by and with the consent of said defendant." Another allegation in the proposed amendment was not allowed.

The presiding judge sustained the demurrer, passing the following order: "The within demurrer having been submitted to the court for determination, and the plaintiff having disclaimed any purpose of alleging specific knowledge and consent by the defendant of the injury complained of, the demurrer is sustained upon each and every ground thereof, and the petition stricken." The plaintiff excepted.

J. T. Hill for plaintiff in error.

F. G. Boatright for defendant in error.

LUMPKIN, J. (*after stating the facts*).—

1. In passing upon a demurrer to a petition, the petition and demurrer are to be considered, not oral admissions. *Hicks v. Beacham*, 131 Ga. 89, 62 S. E. 45.

It may be taken as settled law in this State that a father is not liable for the tort of a minor child, with which he was in no way connected, which he did not ratify, and from which he did not derive any benefit, merely because of the relation of parent and [278] child. *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343, 66 L.R.A. 958. And this accords with the rulings of other courts on the subject. A child, however, may occupy the position of a servant or agent of his parent, and for his acts as such the parent may be liable under the general principles governing the relation of master and servant, or principal and agent. The contested question in cases like the one under consideration usually is whether or not the facts show such a relation and liability arising to the parent therefrom. Some conflict in decisions has arisen from a difference in construing or applying the commonly used expression that the master is liable for the negligence of his servant "acting in the scope of his employment" and in regard to "his master's business," or like expressions. Courts have not always agreed as to what is within "the scope of his employment," or what was an act in regard to the master's "business;" what was comprehended in the term "business." An agent or servant is frequently employed by contract or express agreement;

but this is not necessary to establish the relation. It may arise by implication as well as expressly. Thus it is declared in the Civil Code (1910) § 3569, that "The relation of principal and agent arises wherever one person, expressly or by stipulation, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf." The formality required in creating an agency to do certain acts is not involved. The word "business" is commonly employed in connection with an occupation for livelihood or profit, but it is not limited to such pursuits. When Jesus said, "Wist ye not that I must be about my Father's business?", He had no reference to matters involving pecuniary rewards.

In *Lashbrook v. Patten*, 1 Duv. (Ky.) 316, a minor son, while driving his two sisters to a picnic in his father's carriage, drawn by his father's horses, and with his father's approbation, all of the children being members of his father's family, through negligence ran against the carriage of another, causing damage. The Court of Appeals said: "The son must be regarded as in the father's employment, discharging a duty usually performed by a slave, and therefore must, for the purposes of this suit, be regarded as his father's servant. The doctrine that masters are responsible for the injuries arising from the carelessness of their servants whilst in the master's employment and the discharge of their duties, has [279] been so long recognized and acted on, that we scarcely deem it necessary to elaborate the reasons or recite authorities."

In *Daily v. Maxwell*, 162 Mo. App. 415, 133 S. W. 351, it was held that where a father purchased an automobile for the use of his family for pleasure, and allowed his minor son to operate it for the family, he was liable for the negligence of such son while operating it for his own pleasure with the permission of the father. On that occasion the boy had asked and obtained consent of his father to take some of his young friends to ride in the automobile. In the opinion Johnson, J., said: "The evidence discloses that the machine was devoted to the use of the family of which Ernest was a member. It was a pleasure vehicle, and, when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner? It is the practice of parents to provide their children healthful and innocent amusements and recreations, and certainly it is as much the business of parentage to supervise and control the pleasures of their children as it is to give them nurture and education. Had Ernest been taking his mother for a pleasure ride instead of taking some of his young friends, no one would contend that he was not on

his father's business; or, had he been using the car on an errand of his own, such as shopping for himself, or going to school, he would have been on his father's business, since it was the duty of his father to support and educate him. The rule that a father is not liable for the torts of his minor child applies only to cases where the tort is committed without the consent of the parent and without the scope of any duty he owes his child. We conclude that, in running the car with the consent of his father and within the scope of family uses, Ernest was the agent and servant of his father."

In *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L.R.A.(N.S.) 224, a motor-car was kept by a man for the comfort and pleasure of his family, including a minor son and daughter as members of it. They had the right to use it as often as and when they liked. On the occasion in question the son took the car at his own volition, and at his suggestion carried his sister and three other ladies for a ride. While he was driving the machine, he carelessly ran down and injured a boy on a bicycle. The father was held to be liable, on the ground that, the machine having been [280] provided for the comfort and pleasure of the family, and the son having been given the right to use it, he was to be treated as the servant of his father when operating it (though without a special permission on that occasion) for the entertainment of his sister and her friends. In the opinion Winn, J., cited the cases of *Lashbrook v. Patten* and *Daily v. Maxwell*, supra, and said: "So, in the case at bar, the father had provided his family with this car as a means of recreation and amusement; and the son, in the use of the car for that purpose, was not performing an independent service of his own, but was carrying out what, within the spirit of the matter, was the business of the father."

In *McNeal v. McKain*, 33 Okla. 449, 126 Pac. 742, 41 L.R.A.(N.S.) 775, a father bought an automobile for the pleasure and comfort of himself and family, his minor son, who was a member of his family, being authorized to use it at any time for that purpose. It was held that the son, in taking it out for the pleasure of himself and sister, with a friend, who was a guest of the father's family, was a servant or agent of the father within the meaning of the rule as to liability of a principal for the torts of an agent or servant, and was not performing a service independent of his father, and that the latter was liable for his negligence in driving the machine. In the opinion Williams, J., said: "Vehicles and motor cars may be used not only for the business of the master for profit, but also in his business for pleasure. If Paul, the minor son of the plaintiff in error,

had been driving his father's carriage (whilst he was a member of his family), in which were contained his sister and a guest of his father's house, the same being done by him with the express or implied consent of his father, the relation of master and servant would exist, and the father would be liable for the negligent acts of the minor son whilst engaged in the driving of the carriage; and the same rule is supported by authority as to motor-cars."

In *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L.R.A.(N.S.) 59, a man and wife owned an automobile, which was purchased and kept for the use of the family, and it was customary for the members of the family to drive it at their pleasure. On a certain day when the man and wife were absent from home, the daughter entertained a number of friends at luncheon. In taking them home in the automobile she negligently struck and [281] injured a woman on the highway. In a suit for damages, the jury found for the plaintiff against both the girl and her parents; and this finding was held by the Supreme Court to be authorized by the evidence. Ellis, J., said: "It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair,—that is, his business,—and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent." And again he said: "We think that both on reason and authority the daughter in the present instance should be held the agent of her parents in the use of the automobile. Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family, even if he knew that they were grossly incompetent to operate it for themselves. The adoption of a doctrine so callously technical would be little short of calamitous."

In *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A.(N.S.) 970, a man kept a car for the use, convenience, and pleasure of himself and the members of his family. It was usually driven by his daughter, nineteen years of age, and she was authorized to use it whenever she desired to do so. On the day of the accident she took it, and, accompanied by her younger sister, drove to the home of a relative, where they were joined by other young people. From this point the daughter permitted a cousin, then riding with them, to drive the car, and from his negligent driving injury occurred. On the question of whether the owner of the automobile was responsible for negligence on the part of his daughter, Taylor, C., said:

"Whether the owner of an automobile is liable for the damages caused by it which result from the negligence of the person operating it depends upon whether the person operating it was the servant of the owner and engaged upon the business of the owner at the time the negligence occurred. If he was such servant and engaged upon such business, the owner is responsible for injuries to persons or property caused by his negligence in operating it. If he was not such servant or was not engaged upon such business, the owner is not responsible for such negligence. *Sina v. Carlson*, 120 Minn. 283, 139 N. W. 601; *Geiss v. Twin City Taxicab Co.* 120 Minn. 368, 139 N. W. 611, [282] 45 L.R.A.(N.S.) 382; *Meyers v. Tri-State Automobile Co.* 121 Minn. 68, 140 N. W. 184, 44 L.R.A.(N.S.) 113; *Ploetz v. Holt*, 124 Minn. 169, 44 N. W. 745; *McNeal v. McKain*, 33 Okla. 449, 126 Pac. 742, 41 L.R.A.(N.S.) 775. Defendant's daughter, while operating the car by his authority and upon his business, was defendant's servant within the meaning of the rule, and he was responsible for her acts to the same extent that he would have been responsible for the acts of any other servant. Defendant might properly make it an element of his business to provide pleasures for his family; and as the car was intended for the use of the members of the family for purposes of pleasure as well as for other purposes, and the daughter had the authority to take it and operate it for such purposes, it was at least a question for the jury whether, at the time of the accident, she was not the servant of defendant and engaged upon the business of defendant." See also *Simmons v. Pennsylvania R. Co.* 109 Pa. St. 232, 48 Atl. 1070, where it was said: "Since the scope of the servant's employment is necessarily dependent on circumstances, a hard and fast rule cannot be laid down as to the scope of any particular employment; and it is ordinarily a question for the jury whether or not a particular act comes within the scope of a servant's employment." Also *Moon v. Matthews*, 227 Pa. St. 488, 76 Atl. 219, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, in which the case then under consideration was distinguished from that of *Lotz v. Hanlon*, 217 Pa. St. 339, 66 Atl. 525, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731.

In *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031, it was held that a married woman owning an automobile as her separate property, which she permitted to be used by the different members of the family for family purposes, in the usual manner of using family conveyances, was liable for the negligence of her son (a member of the family) in driving such automobile in taking a servant to a street-car, though she was absent at the time and knew nothing of the particular use

of the automobile; since, though she was not obliged to furnish the use of an automobile to the children or the family from her separate property, having voluntarily done so, it became in effect a use by her. After referring to the case of *Birch v. Abercrombie*, supra, Parker, J., said: "It is true, in the case before us, the automobile was the separate property of the [283] wife; but we are unable to see that the principle announced in the *Abercrombie* case is not equally applicable to her and her separate liability. This use of the automobile by her children was not like the use of it by a stranger to whom she might have loaned it. Of course, she was not obliged to furnish an automobile or its use to her children or her family from the proceeds of her separate property; but, having voluntarily done so, it became, in effect, a use by her. She permitted such use manifestly as a part of her parental duty, and made the furnishing of the automobile 'her affair, that is, her business,' paraphrasing the expression used in the *Abercrombie* case relative to the father in that case."

The case which seems to be generally cited by counsel for defendants in opposition to the views above expressed is that of *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677. The facts recited in the headnotes in that case were, that the father was possessed of an automobile which he kept upon his premises, and his daughter, about nineteen years of age, was accustomed to driving it, and did so whenever she so desired, asking permission to use it when the father was at home, but, when he was not at home, taking it sometimes without permission, there being no proof that the daughter was actually employed by the father to operate the machine. It was held, that, in an action against the father, where the daughter, in using the machine for her own pleasure in driving her personal friends, negligently injured a person on the highway, such proof was not sufficient to constitute the daughter a servant or agent of the father as the master. Voorhees, J., said, that it was error in the trial court to give a charge which made the defendant's liability depend upon the object for which he purchased the machine (which was for the pleasure of the family), in connection with the fact that his daughter operated it for that purpose, the jury being instructed that thereby she became his servant. In one or more cases this has been differentiated from those under consideration. In *Birch v. Abercrombie*, supra, it was criticized; and the court refused to follow it. Ellis, J., said: "While heartily subscribing to the view there expressed, 'that the mere fact of the relationship of parent and child would not make the child the servant of the defendant,' we think

the opinion unsound in that it ignores the agency induced by the fact, independent of that relationship, that the daughter [284] was using the machine for the very purpose for which the father owned it, kept and intended that it should be used. It was being used in furtherance of the very purpose of his ownership, and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742. In running his vehicle she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule respondeat superior."

Cases in which a chauffeur or a child of the owner of an automobile took it without the knowledge or consent of the owner, or against his instructions, and used it for his own purpose, entirely disconnected from the business of the owner or the purpose for which the machine was intended by him to be used, are easily differentiated from that now under consideration. Thus, in *Maier v. Benedict*, 123 App. Div. 579, 108 N. Y. S. 228, it appeared without contradiction that a son, twenty years of age, took his father's automobile without the knowledge or consent of the father, and was using it in connection with his own business when an injury to another occurred. It does not appear that there was any evidence that the automobile was provided or kept for use by the family of the owner for the convenience or pleasure of its members, though the expression is used that an owner who allows his son to drive the vehicle "at his pleasure," etc. So in *Reynolds v. Buck*, 127 Ia. 601, 103 N. W. 946, it does not appear that the automobile was purchased or kept by the owner for the family use, or intended for that purpose. It was taken by the owner's son without the knowledge or consent of the father, and employed for the son's private use.

Nothing decided in *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618, conflicts with what is said above. In that case the defense was that the chauffeur of the owner of the car took it without the knowledge or consent of the owner or his wife (he being absent), [285] and used it for the purpose of taking a pleasure ride with a friend. In the opinion it was said: "It is unnecessary to discuss special cases; such as, where a parent buys an automobile to be used and operated by his son,

whether the son becomes the parent's agent for that purpose; or whether, if an owner knowingly allows a child, an imbecile, a drunken person, or a grossly incompetent and unskilled person to take charge of his machine, which is dangerous if unskillfully operated, and to drive it out upon a crowded thoroughfare, his liability for an injury resulting is to be measured solely by the doctrine of respondeat superior, or whether, in such a case, the owner would himself be guilty of negligence." Thus the question presented in the case at bar was not then determined. Nor is the lending of an automobile by its owner to a servant on a particular occasion when the servant is not engaged in the performance of his master's business, and during a time when he is free to engage in his own pursuits, the same as providing an automobile for the owner's family, and allowing a child to drive it as chauffeur for the purpose for which it is kept by the owner.

In *Schumer v. Register*, 12 Ga. App. 743, 78 S. E. 731, one count of a petition alleged that widow, having the exclusive control of her minor, unmarried daughter, owned an automobile, that the daughter was riding in it, having authority and command over the movements of it, and that it was driven by another named person, when it negligently collided with a passer and injured him. No relation of master and servant, or principal and agent, was alleged to exist between the driver of the car and the owner, nor does there appear to have been any allegation to show that the owner was liable for a tort of her daughter save the mere relationship of parent and child. An amendment was offered, alleging that the owner of the automobile kept it for the comfort and pleasure of her family, including her daughter, who was authorized to use it at any time for such purpose. The Court of Appeals held, that the count of the petition as it originally stood was insufficient; that if the daughter had been driving the automobile at the time of the collision, under certain decisions of courts in other States the mother might have been held liable; but that, under the statute of this State and the construction which the Supreme Court had put upon it, they did not think that if the amendment had been allowed the count of the petition being discussed would have shown [286] a cause of action against the mother. The decisions of this court which were cited by the Court of Appeals as having the effect mentioned were those in *Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343, 66 L.R.A. 958;—*supra*; *Lockett v. Pittman*, 72 Ga. 817; *Vaughan v. McDaniel*, 73 Ga. 97. The case of *Chastain v. Johns* has been referred to above; and it will be perceived that the point there decided was that a father was not liable for the tort of

his minor son merely because of the relationship of parent and child. The question of whether, if a father procures and maintains an automobile to be used for the comfort and pleasure of his family, the operation of it for that purpose might not fairly be termed a part of his business, and whether, if he authorized his minor son to drive the machine for that purpose, he would be liable for the negligence of the son in so doing, was not involved. *Lockett v. Pittman*, *supra*, involved the construction of a statute which provided that, if any damage should be committed in any enclosure not protected as provided by law, by the breaking in of any animal, the owner of such animal should not be liable to answer for the trespass, and that, "if the owner of the enclosure shall kill or injure such animal in any manner, he is liable in three times the damage." Civil Code (1910) § 2025. A suit was brought against the owner of the premises for triple damages. The evidence showed that a cow was peritendent or manager, or by the order of killed in the defendant's absence by his such person. There was some discussion as to the liability of a principal for the wilful trespass of his agent or servant. But the actual ruling was, that the proceeding for triple damages was penal in its nature, that the statute should be strictly construed, and that it did not authorize a recovery, under the facts of the case. *Hall, J.*, said: "Perhaps a recovery for the actual damages proved in this case might have been sustained, upon the evidence disclosed by the record; but beyond this we do not think the finding should have gone, unless the jury were satisfied that the alleged wrongs were done in pursuance of the defendant's commands." This presents a different question from the one under discussion. In *Vaughan v. McDaniel*, *supra*, the questions involved were as to the admissibility of evidence of certain things as part of the *res gestae* of a transaction, and as to whether a suit in a justice's court for triple damages, under the statute, for the killing of a cow, could be so amended on appeal as to be converted into an action for the value of [287] the cow. This does not control the question now before us: and we cannot concur with our brethren of the Court of Appeals in the views which they seem to have taken of the decisions cited.

In the case before us it was alleged, that the defendant was the owner of an automobile; that she kept it for the comfort and pleasure of her family, including her minor son as a member thereof; that at the time of the injury complained of he was driving the car for the comfort and pleasure of himself and friends, who were riding with him, by and with the consent of the defendant. In another part of the petition it was alleged

that he was the chauffeur in charge of the car, operating it for the owner, and running it on the public road with the knowledge and consent of the owner; and that the injury was caused by the negligence of the son, who was the agent and chauffeur of the owner in charge of the car. Admitting these allegations to be true, as the demurrer does, they state a case of liability on the part of the mother. If she kept the automobile to be used for the comfort and pleasure of her family, including her minor son as a member thereof, such use was her business or affair within the meaning of the rule of law discussed above. If she had placed a third person in charge of the car as a chauffeur to drive it for the purpose for which it was kept, he would have been her agent or servant, and she would be liable for the negligent manner in which he drove the car. If, instead of doing this, she allowed her minor son to act as her chauffeur or agent for the purpose of driving the car, she would likewise be liable for his negligence in so doing. If a father or mother, owning an automobile, and keeping it to be used for the comfort and pleasure of the family, should authorize a son to drive it for the comfort or pleasure of the family, this would make the owner liable for the negligence of the son operating the machine for such purpose. How many of the family must be riding in the machine in order to make it a family use? If the boy should carry his sister for a ride, this would evidently be such use. Suppose that the sister should determine not to go, and he should go alone, would the use cease to be a family use? Certainly not all of the family have to be riding in the machine, to make it a family use. If two are sufficient for that purpose, why not one? But it may be said that here the boy was using it for the comfort and pleasure of himself and friends, who were riding with him, even though by [288] and with the consent of the owner of the car. If it would be a family use for the boy to ride alone, it is difficult to perceive how taking his friends with him would make it less so, especially if with the consent of the owner. Suppose that the boy should start to ride with his sister, and at the last moment she should determine not to go, and that the owner should consent for him to substitute a friend or friends of his own in lieu of his sister, would this change the whole status and relieve the owner of liability, where liability would have existed before? In this case it was alleged that on the occasion when the injury took place the boy was the chauffeur or agent of the owner, in charge of the car, operating it for the owner. It seems unquestionable that the demurrer should not have been sustained.

2. Each paragraph in a petition does not alone have to set out a complete cause of

action. If it alleges facts forming a legitimate part of the cause of action, it is not subject to a ground of demurrer which merely sets up that it does not in itself set out a cause of action. A paragraph which alleged that the damage done to the plaintiff's buggy was \$75, and that done to his harness was \$15, was sufficient. Even the microscopic demands of a special demurrer cannot require the plaintiff to specify in detail each bolt, spoke, tire, or other part of the buggy which was damaged and the exact extent and character of that damage. Nor can the plaintiff be required to state in minute detail the character of the damage to the harness, as whether a buckle was broken or bent, and how much, or whether a strap was entirely or only partially broken, or the like. There is nothing which is so insatiable in its demands for information as a special demurrer. We think, however, that this desire for information should be gratified where it asks to be told the amount paid for doctor's bills, in lieu of an allegation that the plaintiff expended for that purpose "\$———."

We will not discuss the added allegations that the automobile was used for hire, and that the defendant's son acted as the chauffeur when it was so hired, as the other allegations show that it was not being used for hire when the injuries occurred. No objection was made that two theories were advanced in one count. The dismissal of the entire petition on demurrer was error. Accordingly, the judgment will be reversed, with direction that, unless amended, the paragraph in regard to the expense for physician's [289] bill and medicine, the amount of which is stated in blank, shall be stricken.

Judgment reversed, with direction.

All the Justices concur, except Beck, J., absent.

EVANS, P. J.—I specially concur in the judgment, because of the allegation of the petition that the defendant's minor son drove the automobile as her chauffeur and with her consent on the particular occasion which resulted in the plaintiff's injury. A mother may engage her son to be a chauffeur or servant, and I construe the allegation to expressly charge that the son was acting as the servant of the mother in driving the machine. But I dissent from the proposition, which finds recognition in the opinion, that a parent who owns an automobile provided for family pleasure and driven at will by the members thereof is liable on the doctrine of respondeat superior for the negligence of a member thereon while driving the automobile filled with his own associates, and whose entertainment is in no way connected with the use for which the automobile was intended.

NOTE.

Liability of Owner of Automobile for Acts of His Chauffeur or Agent.

Scope of Note, 1001.

General Rule, 1001.

Application of Rule:

Generally, 1001.

Where Driver Is Child of Owner, 1002.

Scope of Note.

This note is designed to review the recent cases passing on the liability of the owner of an automobile for the acts of his chauffeur or agent. The earlier cases are collated in the notes to *Lotz v. Hanlon*, 10 Ann. Cas. 731; *Mattei v. Gillies*, 12 Ann. Cas. 970; *White Oak Coal Co. v. Rivoux*, Ann. Cas. 1914C 1032; *Reilly v. Connable*, Ann. Cas. 1916A 656; *Christy v. Elliott*, 108 Am. St. Rep. 196, and *Moon v. Matthews*, 136 Am. St. Rep. 902.

General Rule.

The owner of an automobile is liable for injuries negligently caused by his chauffeur or other agent while operating the car if he is acting within the scope of his employment but not otherwise. See the cases cited in the following subdivision of this note. An automobile is not within the rule whereby the owner of a dangerous instrumentality is held to be liable for the consequences of its use by any person. *Premier Motor Mfg. Co. v. Tilford (Ind.)* 111 N. E. 645; *Brinkman v. Zuckerman (Mich.)* 159 N. W. 316.

Proof that a car which caused an injury belonged to a certain person raises a presumption that the driver was his servant and that he was at the time of the accident acting within the scope of his authority. *Ward v. Teller Reservoir, etc. Co.* 60 Colo. 47, 153 Pac. 219; *Stewart Taxi-Service Co. v. Roy*, 127 Md. 70, 95 Atl. 1057; *Ferris v. Sterling*, 214 N. Y. 249, Ann. Cas. 1916D 1161, 108 N. E. 406; *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78; *Frankel v. Chapal*, 165 N. Y. S. 441.

Application of Rule.

GENERALLY.

If an employee of the owner of an automobile is using the car wholly for his own business or pleasure, either with or without the owner's permission, the owner is not liable to a person injured by the negligent operation of the car. *La Fitte v. Schunemann (Ga.)* 92 S. E. 295; *Garner v. Souders (Ga.)* 92 S. E. 965; *State v. Benson*, 129 Md. 693, 100 Atl. 505; *Higgins v. Bickford*, 227 Mass. 52,

116 N. E. 245; *Brinkman v. Zuckerman (Mich.)* 159 N. W. 316; *Ostrander v. Armour*, 176 App. Div. 152, 161 N. Y. S. 961; *Bogorad v. Dix*, 176 App. Div. 774, 162 N. Y. S. 992; *Scheel v. Shaw*, 252 Pa. St. 451, 97 Atl. 685; *Overland Motor Co. v. Goodman*, 62 Pa. Super. Ct. 622; *Gordon v. Texas, etc. Mercantile, etc. Co. (Tex.)* 190 S. W. 748. Thus where it appeared that a chauffeur after taking the car to a garage as directed took it out again to drive for his own purposes, it was held that the employer was not liable for his acts. *Solomon v. Commonwealth Trust Co. (Pa.)* 100 Atl. 534. And where the use of the car is primarily for a personal purpose of the driver, it is immaterial that as an incident thereto he is testing the operation of the car. *Schoenherr v. Hartfield*, 172 App. Div. 294, 158 N. Y. S. 388.

A chauffeur driving a car on his employer's business is ordinarily held to go outside the scope of his employment in inviting a person to ride, and the employer is not liable for injuries sustained by a person so invited. *Waller v. Southern Ice, etc. Co.* 144 Ga. 695, 87 S. E. 888; *Gruber v. Cater Transfer Co. (Wash.)* 165 Pac. 491; *McQueen v. People's Store Co. (Wash.)* 166 Pac. 626. And see *Walker v. Fuller*, 223 Mass. 566, 112 N. E. 230 (positive orders against allowing any person to ride). *Compare Royal Indemnity Co. v. Platt, etc. Refining Co.* 98 Misc. 631, 163 N. Y. S. 197. And the fact that the person so carried is a fellow employee is immaterial, he not being at the time engaged about the employer's business. *Eberle Brewing Co. v. Briscoe Motor Co. (Mich.)* 160 N. W. 440.

It has been held recently that if a driver is proceeding on his employer's business, a slight deviation from the direct route for a personal purpose will not relieve the employer from liability for his negligent driving. *Slothower v. Clark*, 191 Mo. App. 105, 179 S. W. 55; *Fisick v. Lorber*, 95 Misc. 574, 159 N. Y. S. 722; *George v. Garstens Packing Co.* 91 Wash. 637, 158 Pac. 529. And though the driver has been using the car for his own purpose, he is acting within the scope of his employment when he starts to go to a place to which he has been directed by his employer to proceed. *Graham v. Henderson*, 254 Pa. St. 137, 98 Atl. 870. The foregoing rule has been applied in a case wherein it appeared that the chauffeur while ostensibly proceeding to return to his employment was accompanied by several drunken companions, the question of his intention being for the jury. *Donahue v. Vorenberg*, 227 Mass. 1, 116 N. E. 246. *A fortiori* a driver returning to the garage from a place where he went on the employer's business is within the scope of his employment. *Regan v. John L. Kelly*

Contracting Co. 226 Mass. 58, 114 N. E. 726. But a chauffeur who, having taken his employer's family to a place of entertainment, is directed to wait, and instead of doing so goes for a drive for his own pleasure, is acting outside the scope of his employment. *Hill v. Staats* (Tex.) 187 S. W. 1039, 189 S. W. 85. Likewise the employer has been held not to be liable for the negligence of a chauffeur while driving for his own pleasure where he was directed to call for his employer at a certain time, and he took the car out at an unnecessarily early hour. *Eakin's Administrator v. Anderson*, reported in full, post, this volume, at page 1003.

If the chauffeur is engaged in the employer's business, the fact that he violates a positive order as to the speed to be maintained does not relieve the employer from liability. *Panama R. Co. v. Boese*, 239 Fed. 303.

Any use of a car which is reasonably incidental to the performance of the duties with which the employee is charged is deemed to be within the scope of his employment. Thus an automobile owner has been held to be liable for the negligent driving of his chauffeur while on his way to a telephone to get orders from his employer, *House v. Fry*, 30 Cal. App. 157, 157 Pac. 500, while going to his father for permission to drive for the employer, *Elliott v. O'Rourke* (R. I.) 100 Atl. 314; while searching for garage keys supposed to have been lost by the chauffeur, *Whimster v. Holmes* (Mo.) 190 S. W. 62; or while trying out a car which he was directed to repair, *Hartnet v. Hudson*, 165 N. Y. S. 1034.

A corporation which furnishes a car to one of its officers for use in connection with the business is not liable for an injury caused by his use of it for personal or social purposes. *Mullia v. YePlanry Bldg. Co.* 32 Cal. App. 6, 161 Pac. 1008. And the foregoing rule has been held to be applicable though the corporation was engaged in the automobile business and the officer had hopes of making a sale to the persons whom he was driving. *Louisville Lozier Co. v. Sallee*, 167 Ky. 499, 180 S. W. 841.

The fact that a person borrowing a car from an automobile company has an agreement with a salesman that he shall receive a part of the commission on any sale made by him, does not make him an agent for whose acts the company is liable. *Premier Motor Mfg. Co. v. Telford* (Ind.) 111 N. E. 645.

A chauffeur is within the scope of his employment while driving for a relative of his employer who is permitted to use the car. *Freeman v. Green* (Mo.) 186 S. W. 1166, wherein it was said: "It is admitted that the chauffeur, who was driving the automobile at the time of the collision, was in defendant's employ; that Thompson was a

member of defendant's household, and had been, by defendant, accorded the privilege of using the automobile for his own business or pleasure when not being used by defendant; and that at the time here in question Thompson was so using the machine with this general consent of defendant. In other words, the chauffeur, defendant's servant, was merely following the general directions of his master in driving the machine for the benefit of a member of the master's household. No one can doubt that in so doing the chauffeur was acting within the scope of his employment, and that defendant must respond for any actionable negligence on his part while in the performance of such duties."

A driver employed by the trip from a garage where the car is kept is acting for the owner while returning to the garage with the car after taking the owner to his home. *Jimmo v. Frick*, 255 Pa. St. 353, 99 Atl. 1005.

The proprietor of a repair garage to whom a car is delivered by the owner is a bailee and not a servant, and the owner is not liable for an injury caused by him while taking the car to the garage, *Perry v. Fox*, 93 Misc. 89, 156 N. Y. S. 369; or while driving it for the purpose of a test after the repairs are made, though an employee of the owner accompanies him, *Woolley v. Doby* (Ga.) 92 S. E. 295.

WHERE DRIVER IS CHILD OF OWNER.

A father is not liable for his child's negligence in the use of an automobile merely because of the relation of parent and child. The liability if any must rest on some actual representation of the parent. *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Sultzbach v. Smith*, 174 Ia. 704, 156 N. W. 673; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876. The authority to represent the father need not be expressed in words but may be implied from conduct, and it is not necessary that the child shall be a hired chauffeur to make the father liable for his negligence. *Denison v. McNorton*, supra.

The recent cases are agreed that where a child drives a car for his father or in the course of the latter's business, the father is liable for any negligent operation of the car. *Morrison v. Clark*, 14 Ala. App. 323, 70 So. 200; *Daggy v. Miller* (Ia.) 162 N. W. 854; *Farnham v. Clifford* (Me.) 101 Atl. 468; *Cutts v. Davison* (Mo.) 184 S. W. 921. But in such a case the father is not liable for an injury occurring during a deviation by the child from the father's business made for his own pleasure. *Jennings v. Okin*, 88 N. J. L. 659, 97 Atl. 249; *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876.

It is likewise undisputed that a father is not liable for an injury caused by the negli-

gent driving of a child who takes the car against his express command. *Sultzbach v. Smith*, 174 Ia. 704, 156 N. W. 673; *Johnston v. Cornelius* (Mich.) 159 N. W. 318.

There is a conflict of authority as to the liability of a parent for the negligent operation of a car by a child whom he permits to use it for his own purposes. One line of cases holds that where a car is kept for the pleasure of the family a child so using it represents the father who is liable for the child's negligence in its operation. *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631; *Lemke v. Ady* (Ia.) 159 N. W. 1011; *Lewis v. Steele*, 52 Mont. 300, 57 Pac. 575; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487. And see the reported case. The rule has been said to rest on the view that "where a father provides an automobile for the purpose of furnishing members of his family with outdoor recreation, the use of the car for such purpose is within the scope of the father's business analogously to the furnishing of food and clothing or ministering to their health." *Denison v. McNorton*, *supra*.

Other recent cases repudiate that view and hold that no liability is ordinarily incurred by a father for the acts of a child whom he permits to use the family automobile for his own pleasure. *Woods v. Clements*, 113 Miss. 720, 74 So. 422; *Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443; *McFarlane v. Winters*, 47 Utah 598, 155 Pac. 437. In *Van Blaricom v. Dodgson*, *supra*, the court said: "This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use and occasionally permits a capable son to use it for his individual convenience ought to be regarded as having undertaken the occupation of entertaining the latter and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question. Not much can be profitably said by way of amplification or in debate of the query whether such a liability would rest upon reasonable principles or whether it would present a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship. The question largely carries on its face the answer, whichever way to be made. Unquestionably, an affirmative answer has been given by the courts of some states. (*Birch v. Abercrombie*, 74 Wash. 486; *Marshall v. Taylor*, 168 Mo. App. 240; *Hays v. Hogan*, 180 Mo. App. 237; *Davis v. Littlefield* [97 S. C. 171] 81 S. E. 487; *Griffin v. Russell* [144 Ga. 275] L.R.A.

1916F 216.) But it seems to us that such a theory is more illusory than substantial, and that it would be farfetched to hold that a father should become liable as principal every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct which, so far as we are aware, has never been applied to other articles than an automobile. We have never heard it argued that a man who kept for family use a horse or wagon or boat or set of golf sticks had so embarked upon the obligation and business of furnishing pleasure to the members of his family, that if some time he permitted one of them to use one of those articles for his personal enjoyment, the latter was engaged in carrying out not his own purposes, but, as agent, the business of his father."

In *Gardiner v. Solomon* (Ala.) 75 So. 621, the court said that whatever might be the rule as to a minor child the negligence of an adult child permitted to use his father's car for his own pleasure imposed no liability on the father. And see *Woods v. Clements*, 113 Miss. 720, 75 So. 119.

If a father permits the use of an automobile by a child who is under the age at which persons are permitted by statute to operate a car the father is liable for any resulting injury. *Walker v. Klopp*, 99 Neb. 794, 157 N. W. 962, L.R.A.1916E 1292; *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134.

EAKIN'S ADMINISTRATOR

v.

ANDERSON.

Kentucky Court of Appeals—March 7, 1916.

169 Ky. 1; 183 S. W. 217.

Automobiles — Liability of Owner — Chauffeur Using Car without Authority.

Where a chauffeur was directed by the owner of an automobile to take it from the garage at a stated time and call at a house, but he started nearly an hour earlier, and in making a detour on an errand of his own an accident occurred at a point twice as far from, and beyond, the place to which he was directed to go as to the garage, having made a side trip of several blocks from the main trip of less than one block, he was not in his master's employ at the time of the accident, and his master was not liable; since while a mere disregard of instructions or deviation

from the line of his duty by servant does not relieve his master of responsibility, if the servant for purposes of his own departs so far from the line of his duty that for the time being his acts constitute an abandonment of his service, the master is not liable. [See note at end of this case.]

Appeal from Circuit Court, Fayette county.

Action by Administrator of Frederick Eakin, plaintiff, against R. T. Anderson et al., defendants. Judgment for defendant Anderson. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Gordon & Laurent, Pitts & McConnico and J. A. Edge for appellant.

Hunt & Hunt, Kimball & Hunter and Hunt & Bush for appellee.

[1] CLARKE, J.—This is an action by the administrator of Frederick Eakin against R. T. Anderson and Allen Hicks to recover damages for the death of said Eakin, who, while riding a bicycle, was killed at the corner of Third and Walnut Streets in the city of Lexington by being run over by an [2] automobile owned by said Anderson while being operated by said Hicks.

At the conclusion of plaintiff's evidence a peremptory instruction was given directing the jury to find for the defendant, Anderson, and this appeal is prosecuted to reverse the judgment dismissing the petition against Anderson, the peremptory having been refused and the case continued as to Hicks.

The facts are these: Hicks was Anderson's chauffeur, and upon the day of the accident had been relieved from duty for the day early in the afternoon, and after being released had made an engagement to call that evening upon a young lady who lived at 155 Walton Avenue in said city. About six o'clock that evening, and after Hicks had made the engagement to call upon the young lady, Mr. Anderson's wife called him over the phone and gave him instructions, her right to do which is conceded, to take Anderson's automobile and go to Second and Broadway at about five minutes to nine to get her brother, Baldwin Respass, and convey him and his guests to and from a reception at the Phoenix Hotel. At eight o'clock that evening Hicks went to the garage on Main Street where the automobile was kept, got the automobile and went to 155 Walton Avenue to inform his young lady friend that he would have to work that night and would be unable to keep his engagement with her.

To reach her home he traveled East on Main Street and North on Walton Avenue, a distance of 7,385 feet. After remaining twenty or thirty minutes at the home of this young lady, Hicks started, by a different route from the one over which he came, to

the home of Baldwin Respass who resided at Second and Broadway, traveling north on Walton Avenue and west on Third Street to its intersection with Walnut Street, a distance of 5,564 feet, when the accident resulting in the death of Eakin occurred.

The distance from Third and Walnut where the accident occurred to Second and Broadway, Respass' home, is 2,363 feet, while the distance between the garage and Second and Broadway is 997 feet. The distance traveled by Hicks from the time he left the garage to the place of the accident is 12,949 feet, and the home of Respass is almost directly between the place of the accident and the garage. The accident occurred somewhere between twenty and ten minutes before nine o'clock.

[3] The question involved upon this appeal is whether Hicks at the time of the accident was the servant of Anderson prosecuting his business, or whether at the time he was acting outside of his employment, and engaged in an affair of his own.

Appellant contends that as Hicks at the time of the accident was on his way to the home of Baldwin Respass for the purpose of performing the service required of him by his master, the relation of master and servant existed, and that the doctrine of *respondet superior* is applicable.

Appellee contends that since Hicks had taken the automobile for his own purpose, and without consent of appellee, and that at the time of the accident was far beyond any reasonable route from the garage to the home of Respass, that the relationship of master and servant did not then exist, and he is not liable for Hicks' acts.

In support of appellant's contention we are cited to *Jones v. Weigand*, 134 App. Div. 644, 119 N. Y. S. 441, and *Geraty v. National Ice Co.* 16 App. Div. 174, 44 N. Y. S. 659, which cases are stated by counsel to be perhaps the leading cases in this country supporting their contention.

In the *Jones* case, *supra*, the defendant's driver was sent with defendant's coach to an undertaker for use at a funeral. According to directions he called for some gentleman, took him to the house of mourning, to the cemetery and then back home. Instead of returning the coach to defendant's stable in King's county, a distance of sixteen blocks by the direct route, the driver took a circuitous route, driving back into Queen's county and going several blocks out of his way, and part of the time in an opposite direction from the stable. He left the coach temporarily for an errand of his own, and upon returning started up the horses, taking no heed of a little child who was playing near the step of the coach, with the result that the child was drawn under the wheels and run over.

Commenting upon this state of facts, the court said:

"The master is liable for acts done by the servant in the course of his employment as such; but mere disregard of instructions or deviation from the line of his duty does not relieve the master of responsibility. Wrongful acts are usually in violation of orders, or in deviation from the strict line of duty. The test is [4] whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions. If the servant, for purposes of his own, departs from the line of his duty, so that for the time being his acts constitute an abandonment of his service, the master is not liable; but, to constitute an abandonment of the service, the servant must be serving his own or some other person's purposes, wholly independent of his master's business. It seems to me that the making of the circuitous route to the stable was at most a deviation, not an abandonment, of the service. While the servant deviated from the direct route, he was nevertheless engaged in taking the coach back to the stable. He combined his own with his master's purposes, but did not wholly abandon his service, except during the time when he was absent from the coach to make his call.

"But, if the foregoing be doubtful, it seems plain that, when the driver returned to the coach for the purpose of taking it back to defendant's stable, he re-entered upon his master's service, and resumed the business which he had temporarily abandoned. It is no answer to this to say that the accident would not have happened if he had not made the call. His carelessness after he had resumed his master's business was the *causa causans* of the accident. The leading English cases (Joel v. Morison, 6 C. & P. 501 [25 E. C. L. 511], and Sleath v. Wilson, 9 C. & P. 607 [38 E. C. L. 249]), are the illustrations of mere deviation from the line of duty, while Mitchell v. Crassweller, 13 C. B. 237 [76 E. C. L. 237], and Storey v. Ashton L. R. 4 Q. B. 476, were held to be cases of a total abandonment of the service. The cases cited by the respondent are not in point, and it is necessary to note only one or two of them. In Cunningham v. Castle, 127 App. Div. 580, 11 N. Y. S. 1057, the defendant's evidence tended to show that the defendant had loaned the automobile to his chauffeur, and that the accident happened while the latter was using it solely for his own purposes. Mitchell v. Crassweller, supra. The evidence in that case tended to show, not deviation merely, but an entire abandonment or departure from the master's business. The coachman was not returning the horse and carriage to the stable, even by a circuitous route, but was using them for purposes of his own. The Massa-

chusetta cases may seem to support the defendant's contention. See McCarthy v. Timmins, [5] 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; Perlstein v. American Express Co. 177 Mass. 530, 59 N. E. 104, 52 L.R.A. 959.

"This case, however, may be distinguished from those by the fact that, when the accident occurred, the servant had performed his own purpose and had resumed his duty to return the coach to the stable. I do not see how the case can be distinguished from Williams v. Koehler, 41 App. Div. 426, 58 N. Y. S. 863, a case in this department, decided on the authority of Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392, except that that was a much stronger case for the defendant than this."

From the above it will be seen that where the existence of the relationship of master and servant existed, a departure of a few blocks from a direct route of sixteen blocks for the servant's own purpose, was held to be a mere deviation, or at the most a temporary abandonment of the service, and that, if an abandonment, the service was resumed the moment the driver had performed his own service, and that at the time of the accident he had resumed the service of the master.

In Geraty v. National Ice Co. case, the drivers of the company's ice wagon were sent with a load of ice to be delivered at the Grand Central Station in New York City. They did not take the direct route, but deviated considerably from it, stopping at 43rd street and Third avenue for their own purposes. When they came back to the wagon a cake of ice slipped off and struck plaintiff. The court in that case said:

"It is the rule, no doubt, that the master is not necessarily relieved from responsibility for an injury resulting from the negligence of his servant simply because the servant is at the time acting in disobedience to the master's order. The question in every case is whether the act he was doing was one in prosecution of his master's business. If the act was one which continued until the termination, would have resulted in carrying out the object for which the servant had been employed, the master would be liable for whatever negligence might take place during its performance, although the servant in doing it was not obeying the instructions of the master, or, although he had deviated from the route prescribed by the master for the purpose of doing some act of his own, but yet with the intention, at the same [6] time of pursuing his master's business. Quinn v. Power, 87 N. Y. 535, 539. The rule, as laid down by the latest cases in the English court, is that a master is responsible for an injury resulting from the negligence of his servant while driving his cart, provided the servant

is at the time engaged in his master's business, even though the accident happens in a place to which his master's business did not call him. But if the journey upon which the servant starts be wholly for his own purposes, and without the knowledge or consent of the master, the latter will not be liable. *Mitchell v. Grassweller*, 13 C. B. 237 [76 E. C. L. 237]; *Storey v. Ashton*, L. R. 4 Q. B. 476. This is also the rule laid down in this State. *Cosgrove v. Ogden*, 49 N. Y. 255. In that case it is said that the test of the master's responsibility for the act of his own servant is whether the act was done while the servant was engaged in the prosecution of the business which he was employed to do. In this case the act that the servant was employed to do was to take this ice from the warehouse to the Grand Central Station. The route taken was not the direct route, but that fact of itself does not relieve the master from his liability. Within the cases above stated, the liability still continues, unless the deviation is made, not in the prosecution of the master's business, but for some different and other purpose. The distinction is well illustrated in the cases of *Cavanagh v. Dinsmore*, 12 Hun (N. Y.) 465, and *Sheridan v. Charlick*, 4 Daly (N. Y.) 338, in which the servant, having been directed to use his master's horse and carriage for a particular purpose, and then to put it up in the stable, instead of doing so, after the master's business had been performed, went off in another direction in the prosecution of his own affairs, and for his own purposes, the defendant was not responsible for it. In this particular case, so long as Sweeney and McQuade were engaged in taking this ice to the Grand Central Station they were engaged in the prosecution of the master's business, and it was liable for their acts. The liability ceased, if at all, only when they were not engaged in taking the ice to the place where they were directed to take it.

"According to the evidence of defendant's witness, they stopped near the corner of Forty-third street and Third avenue for the purpose of unloading some of this ice. Up to that time they had been proceeding with the [7] business in which they were engaged. While they stood there, unloading the ice, if they did so, they were undoubtedly not engaged in the master's business, and were acting in their own behalf, and at that time it is quite clear that the master was not liable for the unloading in which they were engaged. The jury were so instructed by the court. They were told that if the accident happened while these men were unloading the ice the defendant was not responsible.

"We think that the defendant was not entitled to be relieved from liability if the accident happened after Sweeney had taken his

place upon the wagon, and resumed his course toward the Grand Central Station and the accident was caused by the slipping of the ice from the wagon. At that time Sweeney, whatever may have been his object in deviating from the direct route, was again proceeding to deliver ice. He had accomplished whatever purpose he intended to accomplish by the deviation, and had resumed the execution of the work which the defendant had entrusted him to do."

From which it will be seen that in that case the servants after having begun a service for the master, deviated a short distance from a direct route for their own purposes, and after the completion of their own purposes, had resumed the service upon which they were engaged.

In both of these cases it will have been noticed that the deviation or abandonment was from a service for the master, to do which the servants had started out, and that in the first case the deviation was one of a few blocks from a journey of sixteen blocks, and in the latter case it was a short distance from what was probably a trip of long distance compared with the deviation. Both of these cases are distinguished from the case at bar by the fact that the deviations were short in comparison with the whole trip, and by the fact that the trip was begun and ended in the master's service; while in the case at bar, the trip on the servant's business was eight times the distance of the trip he was directed to take for the master, and at the time of the accident he was still more than three times the distance he was directed to go, away from and beyond the place to which he was directed to go; and of still greater importance, he did not start out in the service of the master, but to serve his own purposes.

[8] It may be, and probably is, true, as stated in the *Geraty v. National Ice Co.* case, where a deviation from, or temporary abandonment of the service is involved, that as soon as the servant has completed his private business and starts again an act "which continued until the termination, would have resulted in carrying out the object for which the servant had been employed, the master would be liable for whatever negligence might take place during its performance, although the servant in doing it was not obeying the instructions of the master, or, although he had deviated from the route prescribed by the master for the purpose of doing some act of his own, but yet with the intention, at the same time of pursuing his master's business."

But that rule was not contemplated, and does not apply in our judgment where the trip was undertaken not in the master's service, but without the knowledge or consent of the master, and for the servant's own

purposes, and that the court in the *Geraty v. National Ice Co.* case was of the same opinion is apparent from the following statement made almost immediately following the one last quoted above: "But if the journey upon which the servant starts be wholly for his own purposes, and without the knowledge or consent of the master, the latter will not be liable."

Appellant also cites a number of other cases in which a deviation or an abandonment was involved, in which practically the same principles are announced as in the two cases from which we have quoted above, but we do not consider it necessary to discuss them here, because we agree with the rules therein announced when applied to a case where a deviation from or an abandonment of the service is involved.

We do not deem the case at bar such a case, or as involving a "deviation" or an "abandonment." Without doubt the evidence conclusively shows, with nothing to the contrary, that when Hicks went to the garage and took appellee's automobile upon the evening of the accident involved here, he did so without the consent of the master for his own private business, and that he did not then enter the service of appellee; so that, the question before us is not one analogous to, or covered by the cases cited for appellant.

The question before us is whether or not at the time of the accident the servant had entered his master's [9] service, after having been upon a trip of his own with the master's car without his consent. That this was the question involved was argued by counsel for appellee, who were challenged by counsel for appellant to state when, if that were true, the servant may be said to have entered the service of the master, and we presume that it will be expected of us to answer that question; but we are unwilling to attempt to state at just what point the servant under such circumstances may be said to enter the master's service, because in the first place it would be difficult, if not impossible, for us to state such a rule as would be correct under circumstances not now in contemplation; and, in the second place, because it is unnecessary to the decision of this case.

However, we are convinced that upon this evening Hicks had not entered, and was not engaged in the service of appellee at the time of the accident. He had been directed to drive the car from a definite place to a definite place, a distance of less than a thousand feet, at about five minutes before nine o'clock. He took the car nearly an hour before that time, when but a few minutes would have been necessary in which to make the trip, and his reason for taking it at the time he did was to make an entirely different trip, and for his own purposes. At the time of

the accident he was upon the return portion of his own private journey, incidentally, of course, for the purpose of entering his master's service. As we have stated before, it would be difficult, and we are unwilling to attempt to say just when he would have entered the master's service, but at the time of the accident he was not in the vicinity, nor within the "penumbra," as it has been called in one of the cases, of any reasonable route that could have been employed by him in performance to his master's business. He was then more than twice as far from and beyond the place to which he had been directed to go than if he had never started at all, and we hold that at the time and place of the accident he was engaged in one portion of his own trip. The fact that at that time he had in mind a service to be performed for the master, and was proceeding in a direction that ultimately would have accomplished the master's desires, was merely incidental in this case, and the return from his own private trip so that he might go to work for the master was the matter in which he was then engaged.

[10] Statements of distances to or from a place, or before or after a time are relative statements. In the consideration of which in any case a due sense of proportions must be maintained. A side trip of several blocks from a main trip of sixteen blocks may correctly be called a slight deviation, whereas a side trip of several blocks from a main trip of less than one block might reasonably be regarded as an entirely different proposition; and the taking of an automobile an hour before the necessary time for a required journey of a few blocks is an entirely different proposition from what it would be to take it out of the garage an hour before the necessary time for a journey of many miles; and, while Hicks in this case took the automobile out a little less than an hour before the time reasonably necessary to have taken it, and while at the time of the accident he was not a great many squares away from the place to which he had been directed to take it; nevertheless, in view of the short distance he was required to go in the master's service, we are convinced that his service neither warranted his taking the machine at the time he did, not having it near the place of the accident.

We think our position as stated is warranted upon reason and supported by the principles announced in the following cases: *Tyler v. Stephan*, 163 Ky. 770, 174 S. W. 790; *Fleischner v. Durgin*, 207 Mass. 435, 20 Ann. Cas. 1291, 93 N. E. 646, 33 L.R.A. (N.S.) 79; *Hayes v. Wilkins*, 194 Mass. 223, 80 N. E. 449, 120 Am. St. Rep. 549, 9 L.R.A. (N.S.) 1033; *Danforth v. Fisher*, 21 L.R.A. (N.S.) 93, 75 N. H. 111, 71 Atl. 535, 139

Am. St. Rep. 670; *Patterson v. Kates*, 152 Fed. 481; *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; *Symington v. Sipes*, 121 Md. 313, 47 L.R.A. (N.S.) 662, 88 Atl. 134; and that our conclusion upon the facts here is not out of harmony with the *Jones v. Weigand* or the *Geraty v. National Ice Co.* cases, or any case cited by appellant.

Having reached the conclusion that Hicks at the time and place of the accident was not engaged in the service of appellee, Anderson, it is necessary to discuss the question of Hicks' negligence as the cause of the accident, and it results that it was not error for the trial court to have instructed the jury to return a verdict for appellee.

Wherefore the judgment is affirmed.

NOTE.

The reported case, distinguishing the cases which hold that the owner of an automobile is not relieved from responsibility for the acts of his driver during a temporary deviation from duty by the latter, holds that where a chauffeur, directed to call for his employer at a certain hour, takes the car out of the garage at an unnecessarily early hour and spends the interval in riding for his own pleasure, the employer is not liable for an injury caused by his negligence while so doing. The cases relating to the liability of an automobile owner for the acts of his chauffeur or agent are collated in the note to *Griffin v. Russell*, reported ante, this volume, at page 994.

GOTTSTEIN ET AL.

v.

LISTER ET AL.

Washington Supreme Court—December 10, 1915.

88 Wash. 462; 153 Pac. 595.

Constitutional Law — Amendments — Proposal by Legislature — Journal Entries.

Under Const. art. 23, § 1, providing that constitutional amendments may be proposed in either branch of the legislature, and, if agreed to by two-thirds of the members of each branch, shall be entered on their journals with the ayes and noes thereon, and be submitted to the electors for their approval at the next general election, entries made on the journals, referring to a proposed amendment in the language of its title,

that being sufficient as such, were sufficient without copying such proposed amendment in the journals in full.

Form of Amendment — Singleness.

Const. art. 23, § 1, provides that any amendment to the constitution may be proposed, provided that, if more than one amendment be submitted, they shall be submitted so that the people may vote for or against each amendment separately; article 2, § 1, vests the legislative power in a senate and house of representatives, to be called the legislature of the state; and the seventh amendment approved March 10, 1911 (Laws 1911, p. 136), purporting to directly amend article 2, § 1, substantially repeated its language, and qualified it by adding provisions therein for the exercise of legislative powers directly by the people through the initiative and referendum, and by withholding the veto power of the governor from "measures initiated by or referred to the people." It is held, on objection, that the legislative proposal involved more than one amendment, and at least two separate subjects, that the amendment dealt with but one subject of legislative power, the participation of the people in legislation by direct vote, and that all else was incidental thereto, so that it was properly submitted as one proposition.

Statutes — Enactment — Nature of Veto Power.

While the veto power is ordinarily exercised by the person possessing the executive power, it is not an "executive" but a "legislative" power.

Constitutional Law — Adoption of Amendment — Judicial Power to Review Procedure.

The courts have the power to declare void any attempted amendment to the constitution which is not adopted as prescribed by the constitution itself, and it is their duty to do so when the want of such prerequisites is of a substantial nature, and such that the court can judicially know that there has been a want thereof.

Judicial Notice — Procedure for Adoption of Constitutional Amendment.

Const. art. 23, relating to amendments, provides that the legislature shall cause amendments to be submitted to the people, to be published at least three months next preceding the election in some weekly newspaper in every county where a newspaper is published throughout the state. In an action to enjoin the governor and state and county officers from enforcing initiative measure No. 3 (Laws 1915, p. 2), it was contended that the seventh amendment to the constitution had not been lawfully submitted, in that publication was defective because not published in several counties for the required period "next preceding" the election thereon. It is held that, so far as officially recorded facts were concerned, the court judicially knew only that the legislature of 1911 proposed the seventh amendment; that such proposal was duly evidenced by proper entries on the senate and house journals; that the act provided for publication of the

amendment prior to the election, as required by the constitution; that, on a canvass showing its adoption, the governor proclaimed the amendment to have been adopted and to have become part of the constitution; that it could not judicially notice facts touching the sufficiency of its publication prior to its adoption; and that, as all the facts within its knowledge showed its lawful adoption, it could not say that publication was defective, or that it had not been duly submitted to the people.

[See note at end of this case.]

Same.

In such case the court will conclusively presume that the publication was made according to the constitutional requirements by those to whom the constitution and statutes enacted in pursuance thereof intrusted such duty.

[See note at end of this case.]

Same.

In such case neither the stipulations nor admissions of counsel can bring facts within the sphere of judicial notice which in law did not belong there.

[See note at end of this case.]

Matters Judicially Noticed — Notoriety.

The limits of "judicial notice" cannot be prescribed with exactness, but notoriety is, generally speaking, the ultimate test of facts sought to be brought within the realm of judicial notice; in general, it covers matters so notorious that a production of evidence would be unnecessary, matters which the judicial function supposes the judge to be acquainted with actually or theoretically, and matters not strictly included under either of such heads.

Initiative and Referendum — Procedure — Judicial Notice.

Const. Amend. 7, approved March 10, 1911 (Laws 1911, p. 136) requires the legislature to provide methods of publicity of all laws and amendments to the constitution referred to the people so that each voter of the state shall receive the publication at least 50 days before the election, and that any initiative measure shall become a law if approved by a majority of the votes cast thereon. Laws 1913, p. 418, enacted pursuant thereto, provides by section 29 that not less than 55 days before any election on initiative measures the secretary of state shall mail each voter a copy of the pamphlet containing the measure, and by section 30 that votes thereon shall be canvassed by the regular election officers, and that within 30 days after election the secretary of state shall canvass the vote and certify the result to the governor, who shall proclaim measures approved by a majority equal to one-third of the total vote cast to be the law of the state. In an action to enjoin the governor and state and county officers from enforcing initiative measure No. 3 (Laws 1915, p. 2), prohibiting the manufacture, keeping, sale, and disposition of intoxicating liquors, it was contended that the measure had not been lawfully submitted or voted upon. It is held in the absence of

Ann. Cas. 1917D—64.

constitutional or statutory provisions for preserving any official record evidence or facts showing sufficiency of publication that, while the court judicially knew that the measure was submitted by the general election, that a majority of votes were for its adoption, that the governor had proclaimed the result of the canvass, and declared it a law, it could not judicially know any facts touching the sufficiency of the publication, and hence could not determine its sufficiency.

[See Ann. Cas. 1916B 819.]

Constitutional Law — Adoption of Amendment — Number of Votes Required.

Under Const. Amend. 7, approved March 10, 1911 (Laws 1911, p. 136), providing that initiative measures should become effective if approved by a majority of votes cast, if the votes cast equaled one-third of the total votes cast at such election, it is held that the term "votes cast at such election," meant the same as "number of voters voting at such election," and that since the court judicially knew that more than one-third of the voters voting on the amendment voted for its adoption, it was constitutionally adopted.

Judicial Notice — Number of Voters in State.

The court judicially knows, as matter of common knowledge, that there are not 900,000 electors in the state of Washington.

Statutes — Effect of Partial Invalidity.

Under Const. Amend. 7, approved March 10, 1911 (Laws 1911, p. 136), providing for the initiative and referendum and that an initiative measure shall be in operation after the thirtieth day after the election, initiative measure No. 3 (Laws 1915, p. 2), prohibiting the manufacture, keeping, sale, etc., of intoxicating liquors, before any attempt to enforce its provisions prior to January 1, 1916, even if violative of the amendment by reason of the postponement of its operation, would have no effect upon the constitutionality of other provisions thereof, as section 26 expressly so declares.

[See Ann. Cas. 1916D 9.]

Intoxicating Liquors — Validity of Prohibition.

Initiative measure No. 3 (Laws 1915, p. 2), prohibiting the manufacture, keeping, sale, and disposition of intoxicating liquors, except in certain cases, approved by popular vote at general election of 1914, does not violate the equal privileges and immunities provisions of the federal or state constitutions.

Same.

Such initiative measure does not violate the equal protection of the laws provisions of the state and federal constitutions.

Webb-Kenyon Law — Effect on State Legislation.

Such initiative measure is not invalid as an interference with interstate commerce, since the Webb-Kenyon act (Act March 1, 1913, c. 90, 37 Stat. 699 [4 Fed. St. Ann. 2d ed. 593]) divests intoxicating liquors of their interstate character in so far as the power of the state to regulate the sale and dispo-

sition thereof and the shipment into the state for that purpose is concerned.

[See Ann. Cas. 1915D 1171.]

Same.

The Webb-Kenyon law, prohibiting the transportation of liquors from one state into another, to be received, kept, or used in violation of the law of the latter state, thereby divesting intoxicating liquors of their interstate character in so far as the power of the state to regulate the sale or disposition thereof and shipments into the state for that purpose is concerned, is valid.

Appeal from Superior Court, Thurston county: WRIGHT, Judge.

Action by J. L. Gottstein et al., plaintiffs, against Ernest Lister, Governor, et al., defendants. Judgment for defendants. Plaintiffs and interveners appeal. The facts are stated in the opinion. **AFFIRMED.**

Preston & Thorgrimson and Donworth & Todd for appellants.

The Attorney General, John H. Powell and L. L. Thompson for respondents.

Dudley G. Wooten and T. D. Rockwell for interveners.

Piles, Howe & Carey, amici curiae.

[465] PARKER, J.—The plaintiffs, J. L. Gottstein et al., and the interveners, Griffin & Mork et al., seek to have the state and county officials enjoined from enforcing the provisions of initiative measure No. 3, prohibiting the manufacture, keeping, sale and disposition of intoxicating liquors, except in certain cases, approved by vote of the people at the general election of November 3, 1914. The cause was submitted to the superior court upon the pleadings and a statement of facts agreed upon by counsel for the respective parties. After hearing argument of counsel upon the record so made, the superior court rendered judgment in favor of the defendants, dismissing the complaints of the plaintiffs and interveners, from which they have appealed to this court.

The contentions made in the superior court by counsel for appellants, as they are also made here, are, in substance: [466] (1) That the seventh amendment to our state constitution, providing for the initiative and referendum, was not legally submitted to and adopted by the people, and is, therefore, not a valid part of the constitution so as to furnish any authority for the adoption of initiative measure No. 3 by vote of the people; (2) that, if the seventh amendment to the constitution be a valid part thereof, initiative measure No. 3 was not legally submitted to and adopted by the people so as to become an existing law, aside from the constitutionality of its provisions; and (3) that initiative

measure No. 3 is unconstitutional and void, especially in that it violates the equal privileges and immunities, and equal protection of the laws, guaranties of the state and Federal constitutions, and also in that it interferes with interstate commerce.

Appellants, Gottstein et al., are now, and for many years past have been, lawfully engaged in the wholesale liquor business in Seattle, and have a large stock of goods on hand and a large amount of capital invested in their business. If enforced, the provisions of initiative measure No. 3 will compel the discontinuance of their business in this state and result in large financial loss to them. They prosecute this action in behalf of themselves and all others similarly situated who may desire to join as plaintiffs therein. Appellants, Griffin & Mork et al., are severally the owners of, and engaged in operating, hotels in several of the cities of this state, being members of a voluntary organization known as the "Washington State Hotel Association." They come into the cause by complaint in intervention in which they all join as plaintiffs, alleging facts relative to their business, their investments therein, their lawfully dealing in intoxicating liquors as a part thereof, and the compelling of the discontinuance of that portion of their business, resulting in their large financial loss if the provisions of initiative measure No. 3 be enforced, substantially as alleged by the original plaintiffs and appellants, J. L. Gottstein et al. No contention is made by counsel for respondents that the existing business [467] and property interests of appellants here involved and the threatened financial loss to them by the enforcement of initiative measure No. 3 is not such as entitles them to the relief prayed for in this form of action, if their contentions touching the merits of the controversy be well founded.

The contention of counsel for appellants first in natural order is that the proposal by the legislature of the seventh amendment to the constitution, providing for the initiative and referendum, was not lawfully evidenced by proper entries on the journals of the senate and house of representatives, as provided by article 23 of the constitution relating to amendments thereto. This contention, we think, requires but little notice here, since the entries made on the senate and house journals of the proposal of this amendment were substantially the same as those made in the proposal of the eighth amendment to the constitution providing for the recall, which was held by us in *Cudihee v. Phelps*, 76 Wash. 314, 136 Pac. 367, to comply with the requirements of article 23 of the constitution. The question was reviewed at length in that decision, and we adhere to the conclusion there reached that entries

made on the journals, referring to a proposed amendment in the language of the title to the proposing act, the title being sufficient as such, satisfies the requirements of article 23 of the constitution, without copying in the journals such proposed amendment in full. We conclude that the seventh amendment did not fail of lawful adoption for want of proper entries on the senate and house journals.

Did the seventh amendment to the constitution fail of legal adoption because of its proposal and submission to the people as one amendment? It is so contended by counsel for appellants. Section 1, article 23, of the constitution reads in part as follows:

"Any amendment or amendments to this constitution may be proposed . . . Provided, that if more than one amendment be submitted, they shall be submitted in such manner [468] that the people may vote for or against such amendments separately."

The seventh amendment purports to amend directly only section 1 of article 2 of the constitution, the whole of which, prior to the amendment, read as follows:

"The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington."

This language is repeated in substance in the seventh amendment, and is qualified by additional provisions therein providing for the exercise of legislative power directly by the people through the initiative and referendum, which amendment also withholds the veto power of the governor from "measures initiated by or referred to the people." Laws of 1911, p. 136. These, it is insisted, are three, or at least, two subjects, so separable each from the other that they constitute, in substance, as many different amendments, and hence must "be submitted in such manner that the people may vote for or against such amendments separately," to the end that the provisions of article 23 of the constitution be not violated. Section 3 of the act proposing the amendment provides for the submission thereof to the people as a single amendment. Laws of 1911, p. 140.

There is then presented in this branch of the case the question, Did this proposal of the legislature involve more than one amendment within the meaning of the provision of article 23 of the constitution above quoted? The argument of counsel for appellants proceeds largely upon the theory that the initiative and referendum are separate subjects and look to the attainment of separate objects, and the fact that an elector might consistently favor one and oppose the other is controlling as to their separateness of subject-matter and purpose. Now, since the constitution does

not in terms prescribe what shall be regarded as one amendment for the purpose of enabling the electors to vote thereon separately, the [469] question is manifestly to be answered by a consideration of the inherent nature of any given proposed amendment. The logic of counsel's contentions would seem to lead to such a minute subdivision of matters liable to become the subject of constitutional amendment as to practically refine out of existence the power of the people to amend the constitution. Almost any conceivable amendment to the constitution is capable of being subdivided into separate propositions of such nature that an elector might consistently favor the adoption of some and the rejection of others. As we proceed we think it will be found that the singleness of a given proposition beyond division is not the ultimate test; but that the question must be viewed in a broader aspect as one largely of common sense, and in a spirit of deference to the discretion of the legislature, much as we defer to legislative discretion in restricting a bill to one subject and expressing such subject in the title thereof, as required by section 19, article 2 of the constitution, though possibly the latitude of the legislature is hardly so broad in determining what constitutes one amendment to the constitution.

The question of what constitutes one amendment within the meaning of a constitutional provision like ours, of which there are many in the Union, seems to have been first considered by the supreme court of Wisconsin in 1882 in *State v. Timme*, 54 Wis. 318, 11 N. W. 785. There was drawn in question in that case a constitutional amendment the provisions of which are summarized by the court on page 326 as follows:

"It *first* provides that members of the assembly shall be chosen biennially by single districts, on the Tuesday succeeding the first Monday of November after the adoption of this amendment; *secondly*, that the senators are to be chosen at the same time and in the same manner as the members of the assembly, except that they shall be chosen alternately in the odd and even numbered districts, and that all senators elected after the adoption of the amendment shall hold their offices for four years, and that the senators elected or holding over [470] at the time of the adoption of the amendment shall continue in office till their successors are duly elected and qualified; *thirdly*, that the legislature shall meet at the seat of government, at such time as shall be provided by law, once in two years, and no oftener, etc.; and *fourthly*, that their compensation, by way of salary, shall be \$500;"

This, it was insisted, constituted at least four amendments and should have been submitted as four separate propositions, in order

to comply with the constitutional requirement that "if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately." Answering this contention, Justice Taylor, speaking for the court, said:

"We think amendments to the constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other. Tested by this rule, the propositions submitted to the electors contained but one amendment. It is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from annual to biennial sessions of the legislature. . . . The question of compensation was, perhaps, less intimately and necessarily connected with the change to biennial sessions, yet it was clearly connected with it. The duties and service having been somewhat enlarged, it was proper that the compensation should be increased. We do not contend that the legislature, if it had seen fit, might not have adopted these changes as separate amendments, and have submitted them to the people as such; but we think, under the constitution, the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and they are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose."

In *State v. Mason*, 43 La. Ann. 590, 9 So. 776, there was drawn in question a constitutional [471] amendment relating to lotteries and the distribution of revenues derived therefrom in fixed proportions, to the public schools, to levees, to charities, to pensions, to sanitary purposes, and to the general fund of the state. Contention was made against the amendment the same, in substance, as is here made, the constitutional provision invoked being, in substance, the same. The amendment was held to have been constitutionally submitted as one proposition, in that it related to one general subject, to wit, lotteries. The court reached its conclusion evidently upon the authority of the Wisconsin case above noticed, quoting in part with approval from that portion of the decision above quoted by us.

In *State v. Herried*, 10 S. D. 109, 72 N. W. 93, the question was presented by the challenging of a constitutional amendment which provided for a change in the administration of the several educational institu-

tions of the state, concentrating their administration into a central board from that of local boards. The constitutional provision involved was in the exact words of our own. Answering the contention that there was, in substance, more than one amendment and that the submission to the people should have been as separate propositions, Judge Haney, speaking for the court, said:

"A glance at the official ballot shows that each elector was compelled to vote for or against all of the proposed changes. If any effect be given to the title of the joint resolution, it would seem to indicate that the legislature regarded it as embracing more than one amendment, and the inference arises that those who prepared the ballots failed to carry out the legislative intent. But conceding this to be so, if, as a matter of law, but one amendment is included in the resolution, the error of those who prepared the ballots should not be permitted to defeat the proposed change. Then the question is presented: Does the resolution contain more than one amendment, within the meaning of the constitution? It is contended with much apparent reason that two distinct objects were intended, namely, the abolition of the trustees, and a change in the number and powers of the regents; that [472] these objects are independent of each other; that either might have been adopted without adopting the other; and that there are numerous reasons why the elector might have desired one change, and not the other. The defect in this argument consists in substituting for the real object or purpose one of its incidents. Control of the state educational institutions is the subject to which the proposed amendment relates. Its purpose or object is to place such institutions under the control of a single board. The membership of such board, its powers, and the abolition of local boards, are but incidental to and necessarily connected with the object intended. Hence we conclude that only one amendment was submitted. It must be conceded that courts and lawyers may easily differ regarding the result reached herein. The question is involved in serious doubt. Such being the situation, the court invokes the well-recognized rule, applicable here, as in cases where the constitutionality of statutes is brought in question, and sustains the amendment, because it does not plainly and palpably appear to be invalid."

The question was similarly presented to the supreme court of Georgia in *Hammond v. Clark*, 136 Ga. 313, 324, 71 S. E. 479, 38 L.R.A.(N.S.) 77, wherein it was disposed of by Justice Lumpkin, speaking for the court, in part as follows:

"It was contended that the proposed amendment which was submitted to the people for

ratification contained several distinct propositions, and that each of these constituted in effect a separate amendment, and should have been separately submitted. The constitution provides, that, 'When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately.' This amendment was to a single paragraph of the constitution. While the amendment included more propositions than one, they were not wholly distinct and separate, or in regard to different subject-matters, but all tended to carry out one general purpose, and dealt with a single subject-matter—the salaries of judges in certain judicial circuits. It is true that it dealt with those salaries both in the past and in the future, but that is not a sufficient basis for a court to hold it was necessary for the legislature to have proposed two distinct amendments on [473] that subject, instead of one. It was argued that some of the voters might have been willing to increase the salary for the future, but not to ratify its payment in the past (this court having held that the legislative provision for payment of the increase of salaries from the county treasuries was unconstitutional), and that the two things should have been separated. Had the legislature seen fit to divide the two propositions in regard to the salaries of such judges, and to have submitted them separately, we do not say that they might not have done so. But we cannot hold that they were obliged to do so. Almost every amendment to the constitution or to a legislative act involves more than a single simple proposition."

In *Jones v. McClaughry*, 169 Iowa 281, 151 N. W. 210, there was drawn in question a constitutional amendment providing for the organization of grand juries, and also providing that the general assembly might provide for holding persons to answer any criminal offense without the aid of a grand jury. Answering the contention that this was the submission of two amendments as one, Justice Ladd, speaking for the court, said:

"The particular criticism of the amendment is that it is in reality two amendments, even though designated as one, and therefore its submission as one was in violation of section 2 of article 10 of the constitution directing that: 'If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.'"

"The importance of this provision was referred to in *Lobaugh v. Cook*, 127 Ia. 181, 102 N. W. 1121. Its purpose is to exact the submission of each amendment upon its merits alone, and thereby secure the free and independent expression of the will of the people

thereon. Incongruous matter and that having no connection with the main subject is excluded, and the evil of loading a meritorious proposition with another of doubtful propriety obviated. The elector in approving or rejecting cannot be put in a position where he may be compelled, in order to aid in carrying a proposition, also to vote for another which, if separately submitted, he would reject. But this does not mean that every proposed [474] change shall necessarily be analyzed into its minutest component parts, and these separately submitted. All intended is that but one subject be dealt with in a single amendment. 'If,' as said in *Lobaugh v. Cook*, 'the amendment has but one object and purpose, and all else included therein is incidental thereto, and reasonably necessary to effect the object and purpose contemplated, it is not inimical to the charge of containing more than one amendment.'"

In *State v. Alderson*, 49 Mont. 387, Ann. Cas. 1916B 39, 142 Pac. 210, we have a case exactly in point. The constitutional amendment there involved is, in substance, the same as that now before us, providing for the initiative and referendum. The provisions of the Montana constitution touching the submission of amendments thereto separately, reads:

"Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately." Montana Const. art. 19, § 9.

In holding that the amendment providing for the initiative and referendum is one amendment within the meaning of this constitutional provision, the court observed:

"Only one provision of the constitution was changed, to wit, the provision by which the entire legislative authority of the state had been lodged in the legislative assembly. This fact is not of great importance, but it is important that but one change was made, viz.: To express a reservation of legislative authority in the people. That such authority could be used in two ways—designated, respectively, as the power to propose and enact laws, and the power to approve or reject laws enacted by the legislative assembly—does not suggest disconnection, but enumeration of the parts of a whole. Nor is the fact that a greater proportion of the electorate is required for the initiative than for the referendum necessarily significant of more than that one mode of using the reserved authority is deemed of greater value than the other. These provisions are purely detail, which might, without injury to the amendment, have been left for the legislative assembly to establish. So, too, the referendum, while in political effect a veto, is not such in the sense in which that [475] term is used in our consti-

tution, and is not an invasion of the executive function. Under it the people proceed toward bills enacted by the assembly, expressing assent or dissent, in essentially the same manner as the senate upon a bill which has passed the house; they are an additional body through which acts of the legislature must pass in certain cases, and disapproval, when it occurs, is purely legislative.

"It is undoubtedly true that, as the amendment was submitted, persons who approved the initiative, and not the referendum, or *vice versa*, were obliged to take both or neither. But this circumstance is not fatal if they were both parts of a single plan or general purpose; such divergencies of opinion are conceivable as to any amendment involving particularization. 'The unity of object is to be looked for in the ultimate end, and not in the detail or steps leading to the end.'

"After all is said, then, the question is an historical one. Much is made of the fact that the initiative is wholly foreign to our institutions, whereas the referendum has been with us, in one form or another, since early ages; but the referendum established by the amendment in question is the Swiss referendum, and is not the plebiscite resorted to in American practice from the earliest times for the settlement of constitutional or local questions; and while it is a fact that the initiative is the later invention, and does not prevail in all the communities which have the referendum, a very brief glance into political history will disclose that the initiative and referendum came to us together and at a time when they were considered as essentially complementary. It will readily be recalled that for at least fifteen years prior to 1916 distrust of legislatures as truly representative of popular will was widespread, and there was vigorous agitation for a corrective. The press teemed with discussions of the initiative and referendum, always bracketed together, as a supposed panacea; many states adopted them as one, and there cannot be the slightest doubt that to the common understanding of our people they presented the aspect of a single plan to control the power of the legislature through the means of 'direct legislation.' 'See Oberhelzer on Referendum, Chap. 15; Phelps on Initiative and Referendum.) By them, as the supreme court of California has said, the people reserved to themselves supervisory control of legislation (In re Pfahler, 150 Cal. 71, 76, 77, 11 Ann. Cas. 911, 11 L.R.A. (N.S.) [476] 1092, 88 Pac. 270). They are the positive and negative poles of the same magnet—opposite sides of the same shield."

This court has not had occasion to notice this provision of our state constitution, but in the case of *State, etc. v. Riplinger*, 30

Wash. 281, 70 Pac. 748, a similar provision in the freehold charter of Seattle was involved. The charter provided, among other things,

"That if more than one amendment be submitted at the same general election the same shall be submitted at such election in such manner that each proposed amendment may be voted on separately without prejudice to the others."

The charter was amended by submitted to the people, as a single proposition, an article relating to "the library department." This proposed amendment constituted several sections providing in some considerable detail for the administration of that department. While it related to that one general subject, it was plainly susceptible of being divided into several propositions so that an elector might consistently favor one and oppose the others. It was held to be one amendment within the meaning of the charter provision above quoted requiring amendments to be submitted to the people separately. Justice Dunbar, speaking for the court, said:

"As is well said by the respondents, 'There is no more reason in case of amendment in requiring each section to be separately submitted than for requiring each sentence to be so submitted;' that is the unity of subject that is demanded by the charter provision requiring each amendment to be submitted separately. It appears evident from the language of the amendment that it was the intention that the new provision, as a whole, should be substituted in lieu of the old provision, as a whole. That being so, the voter was not deprived of the right to exercise his choice in voting upon the amendment."

The following decisions of the courts involving constitutional amendments made under constitutional provisions in substance the same as our own are in harmony with these [477] views: *Gabbert v. Chicago*, etc. R. Co. 171 Mo. 84, 70 S. W. 891; *People v. Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34; *People v. Prevost*, 55 Colo. 199, 134 Pac. 129; *Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237; *State v. Silver Bow County*, 34 Mont. 426, 87 Pac. 450; *Lobaugh v. Cook*, 127 Ia. 181, 102 N. W. 1121.

There have come to our notice but two decisions of the courts which we regard as being opposed to the views expressed in the above noticed decisions. They are *State v. Powell*, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652, and *McBee v. Brady*, 15 Idaho 761, 100 Pac. 97. The Powell case seems to have been expressly overruled in the later case of *State v. Jones*, 106 Miss. 522, 64 So. 241, 469 McBee v. Brady may possibly be distinguished from the decisions above noticed and from the case before us in the number of subjects

covered by the proposed amendment to the constitution of Idaho submitted as one proposition. If not so distinguishable, we think it, as well as the Powell case, must be regarded as being opposed to the great weight of authority.

In *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C 200, a question akin to that before us was presented. The legislature submitted to the people, as a single proposition, an entirely new constitution. This, it was held, could not be done under the constitutional power of the legislature to submit amendments only, and those separately. Manifestly, this was the submission of more than one amendment as a single proposition.

In *Lozier v. Alexander Drug Co.* 23 Okla. 1, 99 Pac. 808, there was an attempt to submit a constitutional amendment and the question of approval or rejection of an act of the legislature as a single proposition. This was held to be an unlawful submission. This decision plainly is of no aid to the solution of the problem here involved.

[478] It is strenuously argued that the initiative and referendum are separate subjects within the meaning of our constitutional provision requiring different amendments to be submitted separately, because the initiative is purely legislative and the referendum is negative in character, partaking more of the veto power, which power is ordinarily vested in the executive. We have seen, in the above quotations from the Montana court in *State v. Alderson*, supra, that that court regards the referendum more in the nature of a method of referring a bill to another house or branch of the legislature, as a bill goes to the senate or the house after being introduced and passed in the other body, rather than as an exercise of a power likened to the veto. However this may be, it is elementary that, while the veto power is ordinarily exercised by that person possessing the executive power, it is not an executive power, but a legislative power. Speaking of the king's prerogatives, among which is that of the veto power, Blackstone tells us in Book 1 at page 261:

"First, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament as he judges improper to be passed."

Judge Cooley in his *Principles of Constitutional Law*, at pages 51 and 52, says:

"The power to veto legislation, which is conferred upon the president, makes him in effect a third branch of the legislature. The power is legislative, not executive, and the questions presented to his mind are precisely the same as those the two houses of Congress must determine in passing a bill. Whether

the proposed law is necessary or expedient, whether it is constitutional, whether it is so framed as to accomplish its intent, and so on, are questions transferred from the two houses to the president with the bill itself."

In *Black's Constitutional Law*, at page 113, that learned author observes:

"This power vested in the president is not executive in its nature, but essentially legislative. It makes him, in effect, [479] a branch of Congress, though only to a limited and qualified extent."

In the text of 36 Cyc. 958, we read:

"Under the system of government adopted in this country the chief executive, either the president or a governor, is a part of the law-making power."

Numerous authorities are there collected showing that the real nature of the veto power is legislative.

These considerations, it seems to us, render it plain that the seventh amendment to our constitution, vesting legislative power in both the legislature and the people, and withholding from the governor the veto power as to initiative and referendum measures, deals with the one subject of legislative power, and that such vesting of that power, and, incidentally thereto, the defining of the manner and means of its exercise, is the one sole object and purpose of the amendment. That it could have been submitted to the people as more than one proposition, to our minds argues only that such different possible propositions have to do only with matters incidental to the one purpose. The fact that the mode of exercising the power by referendum is negative, or that it might be even regarded as a veto power, does not change the fact that such power is legislative. So, in its final analysis, the language added to section 1 of article 2 of the constitution by the seventh amendment provides only for the participation by the people in legislation by their direct vote. All else found in the amendment is but incidental to this object and purpose. The amendment is to but one section of the constitution, it deals with one subject and looks to the accomplishment of one purpose.

We conclude that the seventh amendment to the constitution did not fail of lawful adoption because of the fact that it was submitted to the people as one proposition.

It is contended by counsel for appellant that the seventh amendment to the constitution was not lawfully submitted to [480] the people, in that it was not published prior to the election at which it was voted upon, as required by that portion of article 23 of the constitution reading as follows:

"The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months

next preceding the election, in some weekly newspaper. in every county where a newspaper is published throughout the state."

It is insisted that the publication of the proposed amendment was defective in several of the counties of the state, in that it was not published therein the required period "next preceding" the election at which it was voted upon. The facts showing this claimed defect in the publication are sought to be brought before us by stipulation of counsel for the respective parties to this action, counsel for respondents reserving, however, their objections to the relevancy of such facts and to the court taking judicial notice of them. This branch of the case, to our minds, presents the most difficult problem in the entire controversy, the importance of the correct solution of which cannot be overestimated. Viewed as a fundamental principle of orderly constitutional government, nothing seems more important than that the mandates of the constitution touching the procedure to be followed in bringing about changes therein by amendment should be followed by those to whom such mandates are directed. It may seem equally important that the courts should declare void and of no effect any attempted amendment to the constitution which is not attended by those things prescribed by the constitution itself as prerequisite to the bringing about of its amendment. This, it is now beyond question, the courts have power to do; more, it is their solemn duty to do, when the want of constitutional prerequisites is of a substantial nature *and such that the courts can judicially know that there has been such want of constitutional prerequisites.*

Important as these things are, and plain as the power and duty of the courts may be in such cases, it is of no less consequence [481] that the courts must never declare void and of no effect a constitutional amendment when *all of the facts which are within the realm of the judicial knowledge* touching its submission and adoption by the people point to its lawful submission and adoption, whatever other facts may exist pointing to the contrary. If it be the duty or privilege of the courts to look to facts beyond the realm of judicial knowledge, which, generally speaking, is limited to facts evidenced by public records and facts of general notoriety, in determining the question of the lawful existence of a constitutional amendment, then, indeed, does the existence of such an amendment rest upon an uncertain foundation, carrying in its supporting strength according as each litigant, in innumerable possible cases, might be able to prove or disprove facts outside the realm of judicial knowledge touching details of its submission and adoption by the people. To give sanction to such a doctrine would leave the lawful existence of this and

every other amendment to our constitution an open question, to be tried out as a question of fact as many times as there might be different cases drawing its existence in question, even a generation hence. Surely the existence of our written law, whether constitutional or statutory, does not rest upon such a precarious support.

The arguments of counsel on both sides proceed upon the theory that, in so far as the court is called upon to notice facts in determining the question of the legal existence of the seventh amendment, only such facts are proper to be considered as the court can judicially notice. Manifestly, the court could not proceed upon any other theory, since this is not in any sense a trial of an issuable fact. The facts here controlling must be regarded as absolute facts, not tentative, *prima facie* or questionable facts; not facts to be proven or in any sense the subject of proof, but facts which the court is bound to judicially know as absolutely true or not true, and from which it must say that the seventh amendment has or [482] has not become a part of our constitution. In other words, the answer to our problem must be absolute. Our answer must, at least theoretically, rest upon facts capable of being judicially noticed without proof, which will furnish the same answer at all times to all men, though the courts may never have spoken upon the subject. This being the nature of our problem, in so far as facts enter as an element into its solution, it seems to follow, as a matter of course, that stipulations or admissions of counsel as to what the facts are can be of no controlling force whatever, though possibly the court may look to such stipulation or admission to refresh its memory, as calling its attention to facts within the realm of judicial knowledge, as it would look to an almanac to be reminded of the day of the month, or to a historical work to be reminded of the date of some prominent historical event of such notoriety as to come within the realm of judicial knowledge, or to official records of public acts. Stipulations or admissions of counsel cannot bring facts within the sphere of judicial knowledge which in law do not belong there. Such is the well settled rule. Among the decisions so holding, we note the following: *Chosen Freeholders v. Stevenson*, 46 N. J. L. 173; *Legg v. Annapolis*, 42 Md. 203; *Atty-Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Fullington v. Williams*, 98 Ga. 807, 27 S. E. 183; *State v. Boise*, 5 Idaho 519, 51 Pac. 110; *Harrison v. People*, 57 Colo. 137, 140 Pac. 203. We proceed, then, in the light of judicial knowledge alone, in so far as we are to be controlled by facts touching the proper submission of the seventh amendment to our constitution.

If we were asked to look alone to facts which the constitution or statute requires to be evidenced by public record, our task would be freed from much of its attendant difficulty; but counsel for appellants ask us to take judicial notice of facts which they claim show defective publication of the seventh amendment in the several counties of the state prior to the election at which it was voted upon. Now, neither the constitution [483] nor the statute of our state requires the publication of a proposed amendment to the constitution to be evidenced by any official record thereof to which the court could look and judicially know that the publication prescribed has or has not been made. So far as officially recorded facts are concerned, it may be said that we know judicially that the legislature of 1911 passed an act proposing the seventh amendment to the people at the general election of 1912; that such proposal was duly evidenced by proper entries upon the journals of the senate and house of representatives; that, by section 2 of that act, the legislature provided for publication of the amendment prior to the election, as required by article 23 of the constitution; that at that election there were cast for the adoption of the proposed amendment 110,110 votes, and against its adoption, 43,905 votes; and that, upon a canvass of the election returns, on file and of public record as the law requires in the office of the secretary of state, showing this result, the governor, on December 28, 1912, issued his proclamation as required by article 23 of the constitution, in which he proclaimed the fact that "said amendment has been adopted, and that the same is now a part of the constitution of the state of Washington."

There may be other officially recorded facts we could judicially notice if necessary, but no officially recorded fact, that is, no fact required by constitution or statute to be recorded, and no fact of such notoriety as to bring it within the realm of judicial notice, answers the question of whether the publication of the proposed amendment, prior to the election at which it was voted upon, was or was not made as the constitution prescribes. By what process of reasoning, then, are the facts determinative of this question to be noticed by the courts? If outside the realm of judicial notice, must we not conclusively presume that the publication was made in obedience to the requirements of the constitution by those to whom the constitution and statutes, enacted in pursuance thereof, intrusted such duty? An affirmative answer to this [484] question seems inevitable, unless the facts are to be judicially noticed by the courts upon the ground of notoriety. This seems impossible in view of the nature of the facts which it is sought to have us judicially notice.

The limits of judicial notice are not capable of being prescribed in general terms with any degree of exactness; but it seems plain from the authorities that notoriety is, generally speaking, the ultimate test when facts sought to be brought within the realm of judicial notice are of the nature we are here asked to notice. In 1 Greenleaf on Evidence (16th ed.) p. 8, it is said:

"The general principle of judicial notice is simple and natural enough. In general, it covers (1) matters which are so notorious that the production of evidence would be unnecessary; (2) matters which the judicial function supposes the judge to be acquainted with, either actually or in theory; (3) sundry matters not exactly included under either of these heads."

Professor Jones in his Commentaries on Evidence, vol. 1, § 105, observes as follows:

"General rules have often been prescribed for determining what facts are, and what are not, matters for judicial cognizance, yet such rules are necessarily too vague and general in their character to afford very valuable aid to the practitioner. Certain facts may be said to be the subject of judicial notice because they are part of the *law of the land*, which is presumed to be generally known. Other facts may be properly the subject of judicial notice, because they relate to the organization and *duties of the court* and its officers, and hence may be said to be peculiarly within the cognizance of the judge. But when we pass from facts of the character already mentioned, the principal guide in determining what facts may be assumed to be judicially known is that of *notoriety*."

In Wade on the Law of Notice, at § 1403, we read:

"The classes of facts of which notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific and artistic, in addition to a wide range [485] of matters arising in the ordinary course of nature, or the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition."

In Bouvier's Law Dictionary (Rawle's 3d Revision), at page 1734, judicial notice is defined as follows:

"A term used to express the doctrine of the acceptance by a court for the purposes of the case, of the truth of certain notorious facts without requiring proof.

"It is the process whereby proof by parol evidence is dispensed with, where the court is justified by general considerations in assuming the truth of a proposition without requiring evidence from the party setting it up. See Wigm. Ev. § 2565. This power is to be exercised with caution. Care must be taken that the requisite notoriety exists

Every reasonable doubt should be resolved promptly in the negative."

In the text of 16 Cyc. 850, we read:

"Judicial knowledge is not reached by the use of evidence; it is a matter pertaining to the judicial function and its existence, like that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the point covered. It is necessary, however, that the community throughout which the fact to be judicially known is supposed to be commonly known should be one whose extent bears some reasonable relation to the territorial jurisdiction of the court itself." See note in 4 L.R.A. 38.

There have been a great number of decisions rendered by the courts which may be regarded as showing the inexactness of the rule of general notoriety as defining the limits of notice. This want of exactness, however, comes from the difficulty in many cases of determining what is sufficient notoriety of a given fact to bring it within the judicial notice of the court.

After a painstaking examination of the numerous decisions called to our attention by counsel, and also others coming to our notice, we believe it safe to assert that no court, so far as can be determined from the reported decisions, has ever [486] judicially noticed facts touching the sufficiency of the publication of a constitutional amendment or a statute, which publication was required by law prior to the adoption of such amendment or the enactment of such a statute, where neither the constitution nor the statute made provision for preserving some official record touching the fact of such publication, except in cases where the propriety of the court taking judicial notice of such facts was not in the least drawn in question.

The decision which seems to us most directly in point as lending support to the contention of counsel for appellants touching this question is that of *State v. Tooker*, 15 Mont. 8, 37 Pac. 840, 25 L.R.A. 560. In that case there was drawn in question the adoption of a constitutional amendment which was held to have failed of lawful adoption because of its defective publication prior to the election at which it was voted upon. Assuming that neither the constitution nor the statute of Montana made any provision for preservation of any official record of facts touching the making of the required publication, as to which the decision is silent, it seems that the court did take notice of facts going to show the insufficiency of such publication. We look in vain in that decision, however, for any challenge to the power of the court to rightfully judicially notice such facts. Just how the facts were called to the attention of the court in that case is not clear from the decision.

The decision which may be regarded as next in order of importance as lending support to appellants' contention upon this subject is that of the supreme court of Nevada in *State v. Davis*, 20 Nev. 220, 19 Pac. 894. What we have said relative to the decision in *State v. Tooker* is equally applicable to this decision. The question of judicial notice extending to facts going to show insufficiency of publication prior to the election at which the constitutional amendment there involved was voted upon was not presented to or considered by the court, so far as can be determined from the reported decision.

[487] The decision of the supreme court of Kentucky in *McCreary v. Speer*, 156 Ky. 783, 162 S. W. 99, also seems to lend some support to the contention of counsel for appellants touching the question of the sufficiency of the publication. But that case was submitted to the court upon facts stipulated by counsel, and the opinion fails to disclose any mention or discussion of the question of the propriety of the court drawing to itself by judicial notice facts necessary to a determination of the sufficiency of the publication.

No other decision has come to our notice holding a constitutional amendment void, rested alone upon the ground of want of sufficient publication prior to the election at which it was voted upon. We proceed, however, to notice a number of decisions which counsel for appellants place reliance upon as touching this branch of the case.

In *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, the court considered and reviewed the question of the sufficiency of a publication of a constitutional amendment and declined to hold the amendment void upon the ground, but did hold it void as being in violation of rights guaranteed by the Federal constitution. The question of the propriety of the court taking judicial notice of facts which were claimed to show the defective publication was not noticed. Indeed, the question of insufficiency of the publication was wholly unnecessary to a decision of the cause in view of the ground upon which the amendment was held void.

In the famous *Kansas Prohibitory Amendment Cases*, 24 Kan. 700, much is said in a general way by the learned writer of that opinion touching the extent of judicial notice. There was not, however, involved in that case any question of judicial notice of facts other than such facts as were evidenced by official records. The sufficiency of the publication of the proposed amendment prior to the election at which it was voted upon was not questioned. The amendment, however, was upheld as against other contentions which were determinable from officially recorded facts.

[488] In *In re House Resolution No. 10*, 50 Colo. 71, 114 Pac. 293, the supreme court of Colorado rendered its decision in response to a resolution and interrogatories of the house of representatives touching the question of the constitutionality of the method of publication provided for in a bill pending in the legislature which contemplated the submission to the people of a constitutional amendment. Manifestly, no question of fact was there presented which was beyond the court's judicial knowledge, because the bill upon its face furnished all the facts the court was called upon to consider incidental to the question of law presented.

In *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77, there was drawn in question the sufficiency of the form in which the publication of a proposed amendment to the constitution was made. But the question was plainly determinable from a public record, to wit, the governor's proclamation, which the general assembly directed the governor to make and publish and which contained the entire act proposing the amendment. It was not a question of the extent of the publication that was actually made, but as to the form of it, which, of course, was determinable from the face of the governor's proclamation, a public document. The proclamation, so far as its form was concerned, was held sufficient.

In *McConaughy v. State*, 106 Minn. 392, 119 N. W. 408, there was drawn in question the sufficiency of a publication of a constitutional amendment prior to the election at which it was voted upon, apparently as a question of fact, in a statutory election contest timely initiated. Manifestly, under such circumstances, the question of the extent of the publication was determinable as a question of fact. Of course, the court in that case could determine the facts from proof, as in any trial of a question of fact, and was not confined to facts of which it could take judicial notice without proof, as in the case before us.

[489] In *Hildreth v. Taylor*, 117 Ark. 465, 175 S. W. 40, there was drawn in question a constitutional amendment upon the ground of insufficiency of the publication thereof preceding the election at which it was voted upon. The court held the amendment to have failed of adoption because of its failure to receive a sufficient number of votes. The court, however, did notice, and to some extent examined, the question of the sufficiency of the publication, and while it was not necessary for the court to express its opinion touching the effect of the claimed defective publication, yet in view of the fact that, as under our law and constitution, the constitution and laws of Arkansas made no provision for preservation of any record of the facts

touching the extent of the publication, the following language of the court in that case is of interest in this connection:

"The legislature has provided no record whereby the fact can be definitely ascertained whether or not the publication has been made as directed, therefore it would be disastrous to hold that a statute or amendment to the constitution could be defeated by showing that the publication in fact was not made in accordance with the specified terms."

This language comes as near touching the question of judicial notice as here involved, as that of any decision which has come to our notice. Indeed, no other language of any decision coming to our attention suggests thought of the question, as here involved.

In *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616, 21 L.R.A. 716, it was held that the governor's proclamation declaring that certain amendments submitted to the vote of the people had received a majority of the votes cast and thereby had been adopted by the people as a part of the constitution, was conclusive upon the courts. This holding was rested upon the language of the Maryland constitution. It is worthy of note, however, that there was not drawn in question in that case any facts other than officially recorded facts, even had [490] the court felt called upon to go behind the governor's proclamation.

In *State v. Williams*, 143 Ala. 501, 39 So. 276, there was presented a situation where the court took judicial notice of facts touching the sufficiency of a publication required by the constitution as a prerequisite to the legislature passing a special law. A critical reading of that decision, however, will show that the court could take judicial notice of the publication or want thereof because of the fact that the constitution expressly provides for the preservation of record evidence of the publication, and also provided that "the courts shall pronounce void every special, private or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section." A similar situation was presented in *Chosen Freeholders v. Stevenson*, 46 N. J. L. 173.

In the following decisions the courts noticed the question of the sufficiency of publication made prior to the adoption of constitutional amendments and held such publications sufficient. In none of them, however, was the question of judicial notice reviewed or mentioned. *State v. Grey*, 21 Nev. 378, 32 Pac. 190, 19 L.R.A. 134; *State v. Alderson*, 49 Mont. 387, Ann. Cas. 1916B 39, 142 Pac. 210; *State v. Winnett*, 78 Neb. 379, 15 Ann. Cas. 781, 110 N. W. 1113, 10 L.R.A.(N.S.) 149. In the following cases the question of the validity of constitutional amendments was decided upon officially re-

corded facts. *Collier v. Frierson*, 24 Ala. 100; *State v. Swift*, 69 Ind. 505; *In re Denny*, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722; *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C 200; *Koehler v. Hill*, 60 Ia. 543, 14 N. W. 738, 15 N. W. 609; *State v. Sessions*, 87 Kan. 497, 124 Pac. 403; *Dayton v. St. Paul*, 22 Minn. 400; *State v. Stearns*, 72 Minn. 200, 75 N. W. 210; *Rich v. State Canvassers*, 100 Mich. 453, 59 N. W. 181; *North Carolina University v. McIver*, 72 N. C. 76; *Ramsey v. Persinger*, [491] 43 Okla. 41, 141 Pac. 13; *Kaddery v. Portland*, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; *Bott v. Wurts*, 63 N. J. L. 289, 43 Atl. 744, 881, 45 L.R.A. 251.

Counsel for appellants rely upon our decision in *Cudihee v. Phelps*, 76 Wash. 314, 325, 136 Pac. 367, in support of their contention that we should take judicial notice of facts showing the extent of the publication of the seventh amendment in the several counties of the state prior to the election at which it was voted upon. It is true we said in that case, "it is conceded that the secretary of state did publish the proposed amendment three full months next preceding the general election of 1912, in a weekly newspaper and published it in each and every county of the state." Counsel seem to argue that this is the taking judicial notice of facts of the same nature we are here asked to judicially notice. A critical reading of that decision, we think, will show that there was no question raised in that case as to the sufficiency of the publication of the recall amendment to the constitution there involved, except as the sufficiency of such publication could be determined as a matter of law from the terms of the constitution and the act of the legislature proposing the amendment. There was no question made in that case as to the extent the publication was actually made. It was insisted that the publication was not made in accordance with the constitution, upon the sole ground that the proposing act, which also provided for the publication, did not comply with the constitution as to the time it prescribed for the publication. We held, however, that, reading the act in the light of the constitutional provision requiring the legislature to cause the publication of proposed amendments to be made, it meant the same as the constitution, in so far as the time of publication was concerned. The question there presented, in its last analysis, was manifestly one as to what the law was, rather than as to what actually occurred touching the making of the publication. No question of the propriety of the court [492] taking judicial notice of the extent of the publication was actually made, was involved, or even suggested in that case.

Counsel for appellants invoke at almost every angle of their argument the doctrine that constitutional provisions are mandatory, except as by express words they may be indicated to be otherwise. That such is the generally accepted doctrine touching the duties the constitution puts upon those it charges with the observance of its provisions, seems now well settled by the decisions of the courts. Such, in any event, is the rule in this state by the express language of § 29, article 1, of our constitution, reading as follows:

"The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise."

Article 23, § 1, of the constitution provides in part as follows:

"The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding the election, in some weekly newspaper, in every county where a newspaper is published throughout the state."

It is argued that this is a mandatory provision of the constitution, not only addressed to the legislature and in turn to those who by the legislature are charged with the duty of making the publication, but also to the judicial department of the government, and charges it with the duty of enforcing to the extent of declaring void every constitutional amendment the adoption of which is not attended by such required publication, regardless of the ability of the court to lawfully draw to itself such knowledge of facts as will enable it to know that such mandate has or has not been complied with by those charged with the duty of making the publication. Were the facts involved in this contention required to be evidenced by official record in accordance with some constitutional or statutory provision, to which record the court could look and know that the publication had or had not been made as prescribed, as, for instance, it can look to the entries [493] upon the journals of the senate and house of representatives, showing the proposal and vote upon a constitutional amendment, as we did in *Cudihee v. Phelps*, supra, there would be substantial ground for this contention to rest upon.

The doctrine of the provisions of a constitution being mandatory, as unquestioned and firmly established as it is, falls far short of solving this problem. Manifestly, that doctrine has its limitations in a case like this, in so far as the power of the courts are concerned. If it be true, as we think it is, that the facts touching the sufficiency of the publication of the seventh amendment are beyond judicial notice, then it may be said, without belittling or detracting an iota from the importance of that doctrine, that,

as applied to the real problem here for solution, it becomes little else than a "glittering generality." There are those who seem to regard the courts as the only guardians of the constitution, and that nothing wrongfully or mistakenly done, or left undone, by those charged with constitutional duties can escape the correcting power of the courts. That this is fallacious needs little reflection to demonstrate. Of course, when it comes to considering individual rights such as are protected by the guaranties, that the right to trial by jury shall remain inviolate; that no person shall be deprived of life, liberty or property without due process of law; that no law shall grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens; and many other constitutional guaranties that look to protection of personal rights, the courts have ample power, and will go to any length within the limits of judicial procedure, to protect such constitutional guaranties.

But in that large field of governmental activity having to do with public affairs only, there are many things that might be done or left undone in derogation of mandatory constitutional provisions which the courts would be powerless to correct. Would not the courts be wholly without such correcting power in all cases where it is not possible for them [494] to know the facts pointing to such violation or neglect of constitutional duty? It seems so to us. Again, suppose the legislature had neglected to obey the constitutional mandate that it shall pass the necessary laws to render effective the recall amendment to the constitution. It is not at all uncommon for constitutions to contain commands to the legislature to pass laws upon given subjects; there are other commands akin to this in our constitution. It is manifest that the courts have no power to correct such a violation or neglect of constitutional duty, though nothing seems plainer than that such constitutional provisions are mandatory in the constitutional sense. Manifestly, such provisions are no less mandatory, nor is the duty imposed thereby any less sacred, because of the fact that the courts may be powerless to enforce such mandates. Those vested with legislative and executive powers of the state have duties and obligations resting upon them by the mandates of the constitution for the performance of which they are answerable alone to their own consciences and to the people: just as the courts have duties and obligations resting upon them by the mandates of the constitution for the performance of which the judges are answerable alone to their own consciences and to the people. It will not do to say that, because there may be no correcting remedy for neglect of legislative

or executive duties, the courts, by that fact alone, acquire some correcting power over legislative and executive acts. Our constitution is not framed upon the assumption that official integrity resides alone in the courts. Some things, though mandatory, are entrusted for their performance to the legislative and executive branches of the state government, branches coequal, within their spheres, with the courts.

Touching the procedure of the legislature in the enactment of laws, our constitution provides that "each house shall keep a journal of its proceedings" (Const. art. 2, § 11); that,

"No bill shall become a law unless, on its final passage, the vote be taken by yeas and nays, the names of the members [495] voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor" (Const. art. 2, § 22);

yet, in *State v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L.R.A. 340, this court held that an enrolled bill, signed by the president of the senate and the speaker of the house and approved by the governor, evidencing the existence of a law, is conclusive upon the courts of the due passage of such law by the legislature, notwithstanding the provisions of the constitution above quoted requiring record facts to be preserved, which it might well be argued the courts could look to and of which they could take judicial notice. The following observations of Judge Hoyt, speaking for the court, in that case we think are worthy of repetition in this connection:

"If such signing and approval are only steps, then the fact that they have been taken in no manner proves that any other required step has been taken, and it must follow that before the courts can find that the bill has become a law, they must look and see that all the steps required by the constitution to constitute it such have been observed by the legislature. Such a construction given to the enrolled act would render it practically impossible for the courts even to determine what was the law, and would render it absolutely impossible for the average citizen to ascertain that of which he must at his peril take notice. There is enough injustice in requiring the citizen to take notice of the statute law, when to do so he has only to determine the legal effect of the enrolled acts on file in the office of the secretary of state, and if he is further required to take notice of all that is shown by the journals of the legislature which may affect the regularity with which such acts have been passed, he will indeed be in a sorry condition. The absolutely disastrous result of this construction has led the courts which have held that they

could go behind the enrolled act to adopt the theory, which seems to us to be entirely illogical, that the enrolled acts *prima facie*, but not conclusively, establish the fact of their regular enactment. Such holding compels the [496] further one that whenever the attention of the courts is directed to the particular parts of the journal which show a want of compliance with constitutional requirements, the courts must take judicial notice of all facts therein contained in relation to the point to which their attention has thus been called, and if such journals show any want of compliance with the mandates of the constitution, declare such *prima facie* presumption overcome and the law invalid. The result of this construction will lead to results as disastrous and embarrassing as would the other construction of which we have been speaking. For a number of years after the passage of an act it may be given force by the courts by reason of the *prima facie* presumption flowing from the finding of the act regularly enrolled and signed in the office of the secretary of state. Then after said act to all intents and purposes has been treated as in force during all of these years, upon the suggestion of some person that there was a fatal omission in the journal entries regarding the passage thereof, the court must take judicial notice of such fact is shown by the journal, and from that time on it must be held not only that such bill was not then a law, but that it never had been such. The confusion as to rights and duties growing out of such a state of uncertainty as to what the statute law of the state is may well appall one who even superficially contemplated the same. . . .

"It may be accepted as a fact that all of the courts hold that these enrolled bills are *prima facie* the law, and that they must be given force as such until their invalidity is suggested in some proceeding. Yet to hold that this *prima facie* presumption attaches, and a conclusive one does not, seems to us to be illogical in the highest degree. Besides, there is something ridiculous in holding that there can be such a thing as a *prima facie* law. It is true that it is frequently the duty of courts and citizens to accept certain things as *prima facie* proof of what the law is, but that is an entirely different proposition from holding that a certain thing is *prima facie* a law. An act of the legislature, when regularly on file in the office of the secretary of state, is, and must necessarily be, either a law or not a law, and it is preposterous to hold that that which is the law is so only *prima facie*, or to hold that that which is in fact not a law is even *prima facie* so. What constitutes the statutory law of a state must [497] necessarily be an absolute proposition, and not simply a *prima facie* one."

Now, in the light of these observations and the conclusions the court there reached, wherein there was ignored certain officially recorded facts which, as we have said, it could be well argued were within the judicial knowledge of the court, how can it be consistently held that we must now take judicial notice of facts touching the sufficiency of the publication of the seventh amendment prior to the election at which it was voted upon, which are not required to be evidenced by any official record, and which are not of such general notoriety that they could for that reason be judicially noticed? All this argues that we might have ceased our inquiry upon looking to the governor's proclamation. We prefer, however, not to rest our decision of this question upon the conclusiveness of the governor's proclamation, though whether our inquiry might be so limited we do not now decide; but we do rest it upon officially recorded facts of which we may take judicial notice, to wit, the act proposing the seventh amendment, the journal entries of the senate and house of representatives, the fact of the holding of the election and the returns thereof on file in the office of the secretary of state, and the governor's proclamation of the adoption of the seventh amendment and its becoming a part of the constitution of our state.

Much has been said in the argument as to the threatened dangers to our constitution in the event we decline to correct this alleged violation of its mandate. Again let us be reminded that the courts are not the sole guardians of the constitution, and while it is necessary that each department of the government heed the mandates of that instrument, it is no less important that the courts should not reach out beyond their constitutional sphere to question and draw to themselves duties and powers which belong to the other departments of the government. In *State v. Jones*, [498] *supra*, touching this thought, Judge Hoyt, speaking for the court, also observed:

"To preserve the harmony of our form of government it must be held that these several mandatory provisions are addressed to the department which is called upon to perform them, and that neither of the other departments can in any manner coerce that department into obedience thereto. Courts have gone behind the final records of the legislative department upon what seems to us a false theory. They have assumed that the mandatory provisions of the constitution are safer, if the enforcement thereof is entrusted to the judicial department, than if so entrusted to the legislature; in other words, they have acted upon the presumption that their department is the only one in which sufficient integrity exists to insure the preser-

vation of the constitution. How the courts have obtained this idea is somewhat difficult to ascertain but that they entertain it, and have allowed it to influence their decisions, is so evident that even a superficial examination of such decisions will satisfy any one of the fact."

Similar observations, which we think are worthy of quotation here, were made by Justice Bryan of the supreme court of Maryland in *Worman v. Hagan*, 78 Md. 152, 165, 27 Atl. 616, 21 L.R.A. 716, as follows:

"It may be asked what is to be done in case the governor should violate his duty, and wrongfully proclaim an amendment as adopted which in point of fact had been rejected. It would not be becoming in this court to suppose that such a contingency would ever happen. The courtesy due to the executive department forbids us to entertain such a conjecture. But if, unhappily, in future times, it ever should occur, assuredly a sufficient remedy will be found. The resources of a free government are ample, and will always be found adequate to punish and redress offenses against its sovereignty. Having neither the means nor the jurisdiction to determine the result of the voting on the amendment, we disclaim all intention to investigate the question."

These remarks, it is true, were made in connection with the holding of that court that the proclamation of the governor [499] was conclusive by reason of the particular language of the constitution of Maryland, but they are equally applicable here to the view that the courts must in any event confine their inquiry within the realm of judicial notice, when there is drawn in question before them the existence of any written law, whether it be constitutional or statutory.

We are of the opinion that, since all of the facts within our judicial knowledge point unerringly to the regular submission and adoption of the seventh amendment to the constitution, we must now conclusively presume that all required steps incidental to the submission and adoption of that amendment which are beyond the limits of our judicial knowledge have been done and had as prescribed by the constitution, and that it is now a valid part of our organic law.

Next in order comes the contention of counsel for appellants that initiative measure No. 3, relating to intoxicating liquors, has not become a valid law, in that it was not lawfully submitted to or adopted by the people, though the seventh amendment to the constitution authorizing this method of legislation has become a valid part thereof. It is first insisted in this behalf that initiative measure No. 3 was not published prior to the election of November, 1914, at which it was voted upon, as required by the seventh amendment to the constitution and ch. 138, p. 418,

of the Laws of 1913, passed by the legislature in pursuance thereof to facilitate the operation of the initiative and referendum. The provision of the seventh amendment invoked in this behalf, reads:

"The legislature shall provide methods of publicity of all laws or parts of law, and amendments to the constitution referred to the people with arguments for and against the laws and amendments so referred, so that each voter of the state shall receive the publication at least fifty days before the election at which they are to be voted upon."

In pursuance of this provision, the act of 1913 was passed, providing in some considerable detail procedure touching [500] initiative and referendum legislative powers by the people. Among other things, section 29 of that law provides:

"Not less than fifty-five days before any election at which initiative or referendum measures are to be submitted to the people, the secretary of state shall transmit, by mail with postage fully prepaid, to every voter in the state whose address he has, or can with reasonable diligence ascertain, one copy of the pamphlet hereinabove provided for."

This refers to pamphlets containing the submitted measure or measures, with arguments for or against the same, which are to be prepared as the law prescribes in preceding sections thereof. Touching the return, canvass and evidencing of the vote upon a measure, § 30 of that act provides:

"The votes on the initiative and referendum measures submitted to the people, as in this act provided, shall be counted, canvassed and returned by the regular precinct election officers, and by the county auditors, in the manner provided by law for canvassing and returning votes for candidates for state offices. It shall be the duty of the secretary of state, in the presence of the governor, within thirty days after any such election to canvass the votes for each measure and certify to the governor the result thereof, and the governor shall forthwith issue his proclamation giving the whole number of votes cast in the state for and against such measure, and declaring such measures as are approved by the majority of those voting thereupon, provided that the vote cast upon such measure shall equal one-third of the total vote cast at such election, to be the law of the state of Washington from the date of such proclamation."

The seventh amendment to the constitution is itself silent upon these matters. It simply provides:

"Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon."

Now, neither the constitution nor any statute of the state makes any provision for the preservation of any official record evidence of the facts touching the sufficiency of the publication of initiative and referendum measures. Hence it would [501] seem that we are here confronted with a problem of the same nature as that presented by counsel for appellants in their challenge to the submission and adoption of the seventh amendment to the constitution, which we have already noticed. Here we are again asked to take judicial notice of facts of which there is no official record evidence, nor are they facts of such notoriety as bring them within the realm of judicial knowledge. It may be said, as in our discussion of the challenge to the seventh amendment to the constitution, that we know judicially that initiative measure No. 3 relating to intoxicating liquors was initiated by petition; that it was submitted to, and voted upon by, the people at the general election of November, 1914; that 381,643 electors voted at that election; that there were cast for the adoption of initiative measure No. 3, 189,840 votes, and against its adoption 171,208 votes, 361,048 electors thereby voting upon the measure; that upon a canvass of the returns of that election filed in the office of the secretary of state showing this result, the governor, in accordance with the provision of the act of 1913 above quoted, passed to facilitate the operation of the seventh amendment to the constitution, on the 5th day of December, 1914, issued his proclamation proclaiming such result to the people of the state. There may be other facts we could take judicial notice of if necessary, but no fact required by constitution or statute to be officially recorded, and no fact of such general notoriety as to bring it within the realm of judicial knowledge, answers the question of whether the publication of initiative measure No. 3, prior to the election at which it was voted upon, was or was not made as the constitution and statute provide.

The supreme court of Arizona has considered this question in substance, in *Allen v. State*, 14 Ariz. 458, 130 Pac. 1114, 44 L.R.A. (N.S.) 468, where there was drawn in question a referendum measure submitted to the electors under a constitutional initiative and referendum provision in substance the same as our own. Unless there is a distinction [502] to be drawn between initiative and referendum measures, which we are unable to see, that decision seems directly in point so far as the principle here invoked is concerned. The approval of the measure by the electors as enacted by the legislature of Arizona, it being subject to referendum and its operation suspended by petition therefor, was challenged upon the ground, among oth-

ers, of want of sufficient legal publicity prior to the election at which it was voted upon. In disposing of such challenge and declining to look behind the records showing the enactment of the measure by the legislature, the referring of the same to the people and the returns of the referendum election as evidenced by the governor's proclamation thereof, the court said in part, at pages 465, 467 and 479:

"This brings us to the second contention of appellant, wherein he asserts chapter 82 did not receive the publicity provided by law. From the view we take of this question, we deem it necessary to discuss what the law requires in that regard. Nor do we propose to go into the details of what was done or not done by the administrative officers in the matter of giving publicity to the measure. We believe that we are precluded from doing so on grounds of sound public policy, logic, reason, and by the law itself. . . .

"All political power is inherent in the people, and governments derive their just powers from the consent of the governed. This is not a mere metaphor, that sounds pleasing to the ear, nor is it a maxim that may not have a concrete application; but it is a vital principle, adhered to in the formation of the government of this state. By their constitution, the legislative authority was vested in a legislature, consisting of a Senate and House of Representatives; but the people reserved the power to propose laws and amendments to the constitution, and to enact or reject such laws and amendments at the polls, independently of the legislature, and they also reserved, for use at their own option, the power to approve or reject at the polls any act, section, or part of any act of the legislature. The people did not commit to the legislature the whole law-making power of the state, but they especially reserved in themselves the power to initiate and defeat legislation [503] by their votes. In this state the legislature and the people constitute the law-making power. This is important when we come to consider the adjudicated cases holding that if the enrollment or original record of the statute is regular on its face—that is, if the act is framed with no infirmity on its face, is duly promulgated, or properly authenticated and deposited in the proper office—it is conclusively presumed to have been regularly enacted, the record is invulnerable to attack, and proves itself. If such sanctity and verity may be given to the acts of the delegated representatives of the people in legislative body assembled, it must with clearer reason and with greater force be given to the act of the sovereign itself, the source of all governmental power, the record of which, in its

law-making capacity, is authenticated and promulgated as the constitution provides.

"Subdivision of section 1 of article 4 of the constitution provides: 'Any measure or amendment to the constitution proposed under the initiative, and any measure to which the referendum is applied, shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon and upon proclamation of the governor, and not otherwise.' In the case at bar we have an act of the legislature deposited in the office of the secretary of state, the legal custodian of the laws. The act is authenticated by the signatures of the speaker of the House of Representatives and the president of the Senate, with the approval of the governor thereon. There is also the proclamation of the governor, giving the whole number of votes cast for and against such measure on a referendum thereof to the people, showing it to be approved by a majority of those voting thereon; the governor declaring in such proclamation the measure to be law.' . . .

"If a properly enrolled and authenticated act of the legislature speaks verity, surely that same act, fortified by the approval of a majority of the qualified voters of the state and the proclamation of the governor, issued under a mandate of the constitution, declaring the act has become and is a law, is doubly strengthened as a record of unimpeachable character. Indeed, we feel that we could rest our decision of this question, without the support of analogous reason as applied to legislative acts, upon the plain language of the constitutional provision that any measure shall become law when approved [504] by a majority vote and proclaimed as such by the governor. These are mandatory provisions of the constitution, and they attach no other condition to a referred measure becoming a law than approval by the electorate and the governor's proclamation. Other conditions could have been imposed, and their omission must have been intentional, and for the express purpose of preventing judicial interference in matters wholly legislative and executive. We agree with those courts that maintain each department of government should in fact, as well as in theory, be independent of the other. Mandatory provisions of the constitution as to the making of laws are directed to the attention of the legislative department, and are binding on the conscience of those whose duty it is to observe them. This is likewise true of the executive and judicial departments within their sphere. Until the people, through their fundamental law, shall require the courts to supervise and direct the actions of the other departments in the process of making laws, we shall adhere to the theory of government that those

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departments are responsible to the people for any neglect of duty, and not to the courts, and that their records, when authenticated as required by the constitution and presented to this department, will import absolute verity, and conclude us from going beyond such records to impeach them."

That decision was rested upon the so-called enrolled bill doctrine, adhered to by this court in *State v. Jones*, supra, which decision was quoted from by the Arizona court at some length. Now, it is true, as is seen from the above quoted portion of the decision of the Arizona case, that the recall provision of the Arizona constitution, by express words, makes the governor's proclamation the final act in rendering the voice of the people effective touching initiative and referendum measures, while ours provides as to an initiative measure only that such a measure "shall take effect and become the law if it is approved by a majority of the votes cast thereon," and remains silent as to the manner in which the vote of the people shall be officially evidenced.

Now, the enrolled bill doctrine is, at all events, no broader than this; that the courts will not look beyond officially recorded [505] acts in determining the question of whether a statute has or has not been enacted by the legislative power of the state. Whether the governor's proclamation of the due enactment of an initiative measure into law by direct vote of the people would preclude all further inquiry by the courts as to it having been regularly enacted under our constitution and statute, we need not here decide. In this case, we do extend our inquiry to facts which the law causes to be evidenced by official records, and stop there, since there are no other facts of which we may take judicial notice touching the question of the due enactment of initiative measure No. 3. All of the facts thus capable of being judicially noticed by us, as we have seen, point unerringly to the due submission and enactment of this measure into law. Observations made by Justice Harlan, speaking for the supreme court of the United States in *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 U. S. (L. ed.) 294, in which decision the enrolled bill doctrine is adhered to, are of interest here. At page 670, the learned justice said:

"We recognize, on one hand, the duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the constitution relating to the enactment of laws that are to operate wherever the authority and jurisdiction of the United States extend. On the other hand, we cannot be unmindful of the consequences that must result if this court should feel obliged, in fidelity to the constitution, to declare that an enrolled bill, on which depend public and private interest of vast magnitude, and which

has been authenticated by the signature of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives, *as an act of Congress*, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law."

Manifestly, the holding of the court in that case rests simply on the broad ground of public policy. This seems evident from the following observation on page 871:

"Nor does any clause of that instrument [the constitution], either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill [506] by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication."

Our attention is called to the decisions of this court in *Wade v. Tacoma*, 4 Wash. 85, 29 Pac. 983, and *State v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39, where there were drawn in question the sufficiency of the publication of amendments to the freehold charter of the city of Tacoma prior to the elections at which they were voted upon. In the *Wade* case, the plaintiff, as a taxpayer, was simply seeking an injunction to restrain the city authorities from holding an election, upon the ground of the insufficiency of the publication prior to the election at which the amendment was to be voted upon. The question being in that form, manifestly involved a question of fact, triable as such, since there was not involved the question of the existence of the charter amendment after its adoption: hence there was not presented any question involving judicial notice.

In the *Doherty* case, there was involved the existence of a charter amendment after its adoption, which was challenged upon the ground, among others, of insufficient publication thereof prior to the election at which it was voted upon. The question appears to have been tried in the superior court as an ordinary question of fact. The amendment was sustained by this court. There is nothing in the reported decision indicating that any question of judicial notice was suggested as being involved. Whether the enrolled bill doctrine could be successfully invoked in support of a freehold city charter or an amendment thereto after adoption by vote of the people, we are not here called upon

to decide. We [507] think it plain that no such question has ever been presented to the courts of this state, nor has any decision of the courts of any state come to our notice where any such question was presented.

A number of decisions have been cited by counsel, dealing with the question of the sufficiency of published notice required to be given preliminary to elections at which special questions such as local option, bond elections, county seat elections, etc., were voted upon. These decisions we regard as of no aid here. They deal almost wholly with pure questions of fact, to be tried as such, and in none of them was the question of judicial notice involved as it is in the problem here for solution. Our decision in *State v. Superior Ct.* 81 Wash. 623, 143 Pac. 461, is in harmony with the conclusion we here reach. While not directly in point, it indicates the limit of judicial inquiry into official acts or a political nature.

We are of the opinion that due publication of initiative measure No. 3, prior to the election of 1914, at which it was voted upon, must now be conclusively presumed to have been made as the constitution and statute require, and that it has not failed of lawful adoption because of want of such publicity.

Contention is made by counsel for appellants that there was not cast, upon the question of the adoption of initiative measure No. 3, the required number of votes, the majority of which must have been favorable to its adoption to enact it into law. This contention is rested upon that provision of the seventh amendment to the constitution reading as follows:

"Any measure initiated by the people or referred to the people as herein provided shall take effect and become a law if it is approved by a majority of the votes cast thereon: *Provided, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise.*"

[508] The italicized words are particularly relied upon. These words, it is insisted, mean votes to be counted separately for or against each separate measure to be submitted and voted upon at the election. Now, there were nine initiative and referendum measures voted upon by the people at the election of 1914, at which initiative measure No. 3 was voted upon, and the average number of votes cast for and against each of these measures was over 300,000. So that, according to counsel's contention, there must have been cast upon the question of the adoption of initiative measure No. 3 at least one-third of nine times 300,000, that is, one-third of 2,700,000, or 900,000 votes, a majority of which was necessary to the enactment of that measure into law. It matters

not whether we regard this as the exact situation in this case or merely as a supposed situation; it, of course, being a possible one, since manifestly there is nothing unlawful in submitting this number of measures at one election. If we were to take into consideration the votes cast for candidates for the various offices at the same time, at the general election, and not regard the election upon these several measures as a special election apart from the general election, as counsel concede it to be, we would have a much more striking example of the absurdity to which their contention leads.

Now, we are informed by the election returns in the office of the secretary of state that there were 381,643 electors voting at the election of 1914, at which initiative measure No. 3 was voted upon. Even if this fact should not be capable of exact demonstration from those records, though such records do show with exactness that 361,048 voters voted upon the question of the adoption of initiative measure No. 3, we know judicially, as a matter of common knowledge, that there are not 900,000 electors in the state of Washington. Common knowledge as to the population of our state tells us of this fact. It is plain, then, that to construe the words "votes cast at such election," as here used, in the narrow sense [509] contended for by counsel, would absolutely defeat the purpose of the seventh amendment to the constitution whenever any considerable number of initiative and referendum measures were submitted to the people to be voted upon at one election.

Several authorities are called to our attention showing the meaning of the word "votes" as compared with the words "voters" or "electors." Doubtless these words, standing alone, are capable of being differentiated as to their meaning, but that does not argue that they might not be so used in a sentence or paragraph of a constitutional provision, read in the light of its whole context and the manifest purpose that they would mean the same thing. This, in its final analysis, is a problem to be solved largely by a resort to common sense, rather than to refined distinctions as to the meaning of words viewed apart from the connection in which they may be used. A review of the authorities cited which are thought to support the contentions of counsel for appellants we think would not be profitable here. Indeed, we think they are of no material aid. The oft quoted observations of Judge Story in volume 1 of his work on the Constitution (5th ed.) at § 451, can well be repeated in this connection as follows:

"Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise

of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss."

We are of the opinion that the words "votes cast at such election," as used in the provision of the seventh amendment to the constitution, above quoted, mean the same as "number of voters voting at such election;" and that, since more than one-third of the voters voting at the election of 1914, [510] at which initiative measure No. 3 was voted upon, voted upon the question of the adoption of that measure, and a majority thereof voted in favor of its adoption, it was thereby constitutionally adopted within the meaning of the seventh amendment, in so far as the required number of votes is concerned.

It is contended by counsel for the appellants that initiative measure No. 3 is unconstitutional in that the concluding section thereof reads:

"This act shall take effect and be in full force and effect from and after the first day of January, 1916." Laws of 1915, p. 17, § 33.

The argument is that, because this is a postponement of the date on which the provisions of the measure become enforceable, for more than thirty days beyond the date of the election of 1914, at which it was voted upon, violates that provision of the seventh amendment to the constitution reading as follows:

"Such measure shall be in operation on and after the thirtieth day after the election at which it is approved."

Now, if this were a controversy as to when the provisions of initiative measure No. 3 became enforceable, and the state and county officers were attempting to enforce its provisions prior to the first day of January, 1916, there would be drawn in question the constitutionality of the concluding section, above quoted. But it is not pretended that there is any threat on the part of the public officers to seek enforcement of its provisions prior to the first day of January, 1916, when, by the terms of this section, they become enforceable. The real question then is, not so much as to the constitutionality of the concluding section of the law above quoted, but whether, if that section be held unconstitutional, such holding would have any effect upon the constitutionality of other provisions thereof. Manifestly it would not, by the express terms of § 26 of the law, which reads:

[511] "If any provision or section of this act shall be held void or unconstitutional, all other provisions and all other sections of the act, which are not expressly held to be void or unconstitutional, shall continue in full force and effect." Laws of 1915, p. 15, § 26.

Now, it seems plain that, by the provisions of the seventh amendment to the constitution above quoted, this measure became a law on the thirtieth day after the election of 1914, at which it was voted upon by the people and adopted, regardless of how he might answer the question as to when its terms became enforceable. Whether the concluding section be unconstitutional or not would not change the date of the coming into existence of the law. Many laws may be found among our statutes prescribing rules of future conduct, which rules are unenforceable until a given date; and yet it could not be successfully contended that any part of the law was, for that reason, non-existent until the date of the enforceability of one or more, or even all, of such prescribed rules of future conduct.

It is contended by counsel for appellants that initiative measure No. 3 is unconstitutional in that it violates the equal privileges and immunities, and the equal protection of the laws, guaranties of the state and Federal constitutions. It is insisted in this behalf that the measure is discriminatory and makes unconstitutional classification as to persons, in that it permits registered druggists and pharmacists to sell intoxicating liquor for mechanical and medicinal purposes, under certain conditions, while such privilege is withheld from others. This question is not new to the courts. Among other decisions in which this contention of counsel for appellants has been answered, we note as of special interest and directly in point, the decision of the supreme court of Kansas in *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284, wherein Justice Brewer, speaking for the court, at page 761, observed:

[512] "Here the sale of liquor being allowed for medical purposes, druggists who deal in medicines are properly named as a suitable class to whom to intrust such sale. The law does not attempt to prescribe who may and who may not become druggists. That question each individual settles for himself. It simply says that only druggists shall sell liquor. It is like a law which should forbid any but licensed engineers from running the engine of a passenger train, any but licensed attorneys from appearing for clients in a court of record, any but medical graduates from engaging in the practice of medicine. No law of this kind interferes with individual liberty in its true sense. Such laws protect the public only in matters involving risk and danger from the acts of unfit and improper persons. They cannot be

adjudged class legislation in any objectionable and unconstitutional sense of the term."

We have recently had occasion to dispose of similar claims made under these constitutional guaranties in *Barker v. State Fish Commission*, 88 Wash. 73, 152 Pac. 537, wherein we reached a conclusion quite in harmony with the view expressed by Justice Brewer in the *Kansas case*. We there noticed the earlier decisions of this court, all of which are in harmony therewith. In *Eberle v. Michigan*, 232 U. S. 700, 706, 34 S. Ct. 464, 58 U. S. (L. ed.) 803, having under consideration a contention in substance the same as that here presented, Justice Lamar, speaking for the court, said:

"Nor can the judgment be reversed because the original act, while prohibiting liquor to be sold by merchants permitted it to be sold by druggists for medicinal, mechanical or scientific purposes. The contention that this was an unlawful discrimination is answered by *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 U. S. (L. ed.) 346; *Ripley v. Texas*, 193 U. S. 504, 24 S. Ct. 516, 48 U. S. (L. ed.) 767; *Ohio v. Dollison*, 194 U. S. 445, 24 S. Ct. 703, 48 U. S. (L. ed.) 1062. These cases show that the state may prohibit the sale of liquor absolutely or conditionally; may prohibit the sale as a beverage and permit the sale for medicinal and like purpose; that it may prohibit the sale by merchants and permit the sale by licensed druggists."

It seems quite clear to us that this measure does not violate any constitutional guaranties of the nature invoked by this [513] contention. These observations, we think, dispose of other contentions of counsel as to claimed unconstitutional classification of persons in certain other respects.

It is contended that initiative measure No. 3 is void in that it interferes with interstate commerce. It may be well doubted that appellants are in position to make this challenge to the law because of want of sufficient allegations in their complaints. They are, in any event, in no position to make such contention in this form of action, in so far as shipment into the state for their personal use is concerned. This question we leave wholly undecided as not being properly before us. We may assume, for argument's sake, that, in so far as shipment of liquors into the state for sale and disposition as a part of their business is concerned, the allegations of the complaints are sufficient to entitle appellants to raise this question. It seems to us, however, that the question of the validity of this law, in so far as it is claimed to interfere with interstate commerce is concerned, is fully answered adverse to the contentions of counsel for appellants by the express terms of the so-called *Webb-Kenyon act* of Congress, of March 1, 1913, which reads:

"An Act Divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, [514] possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited." 37 U. S. Stat. at L. p. 699, ch. 90; 4 Fed. St. Ann. 2d ed. 593.

Nothing could seem plainer than that, by the terms of this act of Congress, the dealing in and shipment of intoxicating liquors are no longer exempt in any degree from state regulation by the fact that such liquor may be an article of interstate commerce. In other words, intoxicating liquors are, by the terms of this act, divested of their interstate character, in so far as the power of the state to regulate the sale and disposition thereof, and the shipment into the state for that purpose, is concerned. This act has been given full force and effect by the courts, even as against the contention that it is in violation of the interstate commerce clause of the Federal constitution. The supreme court of Alabama so held in *Southern Express Co. v. State*, 188 Ala. 454, 66 So. 115, and *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 So. 652, in which cases the subject was examined at length. Touching the effect of the act, in the *Whittle* case, Justice McClellan, speaking for the court, said:

"The Webb-Kenyon Law seems to this court, as it did to the court in the Fourth circuit (*West Virginia v. Adams Express Co.* 219 Fed. 801, 135 C. C. A. 464, L.R.A.1916C 291, Judge Woods writing) that 'the terms of the statute are so plain and unambiguous that we are unable to perceive that its interpretation requires any resort to construction.' It is a prohibitory enactment. Its plainly declared purpose is to divest intoxicating liquors of their interstate character, with reference to interstate commerce, 'in certain

cases.' In the certain cases contemplated and described therein, intoxicating liquor is not and cannot become the subject of and be protected as lawful interstate commerce. *Southern Express Co. v. State*, 188 Ala. 454, 66 So. 115, 118, 119. It is, in those certain cases, 'forbidden commerce.' In the certain cases described intoxicating liquors must be, can only be, regarded and treated, when their movement is from one state into another, as if the Constitution had not contained the clause committing [515] to the Congress the exclusive right to regulate interstate commerce."

In *West Virginia v. Adams Express Co.* 219 Fed. 794, 135 C. C. A. 464, L.R.A.1916C 291, the circuit court of appeals of the fourth circuit, answering a challenge to the constitutionality of the act, Judge Wood, speaking for the court, said:

"The constitutionality of the Webb-Kenyon statute is attacked on the ground that it is an attempt by Congress to confer on state legislatures the power to regulate interstate commerce. This, we think, is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. In *re Rahrer*, 140 U. S. 545, 11 S. Ct. 865, 35 U. S. (L. ed.) 572, *supra*; *Lottery Case*, 188 U. S. 321, 23 S. Ct. 321, 47 U. S. (L. ed.) 492; *Hoke v. U. S.* 227 U. S. 308, 33 S. Ct. 281, 57 U. S. (L. ed.) 523, 43 L.R.A.(N.S.) 906, Ann. Cas. 1913E 905; *Hipolite Egg Co. v. U. S.* 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat."

The supreme courts of Iowa and Delaware are in harmony with these views touching the constitutionality of the Webb-Kenyon law, as evidenced by the decisions in *State v. U. S. Express Co.* 164 Ia. 112, 145 N. W. 451, and *State v. Grier*, 4 Boyce (Del.) 322, 88 Atl. 579. We conclude that initiative measure No. 3 does not unlawfully interfere with interstate commerce.

Some other constitutional questions are presented by counsel for appellants, but we think they are not such as appellants may raise in this form of action. Those questions do not involve property rights of such nature as to entitle appellants to *relief by injunction* against the enforcement of the provisions of initiative measure No. 3. Whatever our views might be on those questions would not render the provisions [516] of the law we have discussed unconstitutional, in

view of the provisions of section 26 above quoted.

We are of the opinion that initiative measure No. 3 is an existing law of the state, and that, in so far as its provisions are here drawn in question, their enforcement will not violate any of the rights guaranteed to appellants by either the state or Federal constitutions. The judgment of the superior court, refusing to enjoin the state and county officers from enforcing the law, is affirmed.

Morris, C. J., Ellis, Holcomb, Main, and Mount, J.J., concur.

CHADWICK, J. (*concurring specially*).—The decision of the court seems to be well founded in all respects, excepting only the holding that the court cannot consider the admission that initiative measure No. 3 was not published for the time required by law, and cannot take judicial knowledge of the fact. The purpose of the amendment was to maintain the spirit of the constitution and to insure an informed electorate. The duty of giving such notice was put upon the secretary of state. He did not give the notice required by the constitution, although it is provided in terms that such duties are mandatory. It is stipulated that he did not give sufficient notice.

I had hitherto understood that courts would consider, as a part of the record, stipulated facts. It is held that we will not do so in this case. I had also thought the law to be that we could judicially notice any fact that went to a question of observance or nonobservance of a provision of the constitution, mandatory in character, by an officer high in station and whose act affected the whole public, and when the fact was known of all men. The amendment to the constitution providing for the initiative and referendum specifically directs that the legislature shall provide a means and method for notice to the people of laws submitted under those measures. It says:

[517] "The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the constitution referred to the people with arguments for and against the laws and amendments so referred, so that each voter of the state shall receive the publication at least fifty days before the election at which they are to be voted upon." Laws 1911, p. 136, § 1.

The legislature did as was directed, and I had understood the rule to be that a statute passed in obedience to a constitutional amendment had the force and effect of the constitution from which it sprang. In other words, it is the thing that makes the constitution efficient.

It had seemed to me that this provision of the constitution, as amended by the initiative and referendum amendment, was not

merely directory, or a thing to be disregarded in whole or in part. There was a controlling reason why those who formulated it provided that notice should be given, and that it should be given for a definite time. They well understood for it has been observed by every statesman and philosopher who has inquired into the theory and possible workings of the scheme, that it might be subject to abuses, and that laws proposed under it might be misrepresented, or possibly voted upon without any guide whatever unless the people were guaranteed ample opportunity to know and understand that which they were voting upon.

The urgent arguments made against the initiative and referendum have been that the measure would reduce our state government to the level of a democracy. The proposers knew that, in the absence of a positive constitutional guarantee, a law might go to the people for their judgment, determination and decision with no means of acquiring certain information as to the terms of the law or the arguments of those who had a real interest for or against it. They knew that the present strength of the initiative and referendum, as well as its retention as an instrumentality of government, depended, not merely upon the participation of the people, [518] but upon intelligent participation, and it is not out of place to say that one of the reasons for the adoption of the initiative and referendum was that many people believed that the legislative body had not been entirely responsive to the public will, and had passed unwise and ill-considered legislation, and its proposers were careful to provide that the people should have every opportunity to test the merit and wisdom of a proposed law. They foresaw that an instrument designed to protect the rights of the people, in the event that no notice and publication of the proposed measures was provided for, would be subject to abuse by those who might propose laws to promote selfish interests, and by the means of unauthorized notices and publications, deceive and mislead the people.

We meet this situation. It is admitted by counsel that the constitution has not been observed. It is stipulated in writing that it was not. The act of a public officer, a high public official, is questioned. His act involves a nonobservance of a duty imposed by the constitution, and touches the whole people, and the whole public has an interest in his act. The act of omission is known and admitted of all men, that is to say, is a matter of common knowledge. I think there is no instance in the books where, under like circumstances, a court has refused to judicially know what they know as men.

If a court cannot accept stipulated facts or judicially recognize a breach of a duty

made mandatory by the constitution, I can imagine no case where it would be justified in resorting to judicial knowledge. The opinion, in this respect, does not, in my judgment, rest upon a readjustment of old principles to new conditions. It is rather an abandonment of old principles, for any decision that makes it possible for an administrative officer to turn a mandate of the whole people into a mere direction does not tend to the security of our constitution.

We have laid down a rule that will be as readily seized upon to sustain an evil law as to uphold a good one. The [519] rule must work both ways. If we could know as judges what we and all men know as men, we would undoubtedly follow an unbroken line of decisions from *Wade v. Tacoma*, 4 Wash. 85, 29 Pac. 983, to *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, decided finally while this case was under consideration, and hold that measure No. 3 was not legally adopted.

I have urged these things. They are fundamental principles and might be sustained by the writings of men learned in the law from Aristotle to the present day, but they have not commended themselves to my associates. Law is declared in several ways, one of which is through the decisions of the courts upon controverted questions. This case involves a pure question of law upon a political question which must be settled by a majority vote of the judges.

"When many persons equal in virtue appeared at the same time, they brooked not a superiority, but sought after equality . . .

"No one then denies that it is necessary that there should be some person to decide those cases, which cannot come under the recognizance of a written law; but we say that it is better to have many than one; for every one who decides according to the principles of the law, decides justly. Yet surely it seems absurd to suppose, that one person can see better with two eyes, and hear better with two ears, or do better with two hands and two feet, than many can do with many . . ." Aristotle's *Politics*, Book III, Chapters XV, XVI.

Seven of my associates find no violation of the constitution in the adoption of the questioned law, or rather, they hold that the court is powerless to notice and correct the admitted omission to observe its terms, and I feel that I can do no better than to say that I yield my judgment to that of the majority, as I would follow a questioned decision under the doctrine of *stare decisis*, and concur in the result, not because it is the law as I had understood it, but because it has been so declared by a competent tribunal.

[520] FULLERTON, J. (*concurring*).—I am unable to agree with the majority in the

reasons upon which some of the questions discussed in the foregoing opinion are rested, although I am content with the conclusion finally reached. I therefore concur in the result.

NOTE.

Judicial Notice of Proceedings for Adoption of Amendment to Constitution.

Comparatively few cases have passed on the question whether judicial notice will be taken of proceedings for the adoption of an amendment to a constitution, as distinguished from the general fact of its adoption, and the decisions are not in harmony. In *State v. Silver Bow County*, 34 Mont. 426, 87 Pac. 450, the court said: "The court below as well as this court takes judicial notice of the fact that the chief executive of this state soon after the election of 1912 declared by proclamation to the people of this state that the amendment in question had been adopted. . . . If there were any fatal irregularities in the manner and form of its adoption, and if in fact the amendment was not adopted and therefore did not become part of the constitution, notwithstanding the fact that the governor declared the same to be part of the constitution, such attack upon the amendment and such attack upon the *prima facie* presumption of the court that it was a part of the constitution necessarily should have been set out in the pleading in the first place and proven by the petitioner, relator herein. This was not done. The pleading, on its face, was opposed to the *prima facie* law of the land, of which the court took judicial notice. There was not any offer on the part of the relator to amend his position in order to set out the facts which he attempted to prove in evidence to the court on the motion to quash. The court, therefore, was *prima facie* correct in sustaining the amendment of the constitution, of which it, as well as we, should take judicial notice."

In *Carmony v. St. Louis Transit Co.* 188 Mo. 572, 87 S. W. 913, Marshall, J., said that the court took judicial notice of the fact that an amendment to the constitution was adopted by the people and that if the defendant desired to challenge any step that was taken in the adoption thereof he must specifically point out the same and assign specific reasons or grounds why the amendment should not be considered and recognized as a part of the constitution of the state.

In *Hildreth v. Taylor*, 117 Ark. 465, 175 S. W. 40, it was assigned as a reason for holding to be directory a requirement of publication of notice of a proposed amendment that the legislature had provided for no rec-

ord of the publication "whereby the court might take notice" whether it had been made.

But in *State v. Tooker*, 15 Mont. 8, 37 Pac. 840, 25 L.R.A. 560, wherein it appeared that the constitutional requirement that the secretary of state should publish a proposed amendment for a certain period was disregarded, the court while not stating in so many words that judicial notice was taken of the omission, took such notice and in holding that the omission was fatal to the adoption of the amendment, said: "The command of the constitution is in no uncertain voice. We cannot misunderstand it. We cannot do other than render to it the obedience which our duty demands. It provides that an amendment may be adopted by certain methods. These methods were not employed. Another method was resorted to. That method accomplished nothing. The amendment was not adopted." See also *State v. Davis*, 20 Nev. 220, 19 Pac. 894. And in the *Matter of Prohibitory Amendment Cases*, 24 Kan. 700, the court in upholding an amendment to the constitution took judicial notice of the proceedings for the adoption from its legislative history which was a matter of record, saying: "When the constitution says that upon certain conditions an amendment is adopted, must we not take judicial notice of the happening of those conditions? . . . So, although it may seem extravagant, yet if the legislature has failed to make provision for the canvass of any vote on a proposed constitutional amendment, and if in fact none be made, must not the courts take judicial notice of the actual vote and its result? . . . When a majority of the electors voting on an amendment at an election properly ordered, adopts it, then it becomes a part of the constitution. So the constitution itself says. The courts must judicially know whether such amendment has been adopted, and is in fact a part of the constitution, and to that end, if need be, must take judicial notice of every ballot cast at that election."

Although the question was not discussed the courts apparently took judicial notice of proceedings for the adoption of an amendment to the constitution in each of the following cases: *State v. Alderson*, 49 Mont. 387, Ann. Cas. 1916B 39, 142 Pac. 210; *State v. Winnett*, 78 Neb. 379, 15 Ann. Cas. 781, 110 N. W. 1113, 10 L.R.A.(N.S.) 149; *State v. Grey*, 21 Nev. 378, 32 Pac. 190, 19 L.R.A. 134. See also *Worman v. Hagan*, 78 Md. 162, 27 Atl. 616, 21 L.R.A. 716.

WOODEN

v.

COMMONWEALTH.

Virginia Supreme Court of Appeals—
September 9, 1915.

117 Va. 930; 86 S. E. 305.

Assault—What Constitutes Participation—Presence at Scene of Assault.

The mere presence of a person at the time and place of an assault, without any act, word, or gesture in aid of it, with nothing to show he advised it, will not render him guilty; mere knowledge not being enough.

[See note at end of this case.]

Criminal Law—Degree of Proof.

To justify a verdict of guilty, it is not sufficient that the evidence create a suspicion or probability of guilt; it must exclude every reasonable hypothesis, except that of guilt.

Assault and Battery—Sufficiency of Evidence.

In a prosecution for assault, the evidence is held to be insufficient to sustain a verdict of guilty.

Error to Corporation Court of Buena Vista.

Criminal action. Percy Wooden convicted of assault, and bring error. The facts are stated in the opinion. REVERSED.

Hugh A. White for plaintiff in error.

John Garland Pollard and *C. B. Garnett* for defendant in error.

[931] *CARDWELL, J.*—Percy Wooden, about sixteen years of age, was indicted for maliciously, feloniously and unlawfully making an assault with a dangerous weapon, to wit, a stone or rock, upon one Wallace Mowyer, with intent to maim, disable and kill the said Wallace Mowyer, and upon his trial was found guilty as charged in the indictment and sentenced to pay a fine of ten dollars and be confined in jail for sixty days. He thereupon applied for and obtained this writ of error from one of the judges of this court.

The only assignment of error is to the ruling of the trial court refusing to set aside the verdict of the jury upon the ground that the evidence is insufficient to support it, and there are but two questions raised by the record for consideration by this court: First, whether the evidence was sufficient to prove that the offense charged against the accused was committed within the jurisdiction of the Corporation Court of the city of Buena Vista; and, second, whether the evidence was sufficient to convict him of the offense charged.

In the view that this court takes of the case, it is only necessary to consider the second of the questions stated.

It appears that on Saturday night, April 25, 1915, five boys, viz.: Wallace Mowyer, the prosecutor; Howard Wooden, Percy Wooden, the accused; Earle Bryant and Harry Campbell, met on the street in front of a picture show. They all started up the street, Mowyer and Bryant being in front of the Wooden boys, and in their progress up the street it seems that Howard Wooden either called Mowyer "Arch Wilson," or in talking to himself said, "My name is Wilson. I am a brother of Arch Wilson, or Tyree," the significance of which is not shown, and both Bryant and Campbell testify that Howard Wooden did not call Mowyer "Arch Wilson," but Mowyer seems to have been incensed [932] by what had been said, and he and Campbell turned off to go behind Bias' shop when Mowyer said to Campbell, "If Howard starts anything I will end it with a rock in my pocket." The Wooden boys had gone on up the street when Mowyer went into Bryant's house to get, as he says, a drink of water, but his real purpose was to let the Wooden boys get ahead so that he might get away from them. There had been no threats or ill-feeling between the Woodens and Mowyer except the threat of the latter to "end the matter with a rock." On the contrary the boys theretofore had been friendly and often played together. Mowyer, after tarrying in the Bryant house about five minutes, went on up the street and when he got to the residence of a Mrs Hall, the Wooden boys were sitting on the side of the street on some rocks opposite Mrs Hall's house. He says that Howard Wooden there again called him "Arch Wilson," and that, on this account, he hit Howard Wooden on the head with a rock. The Mrs. Hall spoken of, testifying for the Commonwealth, stated that she heard the boys in front of her house talking, and thought they were fighting; that she heard Howard Wooden tell Mowyer that he had hit him with a rock and he was going to have him arrested, to which Mowyer replied, "I reckon you will." She also states that she saw Percy Wooden, the accused, stoop down like he was going to pick something up, but did not know whether or not it was his hat; that the boys left the front of her house and went on up the street a block and a half away, and she then heard one of them say, "I have got you," but she does not know who said this. Further she says that she heard Howard Wooden say to his brother Percy, "Hurry up, Percy, he might get away;" but on cross-examination she modified this statement by saying in effect that she only heard him say to Percy, "Hurry up," and just what was meant by that she did not seem to know. The boys it seems [933] went up the street,

Percy Wooden beside Mowyer, and Howard Wooden "sorter" beside him, until they got to an electric light, where Mowyer told Howard Wooden to let him alone, and about the time they got under the electric light Mowyer was hit by a missile, supposedly a rock, knocked senseless and remained unconscious for more than two days when he regained a measure of consciousness, and after a week, not having entirely recovered consciousness, was taken to a hospital at Staunton. There is no direct evidence whatever indicating that Percy Wooden, the accused, threw the rock which inflicted the injury upon Mowyer. In fact, it is conceded by the learned attorney-general that the evidence does not show conclusively that he did throw the rock, and it is only contended that the evidence is sufficient to show that the accused was a participant in the assault, aiding and abetting his brother, and therefore liable as a principal.

The only evidence in the record as to the hitting of the Mowyer boy with the rock is that of Mowyer himself, who states that they were about the electric light when he was hit; that it was very light and that he could see both Howard and Percy Wooden; that he was looking at Percy when he was hit, but he was trying to watch both of the boys; that if Percy had thrown the rock while he was looking at him he could have seen him, but that he saw nobody throw the rock, and after he was hit he knew nothing and never did know who hit him. Mowyer was asked: "You told Mr. Rucker you were watching both of them and had your head turned looking at Percy. Were you hit while you were looking at Percy? A. Yes, sir; but I was trying to watch both of them.

"Q. If Percy had thrown a rock while you were looking at him you could have seen him, couldn't you? A. Yes, sir."

"Q. Did you see anybody throw a rock? A. No, sir."

After Mowyer was hit he was taken to the house of the [934] parents of the Wooden boys and there taken care of until the next day when the parents of Mowyer ascertained his injury and a doctor was summoned. While the evidence shows that one of the Wooden boys probably threw the rock with which Mowyer was hit, it clearly appears from the statement made by Mowyer that it was not Percy Wooden. Beyond the fact that Percy Wooden, the accused, was present when Mowyer was hit with a rock, there is absolutely no evidence that he did anything whatever as a participant in the assault or in aiding and abetting his brother. It clearly appears from the evidence that neither of the Wooden boys had attacked Mowyer at the time that he hit Howard Wooden, and there is no evidence of any provocation to Percy

Wooden to throw the rock that hit Mowyer, the fact being, as stated in Mowyer's own testimony, that he did not throw the rock.

The authorities are uniform that the mere presence of a person at the time and place of an assault, without any act, word or gesture in aid or encouragement of it, and without anything to show that he advised the assault, will not render him guilty. The authorities on the subject are collated in a note to *Brink v. Purnell*, 22 Ann. Cas. 1912A 829, where the rule is stated as follows:

"It is a general and well established principle of law, that one who is present at an assault, and who encourages the person who commits it, is liable criminally in the same manner and to the same extent as the person committing the assault. . . .

"The principle that in cases of assault all who are guilty are principals and that there are no accessories applies, and hence a person who is so present at and encourages an assault is a principal and not merely an accessory. . . .

"The mere presence of a person at the time and place of an assault, without any act, word or gesture in aid or encouragement of it, and without anything to show that he [935] advised the assault, will not render him guilty; . . . nor will the mere fact that the defendant knew of the assault justify a conviction. . . . He must do something; he must aid and encourage by words or gestures, or do some act in the way of encouragement of the actual participants in order to make him guilty as a principal."

In *Mitchell's Com.* 33 Grat. Va. 845, the court said: "Principals are such either in the first or second degree. Principals in the first degree are those who are the immediate perpetrators of the act. Principals in the second degree are those who did not with their own hands commit the act, but were present aiding and abetting it." See, also *Horton v. Com.* 99 Va. 848, 38 S. E. 184; *Daingerfield v. Thompson*, 33 Grat. (Va.) 136, 36 Am. Rep. 783; 2 Rul. Cas. Law, 526.

It is well settled by numerous cases that it is not sufficient to create a suspicion or probability of guilt, but the evidence must go further and exclude every reasonable hypothesis except that of guilt. As said in *Hairston v. Com.* 97 Va. 757, 32 S. E. 797, "The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence."

In the case of *Burton v. Com.* 108 Va. 892, 62 S. E. 376, the opinion by Keith, P., held, that while motions for new trials must be heard as upon a demurrer to the evidence, yet "The rule does not leave the jury at liberty to guess, and where a fact is equally susceptible of two interpretations, one of which is consistent with the innocence of the

accused, they cannot arbitrarily adopt that interpretation which incriminates him."

It might be conceded that either the accused or his brother threw the rock that hit Mowyer, but as we have seen it clearly appears from Moyer's testimony that the accused did not throw it, for it was thrown and Mowyer was hit while he was looking directly at the accused, and [936] Mowyer says that he would have seen him throw the rock if he had done so.

In our view of the evidence in this case as a whole, it is entirely insufficient to sustain the finding of the jury, that the accused was guilty as charged in the indictment, or that he was guilty of any offense, and, therefore, the judgment upon their verdict is erroneous, and it will be reversed and annulled, the verdict of the jury set aside, and the case remanded to the Corporation Court of the city of Buena Vista for a new trial, if the court and prosecuting attorney shall be of opinion that a better case against the accused can be made.

Reversed.

NOTE.

Mere presence at the scene of an assault, without any act or word of encouragement to the perpetrator, is held in the reported case not to warrant a conviction of assault. The liability for assault of one who orally encourages another in making an attack is discussed in the note to *Brink v. Purnell*, Ann. Cas. 1912A 829, the limitation on that liability applied in the reported case being therein discussed.

HANLEY

v.

EASTERN STEAMSHIP CORPORATION.

(Two Cases.)

Massachusetts Supreme Judicial Court—May 22, 1915.

221 Mass. 125; 109 N. E. 167.

Venue — Residence of Plaintiff — Distinction between Residence and Place of Business.

Rev. Laws, c. 167, § 6, as amended by St. 1904, c. 320, provides that an action to recover for injury received by reason of negligence shall be brought in the county in which the plaintiff lives or has his usual place of business, or in the county in which the injury

was received. Such an injury was received by plaintiff's intestate in Essex county, the plaintiff lived in Norfolk county, and was employed as assistant manager of a department store in Suffolk county, and the action was brought in Suffolk county. It is held that the venue was improperly laid, it being a rule in the interpretation of statutes that where reasonably possible full effect should be given all the words used, while "usual place of business" as used in St. 1854, c. 322, first permitting transitory actions to be brought in the county where either party had such place of business, had a more restricted signification than the words "in which he principally transacts his business or follows his trade or calling," used in St. 1856, c. 70, providing that where the plaintiff in a transitory action was a nonresident, the action might be brought in the county in which the defendant lived or principally transacted his business or followed his trade or calling if he resided in the commonwealth, the language of Rev. Laws, c. 167, § 6, as amended, being taken from the earlier act, or that a "usual place of business" does not include where one pursues a "trade or calling," the work of the plaintiff, as a department store manager, being a "trade or calling" or employment by another, as distinguished from working for oneself.

Carriers of Passengers — Steamship — Liability for Injury to Passenger Falling Overboard.

In an action against a steamship company for the conscious suffering of a passenger drowned upon going overboard through an unguarded place in the rail when the vessel lurched, the evidence is held to be sufficient to support a finding of due care on the part of deceased.

[See note at end of this case.]

Same.

In an action against a steamship company for death of a passenger flung overboard through an unguarded space in the rail of the vessel, the evidence is held to be sufficient to support a finding that the accident was caused by a lurch of the ship, and not by deceased's volition or lack of attention.

[See note at end of this case.]

Same.

From the mere fact that a space on the deck of defendant's vessel between a raft and a lifeboat was unguarded by any rail, it cannot be said as matter of law that a passenger, flung through such opening when the ship lurched, had assumed the risk.

[See note at end of this case.]

Same.

From the mere fact that the regulations of the United States required defendant, as the operator of a steamship carrying passengers to place lifeboats so that they could be launched safely in less than two minutes, it cannot be ruled, as a matter of law, that an easily removable chain bridging the unguarded space in the rail, through which a lifeboat passed when launched, is the only practicable protection, since that is a question of fact; it being possible that the jury may find that

passengers should have been excluded from the neighborhood.

[See note at end of this case.]

Same.

The only negligence for which a passenger steamship company is responsible, in an action for conscious suffering of a passenger, drowned when flung overboard by the lurching of the ship, is that of the company's servants or agents.

[See note at end of this case.]

Same.

Where the steamship on which deceased traveled carried several hundred passengers, in view of the high responsibility resting on the defendant steamship company as a common carrier, negligence may be found in its failure to inspect the vessel, by which a gap in the rail, to allow the launching of a lifeboat, was left unguarded by the usual chain for several hours.

[See note at end of this case.]

Instructions — Requests — Giving in Substance.

The request of a defendant for instructions is complied with by giving them in substance, in a fair and comprehensive charge.

Singling Out Evidence — Request Properly Refused.

Requested instructions, directed to fragmentary and indecisive portions of the evidence, are rightly refused.

Trials — Trial on Wrong Theory — Effect.

Where the trial of an action for death of a passenger, flung overboard by the lurching of a steamship, proceeds on the theory that the case was governed by St. 1907, c. 375, imposing a penalty for negligently causing the death of a human being in instances where no other remedy is given, there is a mistrial, since such statute has no application to death of a passenger caused by the negligence of a common carrier, a matter regulated by Rev. Laws, c. 70, § 6, providing a statutory penalty for death caused by the negligence of common carriers, the rule of damages and grounds of liability established by the two acts being different.

Exceptions from Superior Court, Suffolk county: STEVENS, Judge.

Action by Charles A. Hanley, administrator, plaintiff, against Eastern Steamship Company, defendant. Judgment for plaintiff. Defendant alleges exceptions. The facts are stated in the opinion. EXCEPTIONS SUSTAINED.

Jos. A. Dennison, Robt. Gallagher and Chas. D. Driscoll for plaintiff.

John T. Hughes for defendant.

[130] RUGG, C. J.—These are two actions of tort. In one the plaintiff seeks to recover damages for the conscious suffering and in the other the statutory penalty for the death of his intestate, alleged to have been caused by the defendant. The intestate lost his life

in connection with being a passenger upon the Bay State, a steamship operated by the defendant between Boston and Portland.

1. A question as to the proper venue of the actions lies at the threshold. It is agreed that the damage and injury were received in Essex County, that the plaintiff and his intestate lived in Norfolk County and were employed as the manager and the assistant manager respectively in one of the departments of a large store in Suffolk County. Whether the actions rightly were brought in Suffolk County depends upon the meaning of "usual place of business" in St. 1904, c. 320, amending R. L. c. 167, § 6, whereby it is provided that actions like these "shall be brought in the county in [131] which the plaintiff lives or has his usual place of business, or in the county in which the alleged injury or damage was received."

In determining the meaning of the statute in this respect, its history is important. St. 1854, c. 322, first permitted transitory actions to be brought in the county where either party had his "usual place of business," but confined its operation to cases where all the parties were residents of the Commonwealth. St. 1856, c. 70, provided that where the plaintiff in a transitory action was a non-resident, the action might be brought in the county in which the defendant lived, or "principally transacts his business, or follows his trade or calling, if he resides in this Commonwealth." But it did not affect St. 1854, c. 322. These two statutes both continued in force until 1860, when they were combined in c. 123, § 1 of the General Statutes, in these words: "Transitory actions, except in cases in which it is otherwise provided, if any one of the parties lives in the State, shall be brought in the county where some one of them lives or has his usual place of business." The reference to "trade or calling" contained in St. 1856, c. 70, was omitted. The commissioners on revision, in their note to this section, give no information as to the purpose or intent of this change, although referring to another change made in the section. Interpreting the law as it stood from 1856 until the enactment of the General Statutes, it is to be observed that, in order to give full force and effect to all the words used in St. 1856, c. 70, as compared with St. 1854, c. 322, it must be presumed that the Legislature intended for the later act a broader scope than for the earlier. It is a well recognized rule in the interpretation of statutes that, where reasonably possible, full force and effect should be given all the words used by the Legisla-

ture. Previous to 1854 transitory actions could be brought only in the county in which one of the parties had his residence. When the venue was extended in 1854, it included the county of the usual place of business of either, where both parties resided within the Commonwealth. It may well have been thought in 1856, when the venue for non-resident plaintiffs was extended, that it might include not only the residence and the place of business, but also the place of employment, of resident defendants. If the question had arisen in 1859, it cannot well be doubted that the court would have held that "usual place of business" as used in St. 1854, c. 322, had a more [132] restricted signification than the words, "In which he principally transacts his business, or follows his trade or calling" of St. 1856, c. 70. The rational explanation of the action of the Legislature in enacting the General Statutes touching this subject, by employing only the words of the statute of 1854, and omitting entirely those contained in the statute of 1856, appears to us to be that it was intended to recur to the meaning of the words of the earlier statute and discard the broader reference contained in the later statute. This is something more than a mere verbal change in the revision of a statute, which would not affect its meaning, *Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72, 74, 97 N. E. 636, and reaches to a modification of the substance. This interpretation is confirmed by St. 1904, c. 320, which governs the venue of these actions. The purpose of that statute, as was pointed out in *Sandler v. Boston El. R. Co.* 218 Mass. 333, 105 N. E. 980, was to relieve the courts of Suffolk County, in which many defendants in actions of negligence have a usual place of business, from the trial of actions where the alleged act of negligence happened in another county and the plaintiff resided or had his usual place of business in another county. Its manifest design was to diminish the number of trials which theretofore could be had in Suffolk County, and thus to save to that county what was felt to be a disproportionate expense in the maintenance of jury trials. It should be interpreted, so far as reasonably practicable, in such way as to further this design.

The words, "usual place of business," apart from special circumstances throwing light upon their meaning, may be given a comprehensive meaning, *Goddard v. Chaffee*, 2 Allen (Mass.) 395, 79 Am. Dec. 796, and have been held to include the usual place of labor or employment in the service of another,¹ al-

¹ *Lewis v. Davis*, 8 Daly (N. Y.) 185; *Burke v. Burke*, 27 Misc. 684, 58 N. Y. S. 676; *Brassack v. Interborough Rapid Transit Co.* 66 Misc. 190, 121 N. Y. S. 215; *Coker v. State*, 12 Ga. App. 425, 76 S. E. 103, 991;

Idelett v. State, 14 Ga. App. 501, 81 S. E. 379; *In re Belcher*, 2 Ben. 468, 3 Fed. Cas. No. 1237; *In re Bailey*, 2 Ben. 437, 2 Fed. Cas. 753; *Curley v. New England Trust Co.* 221 Mass. 384.

though there are contrary decisions.¹ It follows that the words used in our statute, in the light of its history, do not include a place where one pursues a "trade or calling." The work of the plaintiff and the intestate in a department [133] store comes rather within the description of "trade or calling" than "place of business." It is employment as distinguished from business. Therefore the venue of these actions was laid improperly in Suffolk County. They should have been brought either in the county of the residence, which was Norfolk, or where the alleged act of negligence occurred, which was Essex.

As under R. L. 167, § 14, the actions may be transferred to the proper county and there tried again, other questions now fairly presented and likely to arise in substance at a new trial are considered.

2. There was evidence tending to show that there was, on a deck of the steamship where passengers were permitted to go, a space, variously estimated at from three to five feet between a life boat on one side and a life raft on the other, where there was no rail, guard or protection to prevent a passenger from walking, being thrown or falling over the ship's side to the water; that, as the plaintiff's intestate, walking along at about half past nine o'clock in the evening with a camp stool in his hand, was in the act of putting it down, the vessel gave a lurch and he fell overboard. If this evidence was believed, it was sufficient to support a finding of due care. It well may be found that a passenger upon an ocean going steamship, during the voyage, may assume that no place where he is allowed to go will be left entirely without some safeguard to prevent a passenger from falling overboard.

3. The manner of the accident was not left wholly to surmise or conjecture. If the testimony just narrated were taken at its full value, it reasonably might have been thought to show that the plaintiff's intestate was caused to fall overboard by the lurch of the ship and not by his own volition or lack of attention.

4. It cannot be said as matter of law that he assumed the risk of such an injury. If the jury believed that there was no adequate cause for him to know that there was no guard or protection, then there was no room for the operation of the maxim *volenti non fit injuria*. Even though it may have been obvious that there was no chain or guard stretching over the space between the life boat and the raft, it might still have been reasonable to assume that there was a rail or other protection at the edge of the deck.

5. It has been earnestly argued in behalf of the defendant that because of the regula-

tions of the United States requiring life boats [134] to be so placed and fitted that they can be launched safely in less than two minutes, it should have been ruled there could be no recovery on the fourth count of the declaration, which alleged the negligence of the defendant to have consisted in failing to provide against the removal or unfastening of chains, which it appeared were provided commonly to protect the space between the life boat and the raft. It contends that nothing more permanent than chains which would unfasten easily could have been used at this place. But it could not have been ruled as matter of law that this was the only practicable protection. What was a sufficient and appropriate guard was a matter to be determined upon all the evidence. If the only kind of guard, consistent with the federal regulation as to launching the life boats, was an insecure one, then it might have been found that passengers should have been excluded from the immediate neighborhood.

6. The jury rightly were instructed that the only negligence for which the defendant could be held responsible was that of its servants or agents. *Joy v. Winnisimmet Co.* 114 Mass. 63. But there were several hundred passengers on this boat and necessarily some degree of inspection was required, in the exercise of the high responsibility resting upon the defendant as a common carrier, to see that the various parts and appointments of the vessel remained safe and were not put out of place or rendered dangerous by such ignorant or stupid persons as commonly might be anticipated among so large a number of passengers. The defendant was not obliged to act on the theory that passengers wilfully would remove guards placed for their protection; but, if the peril that was disclosed by the accident was one likely to occur, then the defendant would be required to provide against it, so far as reasonably possible. It properly was left to the jury to determine whether such reasonable inspection as the defendant ought to have exercised, in view of the number of passengers carried and the nature of the particular place and its fittings, and the danger likely to follow from its becoming unguarded, would have revealed the fact that the guard chain had become unfastened. *Peverly v. Boston*, 136 Mass. 360, 49 Am. Rep. 37; *Glennen v. Boston El. R. Co.* 207 Mass. 497, 93 N. E. 700, 32 L.R.A. (N.S.) 470. There is nothing inconsistent with this conclusion in *Lyons v. Boston El. R. Co.* 204 Mass. 227, 90 N. E. 419. There was evidence that the place where the accident [135] occurred was without chain or other guard for a period of several hours. This might have been found to have been negligence.

¹ In *re Lippart*, 201 Fed. 103; In *re Magie*, 2 Ben. 369, 16 Fed. Cas. 8,951.

7. The other requests of the defendant not covered by what has been said either were given in substance in the fair and comprehensive charge of the presiding judge, or rightly were refused as being directed to fragmentary or indecisive portions of the evidence.

8. The form of questions submitted to the jury might have been modified so as to overcome the objections urged by the defendant. Without deciding that the exceptions would be sustained on this ground, in view of the accompanying explanation of the judge, it would have been better to have put the question in some such form as this: "Did the defendant negligently fail to guard the place where the accident happened?" or in some other way to have avoided the implication that the place was unguarded and the only point to be decided was whether that was a negligent act.

All that has been said under paragraphs numbered 5 to 8, both inclusive, of this opinion, relates solely to the action for conscious suffering.

9. Manifestly there was a mistrial in the action to recover the penalty for causing the death of the intestate. The trial of that action proceeded on the theory that it was governed by St. 1907, c. 375, which is the general statute imposing a penalty for negligently causing the death of a human being in instances where no other remedy is given. But that statute has no application to a common carrier of passengers. That was decided expressly as to street railways by *Brooks v. Fitchburg, etc. St. R. Co.* 200 Mass. 8, 86 N. E. 289. It is plain from that decision that the liability of such a common carrier as the defendant for causing the death of a passenger depends wholly upon R. L. c. 70, § 6. See also *Boott Mills v. Boston, etc. R. Co.* 218 Mass. 582, 586, 106 N. E. 680.

But no exception specifically directed to this procedure was taken at the trial. Since the exceptions are sustained on another ground, it is not necessary to determine whether a new trial would have been ordered now for that reason alone. See *Bond v. Bond*, 7 Allen (Mass.) 1, 6.

Neither is it necessary to decide whether the questions of the negligence of the defendant in its corporate capacity or of the gross [136] negligence or unfitness of its servants or agents, were raised by some of the defendant's requests for instructions in general terms, although not then thought of. *Parrot v. Mexican Cent. R. Co.* 207 Mass. 184, 190, 93 N. E. 590, 34 L.R.A. (N.S.) 261. Assuming that these questions are raised upon the present record the rule of damages and the grounds of liability set forth in St. 1907, c. 375, under which the case was tried, are quite different from those established by R.

L. c. 70, § 6, under which alone the defendant in law could be held liable. Therefore it appears to be wiser not to decide these points until the case has been tried and the evidence produced with a view to presenting them.

Exceptions sustained.

NOTE.

Liability of Carrier by Water for Injury to or Death of Passenger Falling Overboard.

Scope of Note, 1038.

Passenger Falling Off Vessel, 1038.

Passenger Falling Off Gangplank, 1042.

Scope of Note.

It is the purpose of the present note to consider only those cases dealing with the liability of a carrier by water for an injury to or the death of a passenger who falls overboard, either from the vessel itself, or from the gangplank extending from the vessel to the wharf. Those cases wherein it appears that the passenger fell or stumbled into a space left between the vessel and the wharf, and was crushed or otherwise injured, are not included.

The liability of the owner of a ferry to passengers thereon is discussed in the notes to *Hopkins v. West Jersey, etc. R. Co.* 17 Ann. Cas. 370, and *Rizzo v. Winnisimmet Co. Ann. Cas. 1915C 1003*. The duty of a carrier by water with respect to the accommodations furnished to passengers is the subject of the note to *Northwestern Steamship Co. v. Ransom*, 20 Ann. Cas. 1015.

Passenger Falling Off Vessel.

The rule by which a carrier by water is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit, is applicable to precautions to prevent injury to a passenger by falling overboard. See *McBride v. McNally*, 243 Pa. St. 206, 89 Atl. 1131, 52 L.R.A. (N.S.) 259. But the duty is not absolute and where there is no proof of negligence on the part of the carrier there can be no recovery. See the reported case.

Thus, in *Dougan v. Champlain Transp. Co.* 50 N. Y. 1, *affirming* 6 Lans. 430, the testimony showed without conflict that the boat wherein the accident occurred had a gangway in the forward part about eight feet in width, with a stanchion in the center, which was covered with rails, about three feet high,

which were attached by hinges to the bulwarks of the same height, inclosing the residue of the forward part of the boat. These rails were swung back, when necessary, for the purpose of receiving and landing passengers and freight, and were, when this was done, again placed over the gangway and fastened to the stanchions. The residue of the forward part of the boat was boarded up three feet high. The accommodations for passengers were in other parts of the boat, and none in this forward part, though passengers were permitted to and did, sometimes, come out into and stay in this forward part, with the knowledge of the defendant's employees. About dusk, while the boat was running on her trip, the deck being somewhat icy, and the wind blowing hard, a passenger came through a door from the room immediately in rear of this forward part. His hat was blown off, and he sprang to recover it, and while so doing fell down, slipped under the railing on the gangway, fell overboard, and was drowned. Holding that there could be no recovery, the court said: "It will be seen that the only proof of negligence was the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury; but the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years; and there was no proof tending to show that any one had ever before fell and gone overboard under the railing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur. Indeed, a man would be much more likely to get overboard by falling over than under the railing. True, it would be unsafe for small children to run upon this part of the boat, as they might run under the rail and fall overboard; but there was no evidence that children were ever permitted to be in this part of the boat, except to go on and off in port; there was nothing showing that any passengers were ever expected to be there except for this purpose. The counsel for the appellant cites cases where it has been held that carriers of passengers are required to exercise the utmost care in their vehicles, machinery, etc., used in their transportation, and that for this purpose they are required to use all the safeguards furnished by science generally known; but these were cases of the explosion of steamboilers; the breaking of axles of railway coaches, defects in railway tracks and the like, where experience had shown that danger was to be apprehended

and necessary to be guarded against. But when, as in the present case, numerous boats constructed in the same way had been run for years with perfect safety to the passengers, where there was no ground for supposing that any passenger ever permitted to be there would fall under the railing, to find negligence from a failure to board up the space so as to preclude such a possibility, could not be justified. Proof was given that two passenger boats navigating the Hudson had the gang space boarded up; but that this was done to prevent passengers from falling overboard does not appear."

In the case of *Cleveland v. New Jersey Steamboat Co.* (68 N. Y. 306, *reversing* 5 Hun 623; 7 N. Y. St. Rep. 598, 125 N. Y. 299, 26 N. E. 327, *reversing* 53 Hun 638, 7 N. Y. S. 28), the following facts appeared: The plaintiff, a passenger on a boat, was, when the boat started, standing in front of the gangway opening, where he had entered, some four or five feet inside the bulwarks, but outside the partition, between the gangway and main part of the boat. The defendant had provided a gate to close the gangway opening, the top bar of which projected at each end. The projecting ends of this bar, when the gate was in its place, rested in iron staples at each end of the opening, to prevent the gate from swinging, and there were two upright stanchions placed outside the gate, let into the deck. There was also a top rail which received the stanchions, and which, when in place, was secured by iron slides. The referee found that the opening of the gangway was, when the gate, stanchions and top rail were in their places, and the fastenings were in their places, properly and sufficiently closed, and that the gate, stanchions, top rail and fastenings, when in their places, were, in construction and quality, sufficient for the protection of passengers. Before the boat left the wharf, the mate put the gate in place. He requested the passengers to step inside, but the plaintiff did not hear the request. As the boat moved out, a person on board attempted to jump ashore, but fell into the water. This caused a sudden rush of a crowd of passengers to the side. The plaintiff was pushed against the gate. One of the projecting ends of the top bar had been lifted out of the staple by some unauthorized person after the boat started. The pressure caused the gate to give way, although it was not broken, and the plaintiff fell overboard. The mate of the steamer, at the time of the accident, had turned to get the stanchions and top rail to put them in their places. In the final opinion (125 N. Y. 299, 26 N. E. 327), the court said: "It appears that as soon as the signal was given, the gangplank was hauled up and the boat started. Immediately upon the hauling up

of the gangplank the mate started for the gate and brought it to the gangway opening, and was in the very act of setting it in position when the man brushed by him and jumped. At this time the boat had only moved thirty-five or forty feet along the pier, and was about twelve or fifteen feet away from it, and yet in that brief period the mate had almost accomplished a secure shutting of the gate. To say that the boat should not have been allowed to move a foot from the dock until this gate had been thus securely fastened and the rail and stanchions placed in position, is to decide the matter in view of the facts which subsequently occurred, and not from the circumstances existing prior thereto. It was an accident which could not, as I think, have been reasonably anticipated. The attempt of a belated man to jump from the boat to the wharf immediately after the starting of the boat, his failure to reach the dock, and his consequent falling in the water; the cry of 'man overboard,' the instantaneous rush of a crowd of ordinary passengers towards the side of the boat whence the cry proceeded, and the shoving of the plaintiff overboard, altogether form such an extraordinary and theretofore unheard of combination of circumstances that the failure to foresee their possibility and to guard against their happening cannot, in any fair or proper view of the subject, be called negligence. The mere fact that an accident of the kind has never before happened may not be enough to avert the charge of negligence. If it might reasonably have been anticipated, or if its occurrence would not, in the minds of reasonable men, be in the highest degree unlikely, if things were left in the condition then presented to them, the charge of negligence might be a proper one for the jury to pass upon. . . . But here is a case where an accident of the nature proved not only never happened before, but it resulted from causes which no human being up to that time could reasonably expect to concur. In this view it is wholly immaterial whether the mate, when he heard the voice and turned around, did so for the purpose of letting the man through the opening, or only for the purpose of seeing what was being done, with a view to perform his own duty more intelligently. It was not to be anticipated that the man would make an ineffectual effort to jump to the dock and fall in the water, and that then all the other circumstances should occur which resulted in shoving the plaintiff overboard. The accident, upon the proof in the case, looking at it in the most favorable light for the plaintiff, was the result of causes for whose existence no one was legally responsible."

Where the evidence shows that the passenger was guilty of contributory negligence, no recovery can, of course, be had. Thus, in

Gretschmann v. Fix, 189 Fed. 716, it appeared that a barge and steamer, of which the defendants were the owners, had on board a large number of excursionists bound on a pleasure outing, and the youth, for whose death the action was brought, was of the party. A lifeboat was attached to the barge by a five-foot line, and at the time the vessels started on the trip, she was manned by a deckhand, who remained seated in her until the arrival at an island, where he left his position on account of the heat of the sun and stood on the barge. Subsequently he went forward on the barge to get a drink of water, and, while doing so, the libellant's intestate voluntarily hauled the lifeboat to the stern of the barge and boarded her. Another excursionist had preceded him and taken a seat in the lifeboat. The steamer was proceeding at the rate of eight miles an hour. Neither the entry of the men into the lifeboat nor their presence therein was known to the master of the steamer. Immediately on the return of the deckhand, who had been absent four or five minutes, he and several members of the excursion party called to the men to come out of the lifeboat, and in his attempt to do so the libellant's intestate slipped or stumbled and was precipitated into the river and drowned. He was at the time of the accident intoxicated. There were no defects in the construction of the lifeboat or the oarlocks, or the manner in which the boat was fastened to the stern of the barge. The court said: "It is difficult to perceive how the libellant may be permitted to recover herein. It is impossible to say that the decedent would not have entered the lifeboat if it had been properly manned. It is idle to indulge in any speculation as to what would have occurred if the deckhand Finn had remained on the lifeboat or if the decedent's associate had not first taken a seat therein. It is thought impossible to determine that the fatality was due to any other cause than the voluntary and obviously negligent act of the decedent in placing himself in the lifeboat—a dangerous place. He clearly had no right or license to enter it even though it was unattended. His stumbling or slipping while in the act of leaving the boat, as a result of which he fell into the river, was the consequence of his initial negligent act. The asserted negligence of the respondents in failing to have a man in the lifeboat at the precise time the decedent boarded her was not the direct cause of the drowning. The absence from his post of the man appointed to man the yawl boat was not the approximate cause of the regrettable occurrence. His absence was not an invitation to the decedent to draw the boat to the stern of the barge and seat himself in her, as she obviously was not provided for such use. Nei-

ther the master of the steamer nor any one in charge of the barge had warning of the decedent's intentions, and they could not be expected to have anticipated them. . . . It is quite true that in the exercise of proper precaution the lifeboat should have been hauled alongside the barge to have permitted the decedent to alight, but the evidence does not show that the master knew of the intoxicated condition of the decedent, or knew of his presence in the lifeboat, or of the temporary absence of the man charged with the duty of manning her. Upon the return of Finn to the stern of the barge, members of the committee in charge of the excursion, and who had nothing to do with the navigation of the vessels, were directing and urging the decedent and his associate to leave the yawl boat, and it was upon compliance to such requests that the casualty occurred. The master of the steamer promptly reversed the steamer's engines and as quickly as possible brought the lifeboat into service. The suddenness of the accident may well have disconcerted those in charge of the steamer and barge, and allowance must be made for any delay or errors in judgment which are apt to occur in such a situation. The law does not require the same calmness, self-possession or control when immediate danger confronts us as is expected when the occasion is more normal. . . . It is quite believable that if the man whose duty it was to remain in the lifeboat had remained there he would not have permitted the decedent to come aboard, but, in view of the facts showing that the direct cause of the accident was attributable to the deceased, any such omission is wholly insufficient to charge the respondents with liability. . . . As it is, I feel bound to hold that the respondents were not negligent."

It was likewise held in the case of *The Southside*, 155 Fed. 364, that the death of a passenger on a ferry boat was the result of his own negligence, and that therefore there could be no recovery. The evidence showed that when the ferry boat was about a hundred feet from her slip, the plaintiff's intestate went through the port forward lattice work iron gate which crossed her bow, fell overboard and was drowned. The preponderance of the evidence showed that, at the time of the accident, the gates were in good order, and that the intestate was leaning, with his right arm around the upright, with his back against the gate and his left arm stretched across it, and that an ordinary lurch of the boat occurred, or there was some movement of the passengers which caused the gate to open and permitted him to go backward through it and overboard. The court said: "It has been urged that other people leaned against the gate but that seems to be imma-

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terial. When the gates were erected notice was printed in a conspicuous place near them that they were not to be handled. When a passenger did handle them, notwithstanding the warning and came to grief, it seems to have been a case of negligence on his part fully accounting for the accident. The fact that millions of passengers were carried on this boat and similar ones during a series of years without any accident happening from the use of the gates is strong proof that the petitioner could not anticipate any such trouble as ensued, and is therefore not liable for the result of this accident."

In *Le Blanc v. Sweet*, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303, the owner of a steamboat was held to be liable for the death of a passenger transferred with the knowledge and assistance of the officers of the vessel, to a skiff while the vessel was in motion, with the result that she was precipitated into the water and drowned. It was held that the means provided by the officers of the boat for effecting the transfer of the passenger were not commensurate with the danger to which she was subjected, and that there had been nothing in her conduct to relieve the owner from his liability.

In *Loddell v. Bullitt*, 13 La. 348, 33 Am. Dec. 567, the plaintiff recovered judgment against the defendant for the value of a slave owned by him who fell overboard and was drowned, through the neglect and want of care of the officers and crew of the boat, in not stopping and putting the boat about in order to save him, and from the want of a small boat and ropes which could be thrown to him.

In *Lindstrom v. International Nav. Co.* 117 Fed. 170, reversed on other grounds 123 Fed. 475, 60 C. C. A. 649, it appeared that during the voyage of the vessel on which the plaintiff's daughter was a passenger, the vessel shipped a large wave, which violently swept the steerage passengers backwards and forwards on the deck, and some of them in and out of the companionway leading to the cabin. The complaint charged, and the jury found, that by the defendant's negligence the plaintiff's intestate was carried overboard and drowned. It was held that the steamship company was liable under the New York statute (Code Civ. Proc. § 1902) giving the personal representative a right of action for the death by wrongful act of his intestate where the latter, if he had not been killed, but injured, could have maintained an action for the injury. The court held that as the ship was an American vessel, registered at the port of New York, she was on the high seas a part of the territory of New York, and that as the proximate cause of the intestate's death was the defendant's negligent act or omission on shipboard, her death, though in

the ocean, was related to the act or omission in such a way that it must be deemed to have been caused within the territory of the state of New York, and the requirements of the New York statute having been fulfilled, there might be a recovery thereunder.

In *Pate v. Tar Heel Steamboat Co.* 148 N. C. 571, 62 S. E. 614, wherein it appeared that a passenger, in descending a narrow and dark stairway of a steamer at night, with a sharp turn near the bottom, and with a loose step which landed at the edge of the boat, and within eighteen or twenty inches of the water's edge, accidentally fell overboard and was drowned, it was held that, despite his own contributory negligence, the question of the dereliction of duty of the defendant in attempting to rescue the passenger, was, in view of the contradictory evidence, properly submitted to the jury.

In *Melhado v. Poughkeepsie Transp. Co.* 27 Hun (N. Y.) 99, the complaint alleged in substance that while the plaintiff's intestate was a passenger on one of the boats of the defendant company he came to his death by being drowned in the waters of the Hudson river; that his death was caused by the wrongful act, neglect and default of the defendant in refusing to stop the boat or render him any assistance whatever, though requested so to do. The court said: "If this complaint fails to allege freedom from negligence on the part of the deceased, it yet does allege wrongful and wilful neglect and default in refusing to stop the boat and save a human life. Culpable negligence resulting in death is a crime, and where life has been lost by the carelessness or negligence of another the law admits no justification. This rule applies not only where the death of one is caused by the negligent act of another, but where it is caused by the negligent omission of duty of that other. There was due from the defendant to the deceased passenger protection and safety so far as they could be secured by reasonable care and exertion; certainly this obligation did not cease at the supreme moment when his life was in peril."

Passenger Falling Off Gangplank.

It is the duty of a carrier by water to provide and maintain a reasonably safe means for the egress or discharge of its passengers, and a failure in this respect as a result of which a passenger falls from the gangplank, renders the carrier liable in damages. *Hrebrik v. Carr*, 29 Fed. 298; *Burrows v. Lowndale*, 133 Fed. 250, 66 C. C. A. 650; *McBride v. McNally*, 243 Pa. St. 206, 89 Atl. 1131, 52 L.R.A.(N.S.) 259; *Croft v. Northwestern Steamship Co.* 20 Wash. 175, 55 Pac. 42.

Thus, in *Burrows v. Lowndale*, supra, it was held that a gangplank thrown out from

the deck of a passenger steamer to the wharf at an angle of about thirty degrees for the purpose of landing passengers, the plank being about ten feet long, sixteen inches wide, one inch thick and having small cleats nailed to one side of it about nineteen inches apart, but having no railing, ropes, or guards of any kind, was not a safe method for the discharge of passengers.

In *Hrebrik v. Carr*, supra, the evidence showed that the passageway from a steamer to the wharf was a single narrow plank, laid from the gangway to the pier, without battens or ropes, and that the plaintiff's husband, while passing from the steamer on which they had taken passage to the pier in order to make some purchases, fell from the gangplank and was drowned. The court held the owner of the ship liable on the ground that the gangplank provided as a means of egress from the steamer to the pier formed an improper and unsafe passageway. The court also held that the husband, who was on board the vessel as a passenger, had the right to go ashore where he did, and that it was the duty of the defendant to keep and maintain, at all proper times, a safe means of passage from the steamer to the pier, the nondischarge of which obligation rendered the defendant liable in damages.

In *McBride v. McNally*, 243 Pa. St. 206, 89 Atl. 1131, 52 L.R.A.(N.S.) 259, it appeared that the plaintiff had bought a ticket for passage on an excursion and started to board the steamboat by way of the gangplank. In consequence of the turning or tilting of the gangplank, which had not been properly and securely fastened at both ends, she was thrown into the river and injured. It was held that the excursion boat owner had failed to exercise the care and diligence proportionate to the danger of the person carried which was required of a common carrier and therefore was liable in damages.

In *Croft v. Northwestern Steamship Co.* 20 Wash. 175, 55 Pac. 42, it appeared that the gangplank placed from the wharf to a steamer had been properly fastened, but that another steamer came up, at the time the plaintiff was boarding the first steamer, and made fast to the first steamer, the result being that the gangplank fell, precipitating the plaintiff into the water. It was held that an instruction was proper which told the jury that if the second steamer was carelessly and improperly handled so that she pulled the first one away from the wharf and caused the gangplank to fall at the time the plaintiff was on it, the first steamer up to that time having been properly moored and the gangplank properly fastened, there should be no recovery against the owner of the first steamer. But the court held that it was not only the duty of the owner of

that steamer to see that it was properly secured to the wharf, and the gangplank placed from the wharf to the steamer, and secured as well, but to exercise due care in maintaining it so.

In *Monaghan v. Buchanan*, Sc. Ct. Sess. 13 F. 860, it was held that the owner of a steamboat was liable for the injuries received by a passenger who was thrown into the water when he rushed on to the gangway after the bow rope of the steamboat had been thrown off.

In *Coney Island Co. v. Dennon*, 149 Fed. 687, 79 C. C. A. 375, the following facts appeared: At the landing at a city, for the purpose of embarking and discharging passengers, a company owning a steamboat plying between the city and a pleasure resort a few miles up the river, had a wharfboat, over which passengers passed from the landing to the steamer and from the steamer to the landing. The plaintiff's intestate, a boy about twelve years of age, with his mother, her sister and the latter's small children returned to the city on the last trip of the steamer late in the evening. The mother was carrying one of the small children and her sister the other. The intestate was by the side of his mother. Having difficulty in getting along in the crowd, his mother told the intestate that if he should get separated from her he should wait for her on the wharfboat. This was while they were nearing the wharfboat and moving slowly. In front or somewhat to one side of their course was the gangway or bridge for crossing from the steamer to the wharfboat. There was an opening in the railing around that side of the steamer of about nine feet, and in the middle of this was the bridge, about three feet wide, and having rails on each side to prevent people from falling off. This bridge was movable, and when in use rested partly on the steamer and partly on the wharfboat, and was intended to provide passageway from one vessel to the other. There was an open space of about three feet on each side of the bridge, extending to the post at the end of the railing. The vessels were near together, but there was an opening down between them of the width of from seven to twenty or twenty-four inches, as estimated by different witnesses. Soon after the mother's direction to the boy, he became separated from his companions. He followed a woman who went over the opening at one side of the bridge, but in some way lost his footing, fell down through the opening, and was drowned. There was evidence tending to show that the crowd was dense about the gangway, moving in a mass. The sister of the boy's mother testified: "We had just to move with the crowd; we couldn't get one way or the other." More than 1,000 people, men, women and children, were on the

steamer. The boy was bright and capable beyond his years, but neither he nor his mother had ever been on a steamboat before. The evidence tended to show that the bridge was liable to get misplaced from the rocking and listing of the boats, and that the wide opening in the railing was to accommodate the changing relation of the boats, and that the company kept a guard of from two to four men around the bridge to keep it in position, and also to keep passengers from going over the openings at the sides of it. But there was also evidence that on this occasion either there were no guards there, or, if there were, they did not stop or warn passengers who crossed at the sides of the bridge. The court said: "In view of the facts (those either not disputed or such as the jury might find from the evidence) we think there were grounds upon which the jury might conclude that the company was at fault in not providing more ample means for safely passing from the steamer to the wharfboat. There was a large crowd of passengers, many of them women and children, and the bridge was narrow. The boats were so near together as to tempt the unwary, the bridge being crowded, to pass over at the opening by the sides of it, and yet there was danger, as the sequel showed, that passengers might by a false step fall down through the opening. That there was danger of it, which the company itself appreciated, is shown by the fact that its practice was to station guards there, whose duty it was to see that passengers did not pass between the bridge and the end of the railing; but more especially because the passage in that way was dangerous, and the company owed a duty to its passengers to maintain a guard there, to prevent accidents which were liable to happen from attempts to pass over the open space, and the evidence, as we have said, tended to show either that the guards were not stationed, or, if they were, they did not attend to their duty in this regard, and that the accident resulted from this fault."

In *Louisville, etc. Mail Co. v. Barnes*, 117 Ky. 860, 79 S. W. 261, 25 Ky. L. Rep. 2036, 111 Am. St. Rep. 273, 64 L.R.A. 574, wherein the facts were somewhat similar to those in the case just cited, a verdict for the plaintiff was upheld. The passengers returning from an excursion disembarked from the excursion barges to a wharfboat, the barges lying "head on" at the forward end of the wharfboat, to which they were properly and securely attached. In this situation there was no space between the barges and the wharfboat. When the plaintiff's intestate attempted to make the step from the barge to the wharfboat, she fell between them, and was drowned. According to the evidence this separation was caused by one of the boats of the defendant coming

in to the wharfboat "head on," striking the wharfboat at the upper end, thereby forcing the separation at the time and place the intestate made her step, this landing made by the boat being a very unusual, unsafe and dangerous one. The court held there was nothing in the record to show the slightest neglect or want of care on the part of the intestate by which she lost her life, and that the failure of the court to give a proper instruction on the question of contributory negligence on her part was not prejudicial, there being no evidence on which to base it.

In *Parker v. Boston, etc. Steamboat Co.* 109 Mass. 449, an action for damages for injuries to a passenger caused by the fall of a gangway plank on which she was passing from the wharf to the defendants' vessel, the defendants were charged with negligence in that they had not properly secured or tended the plank. It was held that testimony that the attention of men who were taking in freight near the gangway, whom it was reasonably to be inferred by the jury were servants of the defendants, had been called to the insecure condition of the plank, was competent to show the defendants' negligence.

In *McKay v. Anderson Steamboat Co.* 51 Wash. 679, 99 Pac. 1030, it was held that the question of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff was clearly for the jury, the evidence being conflicting. The more probable testimony tended to show that the boat on which the plaintiff was a passenger tied up at the wharf, received two passengers, and untied again for the purpose of proceeding on her journey. The plaintiff attempted to land from the boat at the instance of the purser while the boat was lying motionless within a foot or less of the wharf, and was precipitated into the lake by the boat starting up and shifting away from the wharf before she had an opportunity to alight.

FIRST STATE BANK OF ECKMAN

v.

KELLY.

North Dakota Supreme Court—March 16, 1915.

80 N. Dak. 84; 152 N. W. 125.

Bills and Notes — Requisites — Delivery.

As a general rule, a negotiable promissory note, like any other written instrument, has

no legal or operative existence as such until it has been delivered in accordance with the purpose and intention of the parties.

Conditional Delivery — Effect.

A promissory note delivered by a person who has executed the same upon the express condition that such note shall not be deemed the note of the party so executing it, or as delivered, unless it is also executed by another person as a comaker, cannot be enforced by the payee against the person so executing it, unless also executed by the other person so named in the condition as a comaker.

Evidence — Parol Evidence — Conditional Delivery of Note.

In such case evidence tending to prove the condition upon which such notes were executed and delivered to the payee, and that such condition had never been complied with, is competent, and does not come within the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument.

[See note at end of this case.]

Parol Evidence as to Consideration.

In an action by the original payee of a negotiable instrument, or by one having notice, the question of the consideration may be inquired into, and parol evidence is admissible to show the real consideration for the instrument.

Parol Evidence of Signature for Accommodation.

One who signs a promissory note for the accommodation of another may show that fact by parol, in an action against him by the party accommodated.

Parol Evidence of Agreement to Release.

Parol evidence is inadmissible to show that prior to, or contemporaneous with, the execution of a note, the payee agreed to release the maker upon the happening of a certain contingency, and take a note of another person in lieu thereof.

Trial — Admission of Evidence — Waiver of Error by Cross-examination.

Objection to improper evidence is not waived by cross-examination of the witness on the same subject.

Waiver by Requesting Instruction.

Where, in an action on a promissory note, parol evidence tending to vary and contradict its terms is improperly admitted, over objection, the mere fact that plaintiff's counsel requests an instruction in order to limit, as far as possible, the prejudicial effect of such evidence, does not, where such instruction is refused by the trial court, estop the latter from asserting on appeal that the admission of such evidence was error.

Bills and Notes — Defenses — Making for Accommodation — Necessity of Plea.

The party for whose accommodation a promissory note was executed is not entitled to recover from the accommodation party thereon, but such defense, in order to avail, must be specially pleaded.

Verdicts and Findings — Judgment Notwithstanding Verdict — When Authorized.

The laws of this state authorize a judgment notwithstanding the verdict only in cases where it is clear upon the whole record that the moving party is, as a matter of law, entitled to judgment on the merits.

Same.

It is not sufficient to warrant such judgment that the evidence was such that the trial court ought to have granted either a motion for a directed verdict or a new trial on the ground of insufficiency of the evidence to sustain the verdict, but it must also appear that there is no reasonable probability that the defects in or objections to the proof necessary to support the verdict may be remedied upon another trial.

Same.

Such judgment is not warranted on the ground merely that the evidence was variant from and inadmissible under the allegations of the defendant's answer, but it must further appear that no amendment of the answer can properly be made making such testimony competent.

(Syllabus by court.)

Appeal from District Court, Bottineau county: BURR, Judge.

Action by First State Bank of Eckman, plaintiff, against Peter Kelly, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

Bangs & Robbins for appellant.

Greenleaf, Bradford & Nash for respondent.

[90] CHRISTIANSON, J.—This is an appeal from the judgment and an order of the district court of Bottineau county denying plaintiff's alternative motion for judgment notwithstanding the verdict or for a new trial. The action was brought to recover upon a promissory note in the sum of \$730.30, which it is alleged was executed and delivered to the plaintiff by the defendant for value. The complaint is in the usual form, and the answer alleges that the plaintiff induced the defendant, by means of fraud and misrepresentation and without consideration, to affix his signature to an instrument presented by the plaintiff to the defendant for the purpose of having the defendant become surety for one W. N. Chase, and that the defendant signed the said note with the understanding and agreement with the plaintiff that the plaintiff would have the said Chase sign the said note, and that on the signing of the [91] said note by Chase the said Chase was to receive the said money from the plaintiff. The following facts are undisputed: On March 4, 1909, one William N. Chase execut-

ed and delivered to the defendant, Peter Kelly, his certain promissory note for \$670, payable November 1, 1909, and at the same time, to secure payment thereof, executed and delivered a chattel mortgage upon 6 head of horses, 1 set of harness, 10 tons of hay, and a half interest in certain crops for that season on 480 acres of land in Bottineau county. On the same day the defendant, Kelly, sold the note and chattel mortgage to the Citizens State Bank of Russell, at the same time guarantying payment thereof. Subsequently the Citizens State Bank of Russell sold and indorsed the note to the First State Bank of Russell. At the time this note became due on November 1, 1909, Chase apparently was in such financial difficulties that he was unable to pay the note, at least he did not pay it. The First State Bank of Russell thereupon notified Kelly that the note was unpaid, and demanded payment. About December 1, 1909, Chase went to the plaintiff bank to arrange for a loan to pay up the note, and afterwards on the same day Chase went to see Kelly about the matter, and took Kelly with him to the plaintiff bank, and Kelly, while there, signed the note involved in this action. The plaintiff some time thereafter sent a draft to the Russell bank in payment of the note signed by Chase and indorsed by Kelly. This note was canceled by the First State Bank of Russell as having paid on December 11, 1909, and was shortly thereafter returned to Kelly by mail, together with a release of the chattel mortgage. At the time Kelly signed the note involved in this action, he had on deposit with the plaintiff bank about \$800. This money remained on such deposit some months before and after the execution of the note involved herein. There is, however, a square conflict in the testimony as to what took place at the time Kelly signed the note involved in this action.

Respondent's counsel contends that the answer raised three different issues: (1) That the contract was without consideration; (2) that it was vitiated by the fraud of the plaintiff; (3) that the instrument was conditionally delivered, and that the condition was never performed. As we interpret the answer, however, in reality it only raised one issue; namely, that the note was never delivered by the defendant to the plaintiff, but that the defendant, Kelly, merely signed [92] the note, and delivered it to the cashier of the plaintiff bank, to take effect only upon the execution thereof by Chase; and the first two alleged defenses are merely incidental facts, which may be considered in connection with the question of whether or not it was agreed between the plaintiff and defendant at the time the note was signed that it was not to become effective until it was signed by Chase.

While it is a general principle of law, applicable also to promissory notes, that parol evidence is inadmissible to vary or contradict the terms of a written contract as between the parties thereto, in the absence of fraud or mistake, still such evidence is always admissible between the immediate parties, and subsequent holders with notice, to show that the contract never became effective. A promissory note does not become effective until delivered. A delivery is essential to its very existence and validity as a contract. Dan. Neg. Inst. 6th ed. §§ 68a, 81b, and 630. "As a general rule a negotiable promissory note, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties." *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 366, 58 Am. St. Rep. 839, 64 N. W. 163; *Compiled Laws 1913*, §§ 5891, 6901; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576.

It may, therefore, be established by parol that the instrument was delivered conditionally, to take effect only upon the happening of a certain event, and that the condition upon which it was to become operative never occurred. In discussing this matter, the Supreme Court of the United States in the case of *Ware v. Allen*, 128 U. S. 590, 32 U. S. (L. ed.) 563, 9 S. Ct. 174, said: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter."

"The present case is almost identical in its circumstances with that of *Pym v. Campbell*, in the court of Queen's bench, 6 El. & Bl. 370, 373, 88 E. C. L. 370, 373. The defendants in that case had signed an agreement for the purchase [93] of an interest in an invention, which the evidence showed was executed with the understanding that it should not be a bargain until a certain engineer, who was to be consulted, should approve of the invention. There was a verdict for the defendants, which was sustained, and the following language was used by Earle, J., on discharging the rule to show cause: 'I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show that it was conditional; and if that had been so, it would

have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. . . . If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.'"

The defendant in this case was doubtless entitled to offer evidence for the purpose of showing that the note involved in this action was to become effective only after it had been signed by Chase. This issue was raised by the answer, and under the laws of this state would constitute a defense to plaintiff's cause of action. *Comp. Laws 1913*, § 6901. See also *Burke v. Dulaney*, 153 U. S. 228, 38 U. S. (L. ed.) 698, 14 S. Ct. Rep. 816; *Dan. Neg. Inst. 6th ed. §§ 68a, 81b, and 630*; 8 Cyc. 260; 2 Enc. Ev. 450.

It is also generally permissive, as respondent contends, in an action between the immediate parties or subsequent holders with notice, to establish the real consideration by parol; and such evidence is also admissible, in such action to rebut the presumption of a consideration, and to impeach a mere recital of consideration. The rule is stated in *Daniel on Negotiable Instruments*, 6th ed. § 81a, as follows: "In an action by the original payee of a negotiable instrument, or by one having notice, the question of consideration may be inquired into. And so parol evidence may be received, as against such original party or one having notice, to show a want of consideration, or failure of consideration, or that the consideration was illegal." See also 8 Cyc. 252, and 2 Enc. Ev. 491, and authorities cited.

And under this rule it is, also, true as respondent contends, that, in [94] an action by the payee, or one having notice, the maker of a note may show by parol that he executed the note for the accommodation of the payee, and received no other consideration therefor. *National Citizens' Bank v. Bowen*, 109 Minn. 473, 124 N. W. 241; *Conrad v. Clarke*, 106 Minn. 430, 119 N. W. 214, 482; *Shalleck v. Munzer*, 121 Minn. 65, 140 N. W. 111; *Preas v. Vollintine*, 53 Wash. 137, 101 Pac. 706; *Nesson v. Millen*, 205 Mass. 515, 91 N. E. 995; *Dan. Neg. Inst. 6th ed. § 81a*; see also 8 Cyc. 252, note 39, and authorities cited.

During the trial, however, defendant was permitted to introduce testimony to the effect that the cashier of the plaintiff bank agreed with the defendant, that the defendant would not be required to pay the note, but that if the defendant would sign the note for

a short time until Chase could go through and receive a discharge in bankruptcy, that then after Chase had been so discharged in bankruptcy, the bank would then take a note signed by Mr. Chase alone, and release the defendant from liability. This testimony was all admitted over plaintiff's objection that it was incompetent and tended to contradict and vary the terms of a written instrument. We think this testimony was improperly received. Such oral agreement is clearly at variance with the terms of the written contract itself.

Respondent's counsel claims that this testimony was competent and admissible under the allegations of the answer to establish the fact that defendant was induced to sign the note by means of fraud and misrepresentation on the part of the plaintiff. We are unable to agree with respondent's counsel in this contention. It is not contended that defendant was laboring under disability, or any misunderstanding as to the character of the instrument he was signing. The defendant was in possession of all his faculties,—and so far as the record shows could read and write. Defendant knew that he was signing a note, and this note in plain and unequivocal terms obligated him to pay a certain amount of money at a certain time. To permit the defendant to show by parol testimony that at the time he signed the note it was orally agreed that he was not to be bound by the conditions thereof, but was to be relieved and released from the payment thereof at some future date when the payee should take the note of another person in place thereof, is so obviously contradictory to and variant from the terms of the note itself that its incompetency is self-evident. Parol testimony, [95] as we have held, is admissible to show that for some reason the written contract never became effective or has no valid legal existence. A consideration and delivery are essential to a valid contract. Therefore it may be shown by parol that the contract never became effective, or has no legal existence. Hence, in a proper case, it may be shown by parol that the note never was delivered; that the maker received no consideration therefor; or that the contract was vitiated by fraud or mistake. The testimony under consideration in this case, however, does not come within any of the recognized rules for the omission of parol testimony. Its purpose and effect was to establish a contract different in terms from that of the written contract. We are satisfied that this testimony should have been excluded, and that its admission was prejudicial error. *Langdon First Nat. Bank v. Prior*, 10 N. D. 146, 86 N. W. 362; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576; *Rieck v. Daigle*, 17 N. D. 365, 117 N. W. 346; 17 Cyc. 589, 644; 2 Enc. Ev. 453; *Dan. Neg. Inst.* §

80; 4 Am. & Eng. Enc. Law (2d ed.) 146. See also § 5889, *Comp. Laws* 1913. As was said by the supreme court of Michigan in the case of *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11, in considering this question: "It is doubtless true, as contended by the appellant's counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered; that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative, or to become a binding obligation, until the happening of some event. . . . On the other hand, the rule is firmly established that where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, to take effect presently as the obligation of the defendant, parol evidence to introduce conditions or modifications of the terms is not admissible. The case of *Hyde v. Tenwinkel*, 26 Mich. 93, illustrates this rule. It was there held that an attempt to show a verbal contemporaneous agreement to reduce a note from an absolute and specific promise to a defeasible engagement was inadmissible. . . . We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument."

This testimony was not admissible as evidence of fraud on the part of the plaintiff. The supreme court of Michigan in the case of *Kulenkamp [96] v. Groff*, 71 Mich. 678, 1 L.R.A. 594, 595, 15 Am. St. Rep. 283, 40 N. W. 57, used certain language which is directly applicable to the case at hand. It said: "As far as the claim of fraud is concerned, it is not tenable. The signature of Groff was not procured by false pretenses, by the statement of any fact as existing which did not exist, but upon false promises which have not been performed. It is no more nor less than the nonperformance of an oral agreement made at the time the note was signed, and which oral agreement was totally at variance with the terms of the written contract as set forth in the note. This cannot be considered such a fraud as would nullify the note. If proof of this unperformed agreement not to hold Groff upon this note, in plain contradiction to its terms, can be admitted to destroy his liability upon it, then any unperformed oral agreement made at the time a written contract or note is executed may be admitted under the claim of fraud, to defeat the terms and purpose of the written agreement. The maker of a note, as well as the surety or indorser, may say: 'It is true, I signed the note, but it was agreed I was not to pay it, and the collection of it is a fraud upon me.' Written instruments, under the admission and use of such

proof to defeat them, would be of little value, and altogether uncertain, and of no more strength than oral agreements."

It is insisted, however, by respondent that plaintiff is estopped to assert errors in the admission of this testimony for the reason that appellant's counsel cross-examined on the same matter. We do not believe that respondent's position is well taken. It is true that there are cases holding that objections to testimony are waived when the objecting party on cross-examination subsequently goes into the same matter, but we do not believe that these holdings are sound in principle, and they are clearly contrary to the weight of authority. "It would indeed be a strange doctrine, and a rule utterly destructive of the right and all the benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony because, by further inquiry, he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on his cross-examination repeat or restate some or all of his evidence given on his direct examination." *Cathey v. Missouri, etc. R. Co.* 104 Tex. [97] 39, 42, 33 L.R.A.(N.S.) 103, 109, 133 S. W. 417, 419. We are satisfied that the plaintiff did not waive the erroneous admission of evidence over its objection by cross-examining the witness on the same subject; but that it had the right to attempt to destroy its harmful effects by cross-examination, if possible. *Kurtz v. Payne Invest. Co.* 156 Ia. 376, 135 N. W. 1075; *Hydraulic Press Brick Co. v. Green*, 177 Mo. App. 308, 164 S. W. 250; *McIlvaine v. Frederic First Nat. Bank*, 33 S. D. 389, 146 N. W. 574; *Finkelstein v. Keene Electric R. Co.* 75 N. H. 303, 73 Atl. 705; *Story v. Green*, 164 Cal. 768, 130 Pac. 870, Ann. Cas. 1914B 961. See also 38 Cyc. 1399.

Respondent's next contention is that plaintiff waived the error in the admission of this testimony by requesting the court to give the following instruction: "If the defendant delivered the note to the plaintiff with the understanding and agreement that he was not to be liable thereon, but that Chase, after he had gone through bankruptcy, was to pay the note and relieve the defendant of any liability thereon to the plaintiff, then such delivery was a complete delivery, and the defendant was liable to plaintiff on said note."

The court refused to give the instructions requested, hence we are not called upon to decide whether, in the event such instructions had been given, plaintiff would be estopped to assert the error in the admission of such testimony. There are cases holding that where an instruction assuming the competency of the evidence complained of is given at the

request of the objecting party, that the objection to the admission of such incompetent evidence is waived. *Shannon v. Potts*, 117 Ill. App. 80. On the other hand, there are cases holding that such objection is not waived by asking for and receiving such instructions. *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. 107. We are unable, however, to find any instance where it has been held that such objection was deemed waived, or the error cured by a mere request for an instruction. It is obvious that if the instruction requested in this case had been given, an entirely different condition would have existed. The plaintiff would then have obtained the benefit of whatever deduction the jury might have made in plaintiff's favor, from such evidence. It is unnecessary for us, in this case, to decide whether the objection would have been waived or the error cured in the event that the requested instruction had been given. That is not the condition [98] here. The incompetent evidence was admitted over objection, and defendant's request for an instruction was denied. We are entirely satisfied that the error in its admission was neither waived nor cured by plaintiff's request for such instruction.

It is also contended by the respondent that the note involved in this action was signed by Kelly at the request and for the accommodation of the plaintiff bank. It is contended that Chase was farming certain lands belonging to the plaintiff; that plaintiff held a second mortgage upon the horses covered by the mortgage given by Chase to Kelly and assigned to the Russell bank, and that plaintiff desired to have the mortgage held by the Russell bank released in order that plaintiff's mortgage might become a first lien.

It is doubtless true, as a general rule, that the party for whose accommodation a note is executed is not entitled to recover from the accommodation party thereon. *Dan. Neg. Inst.* 6th ed. § 175; 7 Cyc. 725; 3 R. C. L. § 336. This principle, however, can have no application in this case. It is not necessary for us to decide whether or not the facts indicated would have constituted the defendant an accommodation maker; or whether the defendant under the undisputed facts in the case could claim to be an accommodation maker. A sufficient answer to respondent's contention is that there is absolutely no tangible evidence in the record of any such condition; nor is this defense alleged in the answer. And it is obvious that this defense, in order to be available, must in the first place be pleaded; and next established by competent evidence at the trial.

Plaintiff asks for judgment notwithstanding the verdict; but this should not be granted unless it clearly appears from the whole evidence that the defense sought to be estab-

lished could not, in point of substance, constitute a legal defense. In other words, before the plaintiff is entitled to such judgment, it must appear clearly, upon the whole record, that the plaintiff is entitled to a judgment on the merits as a matter of law. *Cruikshank v. St. Paul F. etc. Ins. Co.* 75 Minn. 266, 77 N. W. 958; *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 617.

The mere fact that the evidence was such that the trial court ought to have granted plaintiff's motion for a directed verdict, or ordered a new trial on the ground of the insufficiency of the evidence to sustain the verdict, would not warrant this court in ordering such judgment, [99] but it must also clearly appear that there is no reasonable probability that the defects in or objections to the proof necessary to support the verdict may be remedied upon another trial. *Meehan v. Great Northern R. Co.* 13 N. D. 432, 442, 101 N. W. 183; *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614; *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 617; *Ætna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436; *Rieck v. Daigle*, 17 N. D. 365, 117 N. W. 346.

Nor is such judgment wanted because some of the evidence offered, or which defendant may be able to produce upon a new trial is variant from and inadmissible under the allegations of the answer; but it must further appear that no amendment of the answer can properly be made, making such testimony competent. *Welch v. Northern Pac. R. Co.* 14 N. D. 19, 103 N. W. 396. While the defendant's testimony, as a whole, is not at all satisfactory, the admission of the incompetent testimony hereinbefore referred to apparently confused counsel on both sides, and the issue raised by the pleadings seems to have been almost wholly overlooked; and while it is clear to us that the judgment and order appeared from must be reversed, still we do not feel justified or warranted in saying that the plaintiff is entitled to judgment on the merits as a matter of law. The judgment and order appealed from are therefore reversed and set aside, and the cause remanded for another trial.

NOTE.

Parol Evidence of Conditional Delivery of Bill or Note.

This note discusses the recent cases involving the admissibility of parol evidence for the purpose of showing that a bill or note was delivered subject to a condition. The earlier cases on this point are reviewed in the notes to *Oakland Cemetery Assoc. v. Lakins*, 3 Ann. Cas. 559; *McNight v. Parsons*, 15 Ann.

Cas. 665; and *Hughes v. Crooker*, 128 Am. St. Rep. 606.

Except as against a holder in due course, parol evidence is ordinarily admissible to show that a negotiable instrument was delivered subject to a condition, and that by reason of a failure to perform or comply with the condition the instrument never became a completed contract.

Arizona.—*Fidelity Title Guaranty Co. v. Ruby*, 16 Ariz. 75, 141 Pac. 117.

Iowa.—*Selma Sav. Bank v. Harlan*, 167 Ia. 673, 149 N. W. 882; *Waukee Sav. Bank v. Jones*, 159 N. W. 691.

Kansas.—*Bartholomew v. Fell*, 92 Kan. 64, 139 Pac. 1016.

Minnesota.—*Bowser v. Fountain*, 128 Minn. 198, 150 N. W. 795, L.R.A.1916B 1036. See also *American Multigraph Sales Co. v. Grant*, 135 Minn. 208, 160 N. W. 676.

Nebraska.—*Musser v. Musser*, 92 Neb. 387, 138 N. W. 599.

New York.—*Keller v. Prince*, 76 Misc. 522, 135 N. Y. S. 573; *Rubel v. Honig*, 179 App. Div. 53, 164 N. Y. S. 219; *Newgass v. Shulhof*, 128 N. Y. S. 664; *Weinhandler v. Loewenthal*, 159 N. Y. S. 695. See also *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985, 33 L.R.A. (N.S.) 892; *German Exch. Bank v. Schnitzer*, 72 Misc. 362, 130 N. Y. S. 223, reversing 71 Misc. 261, 130 N. Y. S. 113.

North Dakota.—See the reported case.

Ohio.—*Starr Piano Co. v. Edgar*, 31 Ohio Cir. Ct. Rep. 295; *Shive v. Merville*, 34 Ohio Cir. Ct. Rep. 193.

Oklahoma.—*Colonial Jewelry Co. v. Brown*, 38 Okla. 44, 131 Pac. 1077; *Adams v. Thurmond* 149 Pac. 1141. See also *Jones v. Citizens' State Bank*, 39 Okla. 393, 135 Pac. 373; *Harris v. Clanton*, 46 Okla. 183, 148 Pac. 683.

Texas.—*Hamilton v. Hannus*, 185 S. W. 938. See also *Holt v. Gordon*, 176 S. W. 902.

Utah.—*Martineau v. Hanson*, 47 Utah 549, 155 Pac. 432.

Washington.—See *Gwinn v. Ford*, 85 Wash. 571, 148 Pac. 891; *Gwinn v. Ford*, 85 Wash. 699, 148 Pac. 892.

Wisconsin.—*Harder v. Reinhardt*, 162 Wis. 558, 156 N. W. 959.

Thus in *Rubel v. Honig*, 179 App. Div. 53, 164 N. Y. S. 219, the court said: "It was, therefore, entirely competent for the defendant to show, as he offered to show, that the note never had a valid inception, and that the delivery thereof to the father of the payees was conditional, and that the condition was that it was not to take effect or to be delivered to the payees until the payment of said indebtedness to the defendants."

Parol evidence introduced for the purpose of showing the delivery of a negotiable instrument to have been conditional only, does

not come within the rule that requires the exclusion of parol evidence when offered to vary or contradict the terms of a written contract. Thus in *Harder v. Reinhardt*, 162 Wis. 558, 156 N. W. 959, the court said: "The trial court was clearly right in admitting the evidence concerning the making of the contemporaneous oral contract and within the rule above set forth. The evidence admitted by the trial court did not tend to vary or contradict the written contract, but tended to establish the fact that the note was delivered conditionally and for a special purpose only."

In *Bartholomew v. Fell*, 92 Kan. 64, 139 Pac. 1016, the plaintiff alleged that one Bing was indebted to him and gave a written order on the defendant directing the defendant to pay the plaintiff the sum of \$250; that the order was accepted by the defendant and remained unpaid. The answer admitted the execution of the order and that the defendant accepted the same, but denied that the order had ever been delivered, and alleged that at the time the order was accepted the defendant owed Bing nothing; that on the express understanding that if a certain real estate transaction went through, and he became indebted to Bing, he should then pay the amount to the plaintiff, and on no other condition he accepted the order. The answer alleged further that the real estate transaction was never completed, and that the defendant never became indebted to Bing, and therefore was not liable to the plaintiff. Holding proof of those facts to be admissible the court said: "We do not understand that the evidence was offered for the purpose of contradicting the instrument itself, but only for the purpose of showing that it was not in fact delivered, and, therefore, never became a binding contract."

In *Colonial Jewelry Co. v. Brown*, 38 Okla. 44, 131 Pac. 1077, the court said: "We do not understand that evidence offered for the purpose of showing that a written instrument was delivered conditionally constitutes contradicting or varying a written instrument by parol. Such evidence does not tend to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced. A written contract must be in force to make it subject to the parol evidence rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled." So in *Selma Sav. Bank v. Harlan*, 167 Ia. 673, 149 N. W. 882, it was held that parol evidence of the condition on which delivery of a note was to take effect was admissible for

the reason that it was not an attempt to vary or contradict the written instrument. The court said: "If the agreement was as testified by Hinkle, there was never any authorized delivery of the note, and it never became binding on the defendant. He is not contending that the contract which the note expresses was changed; his claim is that such contract was never entered into at all, for that the contingency upon which the note was to be deemed delivered never occurred." See to the same effect *Waukeev Sav. Bank v. Jones* (Ia.) 159 N. W. 691; *Musser v. Musser*, 92 Neb. 387, 138 N. W. 599; *Adams v. Thurmond* (Okla.) 149 Pac. 1141. See also *Gamble v. Riley*, 39 Okla. 363, 135 Pac. 390.

McCOLGAN

v.

WALTER MAGEE, INCORPORATED, ET AL.

California Supreme Court—February 28,
1916.

172 Cal. 182; 155 Pac. 995.

Trusts — Spendthrift Trust — Rights as to Surplus Income.

By direct provision of Civ. Code, § 867, a spendthrift trust may be created in the rents and profits of realty if the beneficiary is restrained from disposing of his interest only during life or a term of years; but, by section 859, where a trust is created to receive rents and profits, and no valid direction for accumulation is given, the surplus, beyond what is necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of his creditors.

Validity of Spendthrift Trust.

The general doctrine that spendthrift trusts, inalienable by the beneficiary, and inaccessible to his creditors during his life or for a term of years, are valid in California, is well established.

Spendthrift Trust in Favor of Donor.

In view of Civ. Code, §§ 669, 688, 693, providing that a future contingent interest is property, where a father executed a deed of trust conveying property to two sons as trustees for themselves and two others, providing that at any time after his death any three of the beneficiaries might terminate the trust by acknowledging and recording a declaration to that effect, and that on such termination the property should belong to the beneficiaries, share and share alike, one-fourth each, and after the father's death the four beneficiaries executed an agreement whereby the trust was to be terminated and a distribution of the

property made according to its appraised value, giving each beneficiary one-fourth, except that there should be set aside as the fourth share of one son certain shares of stock and cash, equaling one-fourth of the trust property, which share should not go directly to the particular beneficiary, but be transferred to two of his brothers, to be held in trust for him, the agreement further declaring that the beneficiary's interest was inalienable, nontransferable, and exempt from the claims of his creditors, such second trust was invalid, and the property subject to the claims of creditors as in effect an attempt to create a spendthrift trust by the beneficiary in his own favor, which is contrary to the policy of the law, since the beneficiary's interest in the original trust, though a future and not a vested interest, was his disposable property, subject to the demands of creditors. [See note at end of this case.]

Same.

A spendthrift trust attempted to be created in the settlor's own favor is invalid, though he has no fraudulent intent toward his creditors.

[See note at end of this case.]

Action to Subject Spendthrift Trust — Necessary Parties.

In suit by the judgment creditor of the beneficiary of an invalid spendthrift trust to compel a corporation to transfer to him stock in it, the corpus of the trust, which had been sold to him on execution sale, a party who had an interest in the trust by its terms to the extent of a debt owed her by the beneficiary, though a proper party, is not a necessary party, since whether the creditor took the stock absolutely, by transfer on the books, or otherwise, he would take it subject to the interest of the party interested in the trust; she not being made a party to the suit.

Appeal from Superior Court, City and County of San Francisco: SEAWELL, Judge.

Action by D. A. McColgan, plaintiff, against Walter Magee, Incorporated, et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

Coogan & O'Connor and *E. J. Talbott* for appellant.

Charles S. Wheeler, John F. Bowie and *Nathan Moran* for respondents.

[183] SHAW, J.—The court sustained a demurrer to the complaint and thereupon entered judgment in favor of the defendants and against the plaintiff, from which the plaintiff appeals.

On April 9, 1908, one James Nolan recovered judgment against Walter Magee for \$3,957.43. Execution was duly issued thereon and levied upon 4,179 shares of the capital stock of the corporation known as Walter Magee, Incorporated. The plaintiff purchased

the same at the execution sale and the sheriff thereafter executed to him a regular certificate of sale therefor. The shares referred to stand severally in the names of the defendants William A Magee, Thomas Magee, Charles S. Wheeler, Frederick E. Magee, Charles W. Brock, each holding one share, and William A. Magee and Thomas Magee, as trustees, the said two trustees holding 4,173 shares thereof. Who owns the remaining share is not stated. The plaintiff demanded of said defendants the possession of said shares and demanded of the corporation the transfer thereof on the corporation books to the plaintiff, all of which was refused. Thereupon the plaintiff began this action to compel the corporation to transfer the said shares to him. The case presents for consideration the single question whether or not the said shares, or any interest therein, were the property of the said Walter Magee and subject to execution under the judgment against him. To a discussion of this question it is necessary to state the facts in some detail.

On December 2, 1896, Thomas Magee, Sr., executed a deed of trust conveying a large amount of property to William A Magee and Thomas Magee, Jr., as trustees for William A. Magee, Thomas Magee, Frederick E. Magee, and Walter Magee. The terms of the trust were that the trustees should [184] receive the rents, issues, and profits of the property and pay over the net income thereof monthly to each of said beneficiaries, share and share alike; that the said trust should in no event extend beyond the lives of the beneficiaries, but that at any time after the death of Thomas Magee, Sr., any three of the beneficiaries might terminate the trust by acknowledging and recording a declaration in writing to that effect, and that upon such termination of the trust the property embraced therein should belong to said beneficiaries share and share alike, that is, one-fourth to each. It further provided that upon any determination of said trust all the property should belong to the beneficiaries share and share alike, and declared that the donor, Thomas Magee, Sr., granted the remainder, after any determination of the trust, and after his death, to the beneficiaries share and share alike.

Thomas Magee, Sr., died on September 30, 1902, and his property was duly distributed in accordance with the trust. Thereupon the trustees named in the deed accepted the trust, took possession of the property and proceeded to administer it in accordance with the trust. In February, 1905, Walter Magee, Incorporated, was created as a corporation and the trustees aforesaid received from said corporation the said 4,179 shares of its capital stock, the same thereupon becoming a part

of the property held by them in trust under said trust deed, which, it may be added, expressly gave them power to exchange the original property for other property, and provided that the property received should be held under the same trust. On August 29, 1905, the four beneficiaries executed an agreement whereby the said trust was to be terminated and closed in the following manner: Appraisers were to be appointed to fix the value of the properties held by the trustees, and thereupon a segregation and distribution of the property was to be made according to the appraised value, giving to each beneficiary one-fourth thereof in severalty, but that "there should be segregated and set apart, as the one-fourth share of the said Walter Magee, and his successors in interest," the shares of stock aforesaid and cash sufficient, when added to the appraised value of said stock, to equal one-fourth of all the trust property; and further, that said shares should not go directly to said Walter Magee, but should be transferred to Thomas Magee, Jr., and William A. Magee, as trustees, to be held by them in trust as follows: "To collect [185] the income and dividends of said stock and to apply one hundred dollars per month of the said income to the use of said Walter Magee, during his life," and to pay the rest and residue of the income, if any, to Eva J. Shaw upon debts due to her from said Walter Magee, and upon the satisfaction of such debts, to pay the entire income to said Walter Magee during his life, and that upon his death said property should vest in his wife, Flora D. Magee. The agreement further declared that the interest of Walter Magee under the same "is hereby created inalienable, and it is particularly provided that the said Walter Magee cannot alienate, transfer or assign his interest thereunder, and the said moneys hereby directed to be applied to the use of the said Walter Magee and the interest of the said Walter Magee in this trust shall be exempt from the claims of creditors to the fullest extent permissible by law." This agreement was not recorded.

In pursuance of this agreement the property was appraised, and in an action between the beneficiaries a judgment was duly given on September 14, 1906, declaring that each of the trusts created by said deed were terminated and closed, "by the consent and agreement of the beneficiaries thereunder, that the giving of said consent by said beneficiaries and the termination and closing of said trusts was thereby ratified, confirmed and approved," and that there be set apart as the share of the said Walter Magee in said property the said shares of stock and \$7,073.71 in cash, that said stock be transferred to Thomas Magee and William A. Magee, to be held by them in trust in accordance with the terms

of said agreement of August 29, 1905. The remaining portions were divided among the other beneficiaries in fee.

The contention of the plaintiff is that the declaration in said agreement of August 29, 1905, that the interest of Walter Magee in the said shares of stock and the income therefrom was inalienable and exempt from the claims of creditors, was wholly ineffectual to accomplish that purpose, and that the same is subject to execution notwithstanding the said provision of said agreement.

Section 867 of the Civil Code provides that such trusts may be created in the rents and profits of real property, provided the beneficiary is restrained from disposing of his interest therein only during his life or for a term of years. Such trusts in real property are further qualified by the provisions [186] of section 859 of the Civil Code. (*Magner v. Crooks*, 139 Cal. 640, 73 Pac. 585.) It has also been held that trusts of similar character may be created in the income of personal property. (*Cutter v. Hardy*, 48 Cal. 568.) The general doctrine that spendthrift trusts, inalienable by the beneficiary and inaccessible to his creditors during his life or for a term of years, are valid in this state, is well established. (*Seymour v. McAvoy*, 121 Cal. 438, 442, 41 L.R.A. 544, 53 Pac. 946.)

The doctrine that property may be made inalienable by such declaration of trust rests upon the theory that a donor has the right to give his property to another upon any conditions which he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors. For this reason, and upon grounds of public policy, it is further held that one cannot by any disposition of his own property put the same or the income thereof beyond the reach of his creditors, so long as he himself retains the right to receive and use it. This qualification of the doctrine is as well settled as the doctrine itself. In *Seymour v. McAvoy*, 121 Cal. 438, 41 L.R.A. 544, 53 Pac. 946, referring to the first branch of the proposition above stated, the court said: "There is nothing in the policy of the law prohibiting a donor from providing that his bounty shall be enjoyed only by those to whom he intends to extend it, and that the property devoted by him to a trust otherwise valid shall not be diverted from its appointed destination." In *Pacific Nat. Bank v. Windram*, 133 Mass. 175, the court said: "Creditors of the beneficiary have no right to complain that the founder did not give his property for their

benefit or that they cannot reach a greater interest in the property than the debtor has, or ever had. But when a man settles his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors while he retains the beneficial use of it. The practical operation of the transaction is that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt [187] from liability for his debts. To permit a man thus to attach to a valuable interest in property retained by himself the quality of inalienability and of exemption from his debts, seems to us to be going further than a sound public policy will justify." In *Ghormley v. Smith*, 139 Pa. St. 584, 23 Am. St. Rep. 215, 11 L.R.A. 565, 21 Atl. 135, the court said: "It is well settled in Pennsylvania that it is a lawful purpose, upon the part of a father, to protect his bounty to a spendthrift son, both principal and interest, not only against his son's improvidence, but also against his creditors. . . . But it has never been held by this court that a person *visi juris* could settle his entire estate upon himself, free from liability for debts." In *Brown v. Macgill*, 87 Md. 161, 67 Am. St. Rep. 334, 39 L.R.A. 806, 39 Atl. 613, the court said: "The theory upon which courts have held restraints upon alienation, etc., valid, is that the *cestui que trust* only has what the donor has given him—is the recipient of his bounty—and, therefore, if the donor has not given him the right to alienate the property or made it subject to the payment of his debts, no one has the right to complain. . . . But it is going too far and is too violently assailing the policy of the law of this state, as indicated above, to permit a person to convey property owned by him to a trustee, and still retain full enjoyment of the income and revenues from it through the instrumentality of the trustees, and yet have the interest he retains for himself, worth, it may be, thousands or tens of thousands of dollars per annum, so fettered by his own act that it cannot be disposed of or be reached by his creditors. . . . To hold that a grantor can retain all the use and enjoyment of his property for life 'free from the incidents of property and not subject to his debts, would be a dangerous and startling proposition to sanction.' We do not think it can be sustained by reason or authority." In *Missouri* it is said: "Here is an attempt of a man, apparently, to tie up his own property under a trust in such a manner that himself, as owner, may be enabled to enjoy the income and set his creditors at defiance. This is a thing which the law does not allow. A man

cannot own property or money and not own it at the same time." (*McIlvaine v. Smith*, 42 Mo. 45, 58, 97 Am. Dec. 295.) It follows from these authorities that if, upon the facts we have stated, the effect is that Walter Magee transferred, or caused to be transferred, [188] his interest in the original trust property, or his segregated share thereof, to the last named trustees upon a trust which provides that the income therefrom shall be paid to himself free from all claims of creditors, it would be contrary to the policy of the law, the property would remain his own notwithstanding said disposition and would be subject to execution against him in the same manner as any other property interest.

The respondents concede that the qualifications to the doctrine exists as above stated, but claim that the transaction in question was not simply a disposition by Walter himself of his own property. The argument is that the original trust deed vested the property in the trustees for the life of the beneficiaries subject to the contingency that the trust might be sooner terminated, and thereby created contingent remainders in the property from the time of the happening of such contingency until the death of the beneficiaries, or some of them, that the contingent remainder of Walter is the property which constitutes the *corpus* of the new trust, that being a contingent remainder it was not a vested estate in Walter (Civ. Code, secs. 693-697), and could not become vested during the lives of the beneficiaries, until the termination of the trust, that this could not be accomplished except by the voluntary act of persons other than Walter, that is, by three of the beneficiaries acting under the provision of the deed, or by all parties having any interest, that any of the other persons "might withhold consent to any unanimous arrangement, except upon conditions which he elected to impose," that the agreement and judgment carrying it out was made upon the condition that Walter's segregated rights and interest should be free from claims of his creditors, and that this condition imposed by them, and which they had a right to exact, constituted a consideration moving from them for the arrangement and settlement, a consideration of a substantial character and sufficient to uphold the new trust as one created by persons other than the spendthrift beneficiary, and to make it valid and free from the claims of his creditors.

The doctrine that one cannot by any device make his own property free from the claims of his own creditors is based not upon technical grounds, but upon sound reasons of public policy. The cases go so far to declare that if the donee or grantee of such property pays a consideration therefor out [189] of his own estate or property, he cannot claim

the benefit of a declaration of trust making it free from the claims of his creditors. Whatever may be the consideration moving from others, the trust cannot be allowed to free the property from the claims of creditors, where the consideration for the conveyance to the trustee or, as in this case, the entire trust property constituting the source of the income, is contributed by the beneficiary himself. Thus, in Missouri, a husband surrendered his estate by curtesy in his wife's land in order to take under the provision of his wife's will giving her real and personal property in trust for the payment of the income to the husband, the same to be free from the claims of his creditors. The court said that the doctrine of spendthrift trusts prevails because a creditor is not defrauded where the owner of property "so disposes of it that the object of his bounty, *who parts with nothing in return*," has an income therefrom free from liability for his debts, and added:

"In the case at bar the beneficiary did part with something in return. But for his compliance with the express condition in the will, by the surrender of his curtesy in his wife's estate by deed, as the petition recites, duly recorded, the income provided for his use would never have become his. This stands confessed by the demurrer. He, therefore, occupies the attitude of a purchaser of that income. . . . Regarding, then, the defendant in the light of a purchaser of the income bestowed upon him by the will of his wife, and not as the mere recipient of her bounty, it must be ruled that such income is subject to the claims of his creditors, and subject in this proceeding." *Bank of Commerce v. Chambers*, 96 Mo. 459, 10 S. W. 38.

Here the contribution of Walter was more than a mere consideration for the creation of the trust in his favor; it constituted the entire subject matter. It is true that the other parties might have refused to consent and could have prevented the creation of the trust. But they had no interest whatever in the share of Walter under the original trust. Under that trust such share was subject to the claims of Walter's creditors. They gave nothing to him by the termination of the trust except to cause his contingent interest to vest immediately. The transaction took nothing from them. In the Missouri case last mentioned the wife [190] created the trust voluntarily out of her own property, real and personal, and the surrender by the husband of his curtesy right in her land was essential to enable him to avail himself of her bounty, yet it was held that this constituted a consideration which took the case out of the rule allowing spendthrift trusts. In this case more was necessary,—both the consent of the others and the devolution of

the interest of Walter upon the new trustees were essential; but it is true here, as there, that he gave a valuable consideration for the benefits of the trust, a consideration which, at the time he gave it, was subject to his debts, and he is, therefore, in the attitude of a purchaser of the income and of the property from which it is derived. The fact that his interest in the original trust was a future and not a vested interest is not material to the doctrine. It was his property (Civ. Code, secs. 689, 688, 693); it was not free from the demands of creditors, and it was disposable by him. (Civ. Code, secs. 699, 1044.) Public policy does not permit him to put it beyond reach of his creditors while he has the beneficial use of it himself.

The contention of the respondents that the complaint is defective because it does not allege that there was any intent on the part of any of the parties to defraud the creditors of Walter cannot be sustained. The doctrine we are enforcing does not depend upon fraudulent intent. The liability of the property to the claims of creditors comes from the fact that the disposition was ineffectual so far as it attempted to exempt the property from liability for his debts and because, as to creditors, it remained his own property, so far as his creditors are concerned, and not because of any intent to defraud in the creation of the trust.

Lastly, it is asserted that the demurrer was properly sustained because of a defect of parties, in that Eva J. Shaw, who, it appears, has an interest in the trust to the extent of the debt owing to her, which is not shown to have been discharged, is not made a party. We do not consider this a sufficient cause for the sustaining of the demurrer. If the plaintiff, by the execution sale, obtained any interest whatever in the property, he was entitled to have it transferred to him or protected in some manner; by the judgment of the court. In any event, whether he took it absolutely by transfer on the books or otherwise, inasmuch as Eva J. Shaw was [191] not made a party to the suit, he would take it subject to her interest, and the judgment would in no manner prejudice her. In such cases, although she is a proper party, she is in no sense a necessary party, and the court could proceed to judgment without her presence. We are, therefore, of the opinion that the demurrer was improperly sustained.

The judgment is reversed.

Sloss and Lawlor, JJ., concurred.

NOTE.

The reported case passes on an agreement whereby the beneficiaries of a trust terminated the trust as permitted by its terms, but

therein it was further provided that the share of one of the beneficiaries was to be segregated and held in trust for him by two of the others. By the conditions of the newly created trust the property was to be inalienable by the beneficiary and free from the claims of his creditors, the income to be paid to him and the corpus, after his death, to go to his widow. It is held that the agreement amounted to the creation by the beneficiary of the second trust of a spendthrift trust in his own favor and as such it was held to be invalid as against his creditors. The sufficiency of an instrument to create a spendthrift trust is discussed in the notes to *Kessner v. Phillips*, 3 Ann. Cas. 1005; *Wagner v. Wagner*, 18 Ann. Cas. 490; *Sherman v. Havens*, Ann. Cas. 1917B 394; and *Garland v. Garland*, 24 Am. St. Rep. 682. As to the validity of a spendthrift trust generally see the notes to *Mason v. Rhode Island Hospital Trust Co.* 3 Ann. Cas. 586; *Mattison v. Mattison*, 18 Ann. Cas. 218; and *Garland v. Garland*, supra. The cases passing on the validity of a spendthrift trust wherein the donor is also the beneficiary are reviewed in the note to *Petty v. Moores Brook Sanitarium*, 19 Ann. Cas. 271.

ELYRIA SAVINGS AND BANKING COMPANY

v.

WALKER BIN COMPANY.

Ohio Supreme Court—July 2, 1915.

92 Ohio St. 406; 111 N. E. 147.

Checks — Liability of Bank to Holder — Necessity of Acceptance.

By force of the provisions of General Code, § 8294, General Code, there is no liability on the part of a bank to the holder of a check unless and until it accepts or certifies the check.

[See 118 Am. St. Rep. 348.]

Payment on Forged Indorsement.

Where a check is paid by a bank, which is the drawee thereof, on a forged indorsement, and there is stamped upon the check "Paid," together with the date of the payment and the name of the bank, and the check is charged to the account of the drawer, this is not an acceptance of the check within the meaning of General Code, § 8294 and does not create a liability against the bank in favor of the true holder or payee.

[See note at end of this case.]

Same.

The "acceptance" of a check contemplates a promise on the part of the drawee to pay

same, and is essentially different from the payment thereof.

[See note at end of this case.]

Error to Court of Appeals, Lorain county.

Action by Walker Bin Company, plaintiff, against Elyria Savings and Banking Company, defendant. Judgment for defendant in court of common pleas. Judgment reversed by Court of Appeals. Defendant brings error. REVERSED.

[406] Defendant in error is the successor of the Walker Patent Pivoted Bin Co., and became the owner of all contracts, property and rights of action of that company. One C. W. Smalley purchased from the Walker Patent Pivoted Bin Co. certain store fixtures at the agreed price of \$893, and in part payment thereof issued two checks of \$155 each, payable to the order of R. W. McKain, manager of the company, and delivered them to one W. P. Sutherin, a salesman under McKain. These checks were received by plaintiff in error in the regular course of business through other banks and were paid by it and charged to the account of [407] Smalley. One check was paid September 10, 1909, and there was stamped on the face thereof with a rubber stamp the following: "The Elyria Savings & Banking Co. Paid Sep 10 1909 E. M. Rice, Cashier." The other check was paid September 21, and the stamping on this check is the same with the exception of the date. The balance of the \$893 was paid to the defendant in error, but it received no part of the proceeds of the two checks above mentioned, the indorsement of R. W. McKain, manager, thereon having been forged. Defendant in error brought and action against Smalley to recover this balance of \$310 claimed to be due on account of the purchase of the store fixtures, and upon a hearing of this case on its merits judgment was rendered in favor of Smalley, the court holding that Sutherin had authority to receive the two checks and that the delivery thereof to him cancelled Smalley's obligation to the amount of the checks. Thereupon defendant in error brought this action against the banking company to recover the sum of \$310 and interest on account of the payment of these two checks upon a forged indorsement. The case was tried to a jury and at the conclusion of the plaintiff's evidence a directed verdict was rendered in favor of plaintiff in error and judgment was entered on this verdict. This judgment was reversed by the court of appeals upon the ground that the court of common pleas erred in directing a verdict for the banking company.

Ingersoll & Vendemark for plaintiff in error.

F. M. Stevens and *D. B. Symons* for defendant in error.

[408] *NEWMAN, J.*—The checks in question, bearing the forged signature of McKain, manager, were cashed at Franklin, Pennsylvania, and were transmitted by a bank in that city through several other banks whose indorsements the checks bore when they were paid by plaintiff in error. For the purpose of this case, however, the indorsements of the several banks may be disregarded and the checks treated as though they were presented directly to plaintiff in error by the person who forged the signature of McKain, manager.

In 1902 the legislature of Ohio passed the negotiable instruments act. It follows generally the English bills of exchange act and is substantially like the act adopted by practically all the states of the Union. It is entitled "An act to establish a law uniform with the laws of other states on negotiable instruments." It is carried into the General Code, Sections 8106 and 8302. The courts of the country being in conflict in their decisions respecting negotiable instruments, the purpose of the passage of the act was to establish certain fixed rules governing negotiable instruments and to bring about a uniform system of laws on the subject and thereby do away with the confusion that had existed. In the adoption of the act the legislature intended to form a complete system of laws relating to negotiable instruments and to cover the whole subject [409] so far as it could be done by statute. In any case not provided for in the act the rules of the law merchant govern. Section 8300. It follows then that where a case is provided for the statute must govern.

In the case here there is involved the right of the holder of a check to maintain point is specifically dealt with in the negotiable instruments act, the law on the subject should be ascertained by interpreting the language used in its provisions relating thereto. What the state of the law was previous to the adoption of the act need not be considered. Nor should earlier decisions of the court be resorted to if the provisions of the act are not of doubtful meaning. In fact, the act does not purport to be, nor is it, in every instance, a codification of the then existing law. Some of its provisions are declaratory of the existing law, while others alter and change the law as theretofore declared. In *Rockford v. Springfield First Nat. Bank*, 77 Ohio St. 311, 83 N. E. 392, 14 L.R.A.(N.S.) 842, it was held that by force of certain provisions of the negotiable instruments act the law on the subject there under consideration was changed.

Section 8294 reads as follows: "A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." This we think is intended to cover the liability of a bank to the holder of a check, and he can recover from the bank only when he brings himself within the provisions of this statute. If a check is neither accepted [410] nor certified there is no liability on the part of the bank to the holder. There is no claim made that the checks in question here were certified. But it is insisted by counsel for defendant in error, and it was the holding of the court of appeals, that when the bank stamped "The Elyria Savings & Banking Co. Paid. Sept. 10, 1909 E. M. Rice, Cashier," and charged the same to the account of the drawer, there was an acceptance and the banking company thereby became liable to the rightful holder. It is the settled law that a bank is obliged to pay on the order of the drawer to the person named in the check. It must follow the order with the utmost strictness. If it pay upon a forged indorsement, the check cannot be charged against the drawer, unless the bank, upon some principle of estoppel or on account of some negligence chargeable to the drawer, might claim protection. So that as between these two parties, the drawer and drawee, there was no payment. In the negotiable instruments act it is provided that the provisions applicable to a bill of exchange payable on demand apply to a check. Section 8290. Section 8237 provides that the acceptance of a bill of exchange is the signification of the drawee of his assent to the order of the drawer, but it further provides that the acceptance must be in writing and signed by the drawee and it must not express that the drawee will perform his promise by any other means than the payment of the money. Under the negotiable instruments act acceptance means an acceptance completed by delivery or notification. Section 8295. Did the stamping of [411] the checks in question amount to an acceptance as contemplated by this statute? Payment is the natural and legitimate end of a check. Acceptance is essentially different. As has been said, it is the beginning of the active career of the instrument and there is added to its original vitality a new element of force and strength calculated to prolong its existence and widen its sphere of usefulness. Acceptance contemplates a promise on the part of the drawee to do something. Where there is an acceptance a contractual relation arises between the drawee and the holder. The stamping of these two checks by the bank and the charging of them to the account of the drawer was certainly not an acceptance within the meaning of these provisions.

Counsel for defendant in error rely upon the case of Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648, and 30 Ohio St. 1, as decisive of the case at bar. In the Dodge case (30 Ohio St. 5) this language is used: "The postmaster, by drawing and delivering the check in question, in payment of plaintiff's voucher, set apart and appropriated for the plaintiff's use so much of his funds in defendant's hands as would be necessary for its payment. This act of appropriation the plaintiff conclusively ratified by bringing this action. The defendant also assented to this appropriation, by accepting his check, by assuming to pay it, and by claiming and receiving credit from the drawer for its payment." It was upon the theory that the drawing and delivering of the check operated as an assignment *pro tanto* of the [412] funds of the drawer in the bank that the Dodge case was decided. This doctrine was not recognized in a later Ohio case Covert v. Rhodes, 48 Ohio St. 66, 27 N E. 94, where it was held that a check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank. But whether or not that was the law in Ohio prior to the adoption of the negotiable instruments act is unimportant. It is not the law now. The rule announced in the Dodge case has been discarded, and it is expressly provided in Section 8294 that a check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank. In view of the provisions of the negotiable instruments act we cannot adhere to the rule announced in the Dodge case.

Seventh Nat. Bank v. Cook, 73 Pa. St. 483, 13 Am. Rep. 751, and Pickle v. Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L.R.A. 93, are cited by counsel for defendant in error in support of their contention. In these cases it was held that where a bank pays on a forged indorsement the true payee can maintain an action against the bank. At the time these cases were decided the negotiable instruments act had not been adopted by Pennsylvania or Tennessee, and we doubt very much whether the courts of those two states would follow this holding in the face of its provisions.

In Baltimore, etc. R. Co. v. Alexandria First Nat. Bank, 102 Va. 753, 47 S. E. 837, the facts were very similar to those in the case here. The court interpreted certain sections of the Virginia code which are identical with Sections 8237, 8290 and 8294, *supra*. The court used this language, which is in point here:

[413] "Now, if there be any virtue in that law, the checks in question did not assign to the holder the funds, or any part thereof, Ann. Cas. 1917D—67.

of their respective drawers on deposit with the defendant; nor could it have that effect unless and until the checks were certified, and section 185 expressly declares that the provisions of that act, with respect to bills of exchange payable on demand, shall apply with equal force to checks; and turning to section 132, already quoted, we find that the acceptance must be in writing and signed by the drawee in order to constitute a cause of action by the holder against the bank.

"This opinion might be greatly prolonged by citation of conflicting cases, and a discussion of the discordant views entertained by courts and text-writers of the greatest ability upon these questions; but the object, as we understand it, of the codification of the law with respect to negotiable instruments was to relieve the courts of this duty, and to render certain and unambiguous that which had theretofore been doubtful and obscure, so that the business of the commercial world, largely transacted through the agency of negotiable paper, might be conducted in obedience to a written law emanating from a source whose authority admits of no question."

Counsel for defendant in error say that in the Virginia case it does not appear that the checks there were stamped as they were in the case at bar, and had they been a different conclusion might have been reached by the court. It does appear, however, that the amounts of the checks were [414] charged to the account of the drawers and the same returned on settlement of their accounts with the bank. The stamping of the two checks in the present case was simply a method adopted by the bank for cancelling or extinguishing the checks. See also Clark v. Warren Sav. Bank, 31 Pa. Super. Ct. 647.

We call attention to Section 11225-1, General Code. This section was passed in 1911, several years after the adoption of the negotiable instruments act. It fixes the time within which an action may be brought against a bank on account of the payment on a forged or raised check. This language is used: "No bank which has paid and charged to the account of a depositor any money on a forged or raised check issued in the name of said depositor shall be liable to said depositor for the amount paid thereon unless," etc.

It is to be observed that the only liability mentioned is the liability of the bank to the depositor. No mention is made of the holder or payee of the forged check.

We are of the opinion that when the legislature enacted Section 8294 it intended to cover the subject of the liability of a bank to the holder of a check. It prescribed when and when only there is a liability to the holder. In the absence of the conditions

therein prescribed no right of action exists in favor of the holder. In the present case, the checks in question not having been certified or accepted within the meaning of Section 8294, there was no right of action on the part of the defendant in error against the banking company, [415] and the court of common pleas was correct in directing a verdict in favor of the latter company.

Judgment of the court of appeals reversed and that of the common pleas affirmed.

Johnson, Donahue and Matthias, JJ., concur.

NOTE.

Liability of Bank to True Holder or Payee of Check Paid on Forged Indorsement.

View that Bank Is Liable:

Drawee Bank, 1058.

Intervening Bank, 1062.

View that Bank Is Not Liable:

In General, 1066.

Under Negotiable Instruments Act, 1067.

View that Bank Is Liable.

DRAWEE BANK.

There is a conflict of opinion as to the right of the payee or holder of a bank check whose indorsement thereon has been forged, after payment of the check by the bank on which it was drawn on such forged indorsement, to maintain an action thereon against the drawee bank.

In some jurisdictions it is well settled that the true holder or payee of a bank check may sue the drawee bank which has paid the proceeds of the check to another on the forged indorsement of the payee's name. The reason given for this rule is that the payment of the check bearing the forged indorsement by the drawee bank constitutes in law an acceptance of the check and an assignment of the proceeds by the drawer, and that a recovery against the bank by the true payee may then be had as for money had and received or in conversion for an amount equal to the amount due on the check.

England.—Arnold v. Cheque Bank, 1 C. P. D. 578, 45 L. J. C. Pl. 562, 34 L. T. N. S. 729, 24 W. R. 759. See also Kleinwort v. Comptoir Nat. D'Escompte, etc. [1894] 2 Q. B. D. 157. Compare Matthiessen v. London, etc. Bank, 5 C. P. D. 7.

Canada.—Hinton Electric Co. v. Montreal Bank, 9 British Columbia 545.

California.—Survey v. Wells, 5 Cal. 124.

Illinois.—Findlay v. Corn Exch. Nat. Bank, 166 Ill. App. 57. See also Beattie v. Na-

tional Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, 43 L.R.A. 654; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 93 Am. St. Rep. 113, 59 L.R.A. 657. Compare Rauch v. Bankers' Nat. Bank, 143 Ill. App. 625.

Indiana.—Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85. Compare Hamilton Nat. Bank v. Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333.

Kentucky.—See Henderson Trust Co. v. Ragan, 52 S. W. 848, 21 Ky. L. Rep. 601.

Louisiana.—Vanbibber v. Louisiana Bank, 14 La. Ann. 481, 74 Am. Dec. 442.

Minnesota.—McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542, 37 L.R.A. (N.S.) 201.

Mississippi.—Thomas v. Gulfport First Nat. Bank, 101 Miss. 500, 58 So. 478, 39 L.R.A. (N.S.) 355.

New Jersey.—Buckley v. Jersey City Second Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249.

New York.—Johnson v. Hoboken First Nat. Bank, 6 Hun 124, affirmed 68 N. Y. 616 mem.; Graves v. American Exch. Bank, 17 N. Y. 205; Salomon v. State Bank, 28 Misc. 324, 59 N. Y. S. 407; Adler v. Broadway Bank, 30 Misc. 382, 62 N. Y. S. 402; Laue v. Nuffer, 5 N. Y. S. 421. See also Szvento Juozupo, etc. v. Manhattan Sav. Inst. 164 N. Y. S. 498.

Pennsylvania.—Seventh Nat. Bank v. Cook, 73 Pa. St. 483, 13 Am. Rep. 751. Compare Clark v. Warren Sav. Bank, 31 Pa. Super. Ct. 647.

Tennessee.—Pickle v. Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L.R.A. 93; Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Knoxville Water Co. v. East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447. See also Chism v. New York First Nat. Bank, 96 Tenn. 641, 36 S. W. 387, 54 Am. St. Rep. 863, 32 L.R.A. 778.

Texas.—See Texas Seating Co. v. Farmers', etc. Nat. Bank, 134 S. W. 807.

In Vanbibber v. Louisiana Bank, 14 La. Ann. 481, 74 Am. Dec. 442, the court said: "The bank holds the money of its depositors subject to be checked for as their agent. When then, the bank receives a check, instructing them to pay a certain part of the deposit of the drawer to a third party, and the bank agrees so to do by its general custom, and by undertaking to pay it upon the supposed indorsement of the third party, the amount of money represented by the check, and on deposit as that of the drawer, becomes eo instanti the property of the payee, and the bank from the moment it undertakes so to pay the check holds the amount of the check as the agent of the payee, and is responsible to the payee, as his agent, if he pays it upon a forged indorsement. The bank also holds the amount of the check as the agent of the drawer, and undertakes, as his agent,

to hold the amount of the check no longer as the agent of the drawer, but as that of the payee; so that, either the drawer or the payee can maintain an action against the bank, unless one of them has deprived himself of the right by some action of his own."

In *Laue v. Nuffer*, 5 N. Y. S. 421, an action by the payee of a certified check, the court said: "The bank, having paid the check on a forged or unauthorized indorsement, in law became liable to the plaintiff as the legal owner of the check for the amount so paid, whether on the theory of conversion or for its failure to pay to the plaintiff the money rightfully due to him on the check, it is unnecessary to consider, as the distinction affects the form of the remedy rather than the right of action."

In *Findlay v. Corn Exch. Nat. Bank*, 166 Ill. App. 57, it was held that where a bank paid a check on the forged indorsement of the payee's name, the right of action on the check or the fund represented by the check was vested in the payee. But compare *Rauch v. Bankers' Nat. Bank*, 143 Ill. App. 625, wherein it was held that while since the passage of the negotiable instruments act of June 5, 1907, a bank was not liable in any case to the holder of a check drawn on it unless and until it accepted or certified the same, prior to the passage of that act, the payment by a bank of a check on a forged indorsement did not thereby constitute an acceptance and so make it liable to the true owner.

Whether there has been an acceptance of a check bearing a forged indorsement, thereby establishing privity of contract and entitling the payee to sue, has been held to depend on the evidence tending to prove an acceptance in each particular case. *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L.R.A. 93, wherein the court said: "We agree that, for want of privity, the holder of a check cannot recover upon it against the bank unless he can show an acceptance. The question presented is as to the weight to be attached to certain acts done by the bank, and the inferences fairly to be drawn from these acts. Where a bank has negligently paid a check to an improper person, it would seem that, in good conscience, the true owner and payee ought not be remitted to his action against a possibly insolvent drawer, for thereby he may lose his debt altogether. A legal principle, however, stands in his way, in that there is no privity between himself and the bank until the bank has assented to the order of the drawer requiring it to pay the holder of the check the sum of money named. This assent, which is necessary before there is any contract relation between the holder of the check and the bank, is what is meant by acceptance. This

assent need not be by an indorsement of 'good' across the check, or by any other particular words, either in writing or oral. The question of assent or acceptance is one of fact, and may be made out by any of the methods by which a fact is proven. Did the defendant bank assent to the direction of its customer to pay out of his funds on deposit the sum named in this check? If so, to whom did it assent to pay this sum? The answer is found by inspection of the check. If it assented to pay this check, it undertook and assumed to pay it to Thomas Pickle, or upon his order. Now, the facts which are relied upon as making out such an assent to the direction of the drawer of this check as to bring complainant into privity with the bank, are that it received and retained the check, and that it has charged the check to the account of the drawer and settled with him, deducting the amount of this check. Now, where a bank certifies a check as 'good,' it is not only authorized, but good banking would require that such check should be then charged up to the account of the drawer as so much of his funds which they have obligated themselves to pay upon that check. Of course, if the check is never paid, or is returned, the drawer would be credited. The debiting of this check to the account of the drawer would then mean only one of two things: that this check has been paid as ordered, or that the fund is held subject to the demand of the payee. The bank must be taken to have assented to pay it as directed—that is, to the payee or his order. That it has assented to the payment of this check is, we think, to be inferred from the retention of the check when presented at its counter, and the subsequent charge of the check to the drawer. Upon this charge to the drawer we predicate its assent or acceptance. It had no right to charge it to the drawer and to settle his account, unless it had either paid the check to the payee named in the check or on his order; or, having accepted the check, held the fund of the drawer subject to the demand of the payee. It has not paid the check; it must therefore be held to hold the amount of the check for the payee. It cannot escape this consequence by saying that what it has done in receiving the check and in paying it, and in debiting to the account of the drawer, is all through mistake. That would be to suffer it to escape the consequences of its own mistake by pleading its own negligence as a defense. To allow it to plead its own negligence in answer to the natural inference from its receipt and retention of this check, and its subsequent charge to the drawer, might enable it to shelter itself behind the technical defense of want of privity; but, on the other hand, it may result in the loss to complainant of his debt

by remitting him to his action against his original debtor, whom he may be unable to coerce into payment. We think there is no inequity in holding the bank to the inference that it has accepted this check, springing out of the fact that it has charged it up to the account of the drawer."

In *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483, 13 Am. Rep. 751, the court declared that the act of a bank in mistakenly paying out money on a check on which the name of the payee had been indorsed by another without authority amounted to an acceptance, saying: "It is, in fact, an acceptance, and binds the bank as a certified check does. 'It is tantamount to an acceptance of the draft.'" However, in *Clark v. Warren Sav. Bank*, 31 Pa. Super. Ct. 647, the court, while holding the decision in *Seventh Nat. Bank v. Cook*, supra, to be binding, dissented most strongly therefrom, saying: "Payment and acceptance, in the commercial world, are essentially different things. The former is the natural, legitimate end; the latter is often but the beginning of the active career of a negotiable instrument. When a bill has been paid its mission has been fully accomplished, it is dead and useless; and this is not only the result, but the object of payment. But by acceptance there is added to its original vitality a new element of force and strength calculated to prolong its existence and widen its sphere of usefulness; and, as before, this is not a merely casual incident, but the very purpose of the act of acceptance. The two things being thus radically different it is hard to see how an attempt to pay can be construed as an intent to accept. Moreover, the contract of a bank with its depositor is a simple one. It undertakes to safely keep his money and pay it out only upon his demand made in the manner and form sanctioned by the long-established usage of the commercial world. And the payment must be, at the peril of the bank, in exact accord with the tenor of the demand. When, therefore, a bank hands over its counters the money called for by a check to which the name of the drawer or payee has been forged, it pays out its own money and not its depositor's, because the sole condition upon which it could disburse the latter does not exist. It has attempted to pay its debt to its depositor, but the attempt has been rendered ineffectual by its own negligence or mistake, and the consequences of such error must be borne by itself; they cannot be visited upon either the depositor or payee who were in no wise responsible for it. Convincing as the line of reasoning would seem to be when fully developed and strongly stated, as it has been by the Supreme Court of the United States in *Washington First Nat. Bank v. Whitman*, 94 U. S. 343 [24

U. S. (L. ed.) 229], yet, for the purpose of determining whether or not the acts of the appellant bank amounted to an acceptance of the check, we must regard it as conclusively answered by the case of *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483. In that case, upon a state of facts precisely similar to the one now before us, our supreme court has declared the act of a bank, in mistakenly paying out money on a check on which the name of the payee was indorsed, by another without authority, amounted to an acceptance of the check. 'It is, in fact, an acceptance, and binds the bank as a certified check does. "It is tantamount to an acceptance of the draft."' We think we may properly say, without being accused of any want of respect for the authority of the high tribunal uttering that judgment, that the opinion delivered does not disclose any satisfactory reason for the conclusion reached. The judgment seems to be rested on a single sentence taken from the opinion of Mr. Justice Davis in *Bank of Republic v. Millard*, 10 Wall. 152 [19 U. S. (L. ed.) 897]. In that case it was distinctly held that the payee in a check, which the bank had mistakenly undertaken to pay on an unauthorized indorsement, could not maintain an action against the bank, and the judgment he had recovered in the court below was reversed. This was the only point decided. No question arose as to the result that would follow had the bank, later on, balanced the book of its depositor, taken credit therein for the money so paid out, and returned the check as paid and canceled to the drawer. No such facts were presented by that record. It is true the eminent jurist who delivered the opinion in that case uttered a carefully guarded suggestion as to the result that might flow from such facts, had they been established. This, we think, cannot be regarded as more than dictum merely, especially in the light of the later case of *Washington First Nat. Bank v. Whitman*, supra. In that case the exact point was raised and decided and it was again held, following *Bank of Republic v. Millard* to that extent, that a payee in a check could not maintain an action against the bank because the latter had paid out the money called for by the check on an unauthorized indorsement of the name of the payee. But the case goes much farther. The record presented the exact state of facts contemplated in the suggestion of Mr. Justice Davis quoted, and apparently relied on in *Seventh Nat. Bank v. Cook*, supra: but the court clearly held that neither the payment of the money by the bank, under such circumstances, nor the subsequent entry of the check in the depositor's book and its return to him as a canceled check, amounted to an acceptance of the check by the bank, nor did such acts disclose any intention to

accept. On the contrary, the entire conduct of the bank evidenced an intent to do a very different thing, viz., to pay the check. The bank paid out its money on the mistaken assumption that it had before it a proper demand of its depositor; it afterwards charged up and returned the check on a like assumption that it had actually paid the check. But these mistakes affected neither the depositor nor the payee. 'It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty and there would be an end of the claim against it. The bank supposed it had paid the check, but this was an error.

. . . Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before.' Washington First Nat. Bank v. Whitman, 94 U. S. 343 [24 U. S. (L. ed.) 229]. It is clear, therefore, that the case of Seventh Nat. Bank v. Cook finds no support in the decisions of the Supreme Court of the United States in like cases. . . . Although it thus seems to stand unsupported and alone, it must still stand for us as declaratory of the law of Pennsylvania. We can neither reverse nor ignore it. We must follow it as far as it actually goes, but we are unwilling to stretch its doctrine so as to carry us a step farther in that direction. . . . We are now asked to say that the mistake of the bank in paying out the money without the indorsement of the payee, and its subsequent and consequent charging of the check against the account of the drawer, not only amounted to an acceptance of the check by matter in pais, but to an acceptance in writing signed by the acceptor. This we are unable and unwilling to do. To so hold would be to attempt, without warrant, to evade the clearly expressed mandate of the legislature. The case of Seventh Nat. Bank v. Cook, so often referred to, furnishes no support for the conclusion we are now asked to adopt, whilst sound reason and high authority unite to lead us in the other direction. . . . We therefore hold that the evidence in this case wholly fails to establish that the bank ever became bound as an acceptor of the check and consequently that, in so far as this action rests on an alleged acceptance, the plaintiffs have no right to maintain it."

It has been held that an indorsement by a person bearing the same name as the payee is a forgery and therefore that payment to

such a person will not relieve the bank from liability to the true payee. Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85; Thomas v. Gulfport First Nat. Bank, 101 Miss. 500, 58 So. 478, 39 L.R.A.(N.S.) 355; Graves v. American Exch. Bank, 17 N. Y. 205. See also Mead v. Young, 4 T. R. 28, 100 Eng. Rep. (Reprint) 876; Beattie v. National Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, 43 L.R.A. 654. Compare Meyer v. Indiana Nat. Bank, 27 Ind. App. 354, 61 N. E. 596.

In Thomas v. Gulfport First Nat. Bank, supra, the court said: "There seems to be little dissent in the authorities; almost, if not quite all, the authorities holding that under such circumstances the party paying the check to the one forging the indorsement is not protected. Under such circumstances, it is nothing but a forgery. The true owner of the check is not placed beyond the protection of the law because some unscrupulous person of the same name lives in the same town with him. The true owner has never parted with his title, and his property is not to be taken away from him without his consent merely because the check happens to fall into the hands of another of the same name. Banks taking checks must know the true parties claiming to own them—in fact, who do own them—and they act at their peril. Where there are two or more persons of the same name, it cannot be anticipated that one of them will commit a crime and forge the name of the other to an instrument which may have accidentally come into his hands. The true owner of the check was guilty of no sort of neglect which would operate as an estoppel on him. . . . It is difficult for us to understand by what principle of right a man should have his money or valuables taken from him because he has the misfortune, through no fault of his own, to have the same name as some other person in the same town. It is difficult for us to understand how the true owner of a draft may lose his proper rights in same by reason of the fact that it has fallen into the hands of another person of the same name and that other person has forged an indorsement of his name to the instrument and obtained money for it when the true owner knew nothing about it."

Likewise, in a number of cases wherein it appeared that the indorsement of the payee was signed to a check by his agent, who was without any authority so to do, it has been held that the payee might recover from the bank, in the absence of a ratification of the agent's conduct or estoppel by reason of any negligence or undisclosed knowledge on his part. Robinson v. Winslow Bank, 42 Ind. App. 350, 85 N. E. 793; McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542, 37 L.R.A.

(N.S.) 201; *Standard Steam Specialty Co. v. Corn Exch. Bank*, 220 N. Y. 478, 116 N. E. 386, *reversing judgment* 163 App. Div. 496, 148 N. Y. S. 549, and *affirming judgment* 84 Misc. 445, 146 N. Y. S. 181; *Schmidt v. Garfield Nat. Bank*, 64 Hun 298, 19 N. Y. S. 252, *affirmed* 138 N. Y. 631, 33 N. E. 1084; *Adler v. Broadway Bank*, 30 Misc. 382, 62 N. Y. S. 402; *Burstein v. People's Trust Co.* 143 App. Div. 165, 127 N. Y. S. 1092; *Morrison v. Chapman*, 155 App. Div. 509, 140 N. Y. S. 700; *Jackson v. McMinnville Nat. Bank*, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. Rep. 81, 18 L.R.A. 663; *Knoxville Water Co. v. East Tennessee Nat. Bank*, 123 Tenn. 364, 131 S. W. 447. See also *Brown v. People's Nat. Bank*, 170 Mich. 416, 136 N. W. 506, 40 L.R.A.(N.S.) 657; *New York Birch, etc. Co. v. Bronx Borough Bank*, 42 Misc. 31, 85 N. Y. S. 557, *affirmed* 186 N. Y. 559, 79 N. E. 1112; *Rosenberg v. Germania Bank*, 44 Misc. 233, 88 N. Y. S. 952; *Schnabel v. Hanover Nat. Bank*, 78 Misc. 35, 137 N. Y. S. 727; *Texas Seating Co. v. Farmers', etc. Nat. Bank (Tex.)* 134 S. W. 807.

INTERVENING BANK.

With respect to the liability of an intervening bank, which pays a check on a forged indorsement of the payee's name and thereafter collects the amount of the check from the drawer or the drawee bank on the strength of the forged indorsement, in several instances the intervening bank has been held to be liable to the payee, without comment on the fact of its being an intervening and not the drawee bank. *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85; *Buckley v. Jersey City Second Nat. Bank*, 35 N. J. L. 400, 10 Am. Rep. 249; *Talbot v. Rochester Bank*, 1 Hill (N. Y.) 295 (certificate of deposit); *Johnson v. Hoboken First Nat. Bank*, 6 Hun (N. Y.) 124, *affirmed* 68 N. Y. 616 mem.; *Graves v. American Exch. Bank*, 17 N. Y. 205; *Ellery v. People's Bank*, 114 N. Y. S. 108; *Farmer v. People's Bank*, 100 Tenn. 187, 47 S. W. 234; *Knoxville Water Co. v. East Tennessee Nat. Bank*, 123 Tenn. 364, 131 S. W. 447. See also *Canal Bank v. Albany Bank*, 1 Hill (N. Y.) 287. To the claim that the action cannot be maintained for the want of privity between the parties, it has been said that, although the check is actually delivered to the plaintiff, yet his ratification by a demand on the defendant for its proceeds, by suit, if not before, makes the check his property, so that when, without any lawful right, the defendant converts it into money, that money stands in place of the original paper, and is equally the property of the plaintiff. In the one case no more than in the other can the defendant resist the right of recovery of the true owner on the ground of want of

privity; for the action against the wrongdoer does not rest on privity, but on the fact that he has intermeddled with property not his own, and, asserting a hostile claim, has interfered with the lawful use and dominion of the owner of the property. *Buckley v. Jersey City Second Nat. Bank*, 35 N. J. L. 400, 10 Am. Rep. 249; *Talbot v. Rochester Bank*, 1 Hill (N. Y.) 295; *Farmer v. People's Bank*, 100 Tenn. 187, 47 S. W. 234. In *Buckley v. Jersey City Second Nat. Bank*, *supra*, the court said: "The plaintiff's right to the check remained precisely as it was before his name was forged. The check, therefore, when the defendants obtained the money on it, was the property of the plaintiff, and in that case he may, as we have seen, recover the amount in this action, as money received by the defendants to his use. The case of *Talbot v. Rochester Bank* is directly in point."

But in some cases the right of a payee to maintain an action against an intervening bank paying a check on a forged indorsement of his name has been expressly adjudicated, and the rule has been laid down that the payee is entitled to a recovery as for moneys had and received, even though the intervening bank fully pays over and accounts for the proceeds of the check to the forger without knowledge or suspicion of the forgery. *U. S. Portland Cement Co. v. U. S. Nat. Bank (Colo.)* 157 Pac. 202, L.R.A.1917A 145; *Crisp v. State Bank*, 32 N. D. 263, 155 N. W. 78. *Compare Tibby Bros. Glass Co. v. Farmers', etc. Bank*, 220 Pa. St. 1, 69 Atl. 280, 15 L.R.A.(N.S.) 519. Those cases are based on the theory that there has been a ratification by the payee of the collection of the check from the drawer; that the collecting bank can then be held as for moneys had and received, and that the payment by the drawee bank to the collecting bank with the forged indorsement thereon is evidence that the check has been accepted and paid by the drawee bank, which acts the payee ratifies.

In *U. S. Portland Cement Co. v. U. S. Nat. Bank*, *supra*, the court said: "Under our former decisions we agree that the payee of a check cannot sue the drawee until after acceptance. We might also concede, if necessary, that the payment of a check upon a forged indorsement is not sufficient to give the payee thereof a right of action to compel the drawee to pay it over again to him, for by so doing would be to allow the act which is expressly repudiated by the payee, so far as the payment is concerned, to be ratified by him as an acceptance of the check, but not as a payment of it; but such is not the case here. To the contrary, the plaintiff seeks, as we think he has the right to do, to ratify the collection of the check for him: in such case he ratifies the assumed payment of it, and the check is then paid; the drawee

bank and the maker thereof are both released from paying it over again; the payee would be estopped from making such claim. The ratification is not upon the acceptance alone of the check by the drawee bank, but upon its collection by the defendant in error bank and payment by the drawee bank, all of which are ratified by the payee, and the suit is then against the collecting bank as for moneys had and received."

Also, in *Crisp v. State Bank*, 32 N. D. 263, 155 N. W. 78, it was held that the payee of a check, which was sent to her by mail, but which was intercepted and cashed with a fraudulent indorsement thereon by her husband, might recover from the intermediate bank which had cashed it and had collected the amount thereof from the drawee bank through a correspondent. The court said: "It is also quite clear that if a delivery to the plaintiff was in fact made or must be assumed the action of trover will lie, since the defendant bank, in order to reimburse itself for the payment which was made to the husband, transmitted the check and collected the same from its correspondents, who in turn collected it from the drawee bank. So, too, it would seem that a person to whom a check is sent by mail, and which check is intercepted and cashed with a fraudulent indorsement thereon by a third party, may ratify the delivery without ratifying the forged indorsement. 'This brings us to the question,' says Mr. Justice Lurton, of the Supreme Court of the United States, then a member of the supreme court of Tennessee, 'as to whether this check was ever delivered to the complainant; for it is insisted that if there has been no delivery to him that he has no such title to the instrument as will enable him to maintain a suit against the bank. Whether this check was sent to complainant and miscarried, and fell into the hands of a stranger, or whether it was left with the bank to be credited to the complainant, who kept his account there, and by oversight this credit was not given is all matter of conjecture. How this check ever reached the bank we are unable, from the proof, to determine. All we can say is that we are satisfied that it never came into the hands of complainant. Someone undoubtedly received it from Muse. By suing the bank upon this check, complainant may and does ratify the receipt of the check from Muse. It is as if it had been received by an agent for the use and benefit of the complainant. *Omnis ratihabitio retro trahitur et mandato priori acquiparatur*—a subsequent ratification has a retrospective effect, and is equivalent to a prior command. Broom, *Legal Maxims*, 837. "This is a rule," says Mr. Broom, "of very wide application." . . .

"No maxim," remarks Mr. Justice Story, "is better settled in reason or law than this maxim; . . . at all events, where it does not prejudice the rights of strangers." [*Fleckner v. U. S. Bank*, 8 Wheat. 363, 5 U. S. (L. ed.) 637.] As illustrative of the application of the rule the author cites the case where the goods of A are wrongfully taken and sold. The owner may either bring trover against the wrongdoer, or may elect to consider him as his agent, and adopt the sale, and bring an action for the price. *Smith v. Hodson*, 4 T. R. (Eng.) 211. So, in another case it was said: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and by and with all the consequences which follow from the same act done by his previous authority." [*Wilson v. Tumman*, 6 M. & G. 242, 46 E. C. L. 236.] Broom, *Legal Maxims*, 871. The bank is not prejudiced by this subsequent ratification, for it dealt with the check as the property of the complainant, and undertook to pay to him or his order. The effect of this ratification is simply to make the check the property of the complainant. It does not ratify the collection of the check by one whose act in receiving it is subsequently ratified, and agency to receive a check payable to order implies no authority to indorse it in the name of the payee, or to collect it without such indorsement. In the case of *Dodge v. National Exch. Bank*, a certificate of indebtedness by the government to Dodge was remitted by mail to the paymaster for a check. The mail was robbed, and the certificate presented by the thief to the paymaster, and a check demanded. The latter, without requiring proof of the identity of the holder of the certificate, issued a check payable to Dodge or order, and took up the certificate. The indorsement of Dodge was forged and the check paid. Subsequently Dodge sued the bank and recovered, the court holding that he might ratify the taking of the check for the certificate, and sue upon it as an accepted check. 20 Ohio St. 234, 5 Am. Rep. 648. See to the same effect *Graves v. American Exch. Bank*, 17 N. Y. 207. The decree of the chancellor is reversed, and judgment for complainant against the bank for the amount of the check, and interest from filing of bill, and all the cost of the cause. See *Pickle v. Muse*, 88 Tenn. 380, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919.' The case cited by counsel

for appellant, namely, *Talbot v. Rochester Bank*, 1 Hill (N. Y.) 295; *Garthwaite v. Tulare Bank*, 134 Cal. 237, 66 Pac. 326; *Buehler v. Galt*, 35 Ill. App. 225, 227; and *Bank of Republic v. Millard*, 10 Wall. 152, 19 U. S. (L. ed.) 897, in no way hold to a different doctrine. In the last case the action was brought against the drawee bank, and the court merely held that a payee of a check which was intercepted before the delivery could not maintain an action against the drawee bank, as there was no privity between him and the bank, the bank's contract being with the maker of the deposit merely. In the case of *Buehler v. Galt*, 35 Ill. App. 225, there was no proof that the check ever reached the person to whom it was mailed, and the only question at issue was whether the mailing of it constituted a delivery. The court held that the post office in the case was the agent of the sender, and that the debt which it was sent to pay had never been paid. In the case of *Talbot v. Rochester Bank*, 1 Hill (N. Y.) 295, *Talbot*, the owner of a certificate of deposit in the bank of L. caused it to be indorsed with directions that it should be paid to W. & Co., and then transmitted to them by mail, though without their knowledge or request. It never reached W. & Co., and was stolen on its way, and their names forged upon it, after which it came into the hands of the Bank of Rochester, the defendants, in the course of business, who collected the money on it from the Bank of L., supposing themselves to be the owners. But it was held in this case that the owner of a certificate of deposit who indorses it payable to another, and sends it to him by mail and without his knowledge, retains the property in it until the indorsee receives it, and that such a one had the election either to sue the Bank of Rochester, the intermediary bank, in trover as for the conversion of the certificate, or to recover the amount in an action for money had and received. In this case, however, the indorsee of the certificate of deposit, W. & Co., asserted no right of ownership in it, and provided that one who has the right of possession may assert that right, the case is authority for just such an action as is brought in the case at bar. It holds, in short, that an intermediary bank which cashes a check on a forged indorsement, and then collects that check from the drawee bank in order to reimburse itself, has converted that check. We can see no reason why, if no ratification had been made, the owner or payee of the certificate of deposit would have been able to maintain an action of trover against the intermediary bank, the indorsee of such check could not do the same thing, in other words, ratify or accept the delivery, though not the forgery. In the case of *Garthwaite v. Tulare*

Bank, 134 Cal. 237, 66 Pac. 326, the questions before us were not considered nor involved."

However, in *Tibby Bros. Glass Co. v. Farmers', etc. Bank*, 220 Pa. St. 1, 69 Atl. 280, 15 L.R.A.(N.S.) 519, the court denied the liability of an intervening bank to the payee of a check paid by it on a forged indorsement, saying: "From April, 1903, to the time he left the service of the plaintiff company, the bookkeeper presented to the defendant bank several checks drawn to the order of the plaintiff by its customers and indorsed with the rubber stamp, and received the cash for the face of the checks without the knowledge, consent or authority of the plaintiff company, and without accounting to it for the proceeds of the checks. These checks were received by the plaintiff, the payee, and credited to the account of the several drawers. The defendant collected the checks through a clearing house, and had the amount thereof at the date of the bringing of this suit. The plaintiff company presented the check for payment to the defendant, and, payment being refused, it brought this action of assumpsit, basing its right to recover on an implied contract that the moneys held by the defendant bank were for the use of the plaintiff. The case was submitted to the jury and a verdict was rendered for the plaintiff. The court, however, subsequently entered judgment non obstante veredicto for the defendant bank and the plaintiff has taken this appeal. The plaintiff company contends that it sustained such relations to the defendant and to the moneys collected by the defendant on the checks as entitled it to recover. It raises no question of the acceptance of the checks by the drawee banks. We think the plaintiff's position is untenable, and that under the facts of the case the plaintiff cannot maintain this action against the defendant bank. The checks in question were not drawn upon the defendant, but upon various other banks. The defendant simply cashed them on the forged indorsements of the payee's name, paid the several amounts to the defaulting bookkeeper, and collected the amount of the checks through a clearing house. In this state there is no contractual relation between the payee of an unaccepted check and the bank on which the check is drawn, and no action will lie by the payee in his own name against the bank although it has sufficient funds of the drawer at the time payment is refused. . . . The reason why the payee of a check cannot recover from the drawee bank is, as shown by the cases, that there is no privity of contract or other relations existing between the payee and the bank which establishes an obligation to pay, or from which an assumption to pay arises. A check is only conditional payment until it is paid,

and in the event of nonpayment the holder may resort to the original indebtedness: 2 Bolles on Modern Law of Banking, 600. Until, therefore, the check has been presented to the bank and it has been accepted, which must now be in writing, there is no relation between the payee and the bank which establishes the former's right to an action. The amount of the check on deposit with the bank continues to be the money of the drawer and subject to his check, and if on presentation of the check the bank refuses for any reason to accept and pay, the payee still has recourse to the drawer of the check for the amount of his indebtedness. None of the checks in question, as we have seen, was drawn upon the defendant bank. It simply cashed the checks with the forged indorsements made by the bookkeeper and collected the money from the drawee banks. The action of the defendant in cashing the checks puts it upon no better ground than if it had been the drawee bank, and establishes no relations between it and the plaintiff company that would warrant the latter in maintaining an action for the recovery of the amount of the checks. A nondrawee bank is under no obligations whatever to pay a check, and it does so at its peril: 2 Bolles on Modern Law of Banking, 728, 729. The plaintiff's contention is, however, that the defendant having received the money of the plaintiff company, due on the several checks drawn to its order by its customers, and the plaintiff having given credit to its customers for the amount of the checks, the defendant is liable in this action for money had and received for the use of the plaintiff. This contention wholly misapprehends the relations of the parties, as well as their rights and obligations arising out of the transaction. We may assume that the defendant bank received the amounts of the several checks through a clearing house from the banks on which they were drawn. This fact, however, does not convict the defendant of having received money for the use of the plaintiff. As we have already seen, if these checks had been presented to the drawee banks and the money had been paid on the forged indorsements and charged against the deposit account of the drawers, the plaintiff would have no right of action against the drawee banks. And for the reason that the checks not having been accepted in writing there was no contractual relation or privity between the parties. The money paid on the checks would not be the money of the drawer of the checks; it would be the money of the banks which paid it. Such is the case here. If the defendant bank received the money on the checks from the drawee banks, the latter did not pay the money out of the deposits of the drawers of the checks, but out of their own money, and

hence the money which the defendant received was not the money of the drawers of the checks nor was it the money of the plaintiff; neither was it received for the use of the plaintiff. The drawers of the checks and the payee were in no way affected by the payment of the amount of the checks by the drawee banks to the defendant bank on the forged indorsements. The deposits of the drawers on which they had drawn the checks were still their money, and the indebtedness of the drawers to the payee for which the checks were given still existed and warranted an action by the payee against his debtors, the drawers of the checks. The collection of the checks by the defendant bank from the drawee banks did not constitute a payment by the latter of the drawer's checks, and hence left intact the drawer's deposits, unaffected by the checks which they had drawn and delivered to the payee. The plaintiff's right of action against the defendant bank is not superior to its right of action against the drawee banks. The money paid the defendant on the several checks was the money of the drawee banks in which neither the drawers of the check or the plaintiff had any interest, and having been paid on forged indorsements, it may be recovered from the defendant by the paying banks. The defendant, therefore, has received no money for or on account of the plaintiff company and for which in good conscience it should account to the plaintiff. The fact, if it be a fact, that the bookkeeper entered a credit on the plaintiff's books for the amount of the different checks does not affect the liability of the defendant in this action. The payment of these checks on the forged indorsements was not a payment to the plaintiff, the payee of the checks. So far as the plaintiff company is concerned, the checks are still unpaid, and it has a right of action against its customers for the indebtedness. Under the facts of the case, we are of the opinion that the plaintiff has shown no right to maintain this action, and that the learned trial judge did not commit error in entering judgment in favor of the defendant bank."

The foregoing decision was criticized in *U. S. Portland Cement Co. v. U. S. Nat. Bank* (Colo.) 157 Pac. 202, L.R.A.1917A 145, wherein the court said: "There, as here, the suit was by the payee of the checks against an intervening bank, which had paid them upon forged indorsements and collected the amounts from the drawee bank; but we cannot subscribe to the reasons given. They are against the weight of authority, and also overlook the fact that the acts which the plaintiff seeks to ratify were not the drawee bank's acceptance of the checks, but their payment, and the intervening bank's collection of them."

View that Bank Is Not Liable.

IN GENERAL.

In some jurisdictions the rule is that, in the absence of proof that a check bearing a forged indorsement was accepted by the drawee bank or charged against the drawer, the payee or holder of a bank check so indorsed and paid on such forged indorsement cannot maintain an action against the drawee bank to recover the amount thereof. *Bank of Republic v. Millard*, 10 Wall. 152, 19 U. S. (L. ed.) 897; *Washington First Nat. Bank v. Whitman*, 94 U. S. 343, 24 U. S. (L. ed.) 229, *reversing* 1 MacArthur (D. C.) 61; *Sims v. American Nat. Bank*, 98 Ark. 1, 135 S. W. 356; *Freeman v. Savannah Bank, etc. Co.* 88 Ga. 252, 14 S. E. 577; *J. M. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App. 132; *Baltimore, etc. R. Co. v. Alexandria First Nat. Bank*, 102 Vt. 753, 47 S. E. 837. And see the reported case. *Compare Shaffer v. McKee*, 19 Ohio St. 526; *Dodge v. National Exch. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648, 30 Ohio St. 1.

The theory on which this holding is based, is that there is no foundation for an action by the payee or holder of the check which has been paid by the drawee bank on the forged indorsement of the payee against the bank, as there is no privity of contract between him and the bank entitling him to bring suit against it. *Bank of Republic v. Millard*, 10 Wall. 152, 19 U. S. (L. ed.) 897; *Washington First Nat. Bank v. Whitman*, 94 U. S. 343, 24 U. S. (L. ed.) 229, *reversing* 1 MacArthur (D. C.) 61; *Sims v. American Nat. Bank*, 98 Ark. 1, 135 S. W. 356.

Hence, in accordance with this holding, the action of the drawee bank in paying a check or draft, the indorsement whereon has been forged, is not deemed to constitute an acceptance thereof so as to create a privity between the payee and the bank. *Washington First Nat. Bank v. Whitman*, 94 U. S. 343, 24 U. S. (L. ed.) 229, *reversing* 1 MacArthur (D. C.) 61; *Sims v. American Nat. Bank*, 98 Ark. 1, 135 S. W. 356. Thus, in the case last cited the court said: "Can the payee of a check or draft whose indorsement was forged, after payment by the bank upon which it was drawn upon such forged indorsement, maintain an action against the drawee to recover the amount of it? The question is before this court for the first time. There are many authorities holding that the payee of a check, unaccepted, may bring suit against the drawee, upon the theory that it has the amount of the draft in its hands subject to the order of the drawer which is in effect by the check assigned to the payee, but the great weight of authority is against the proposition. *Zane on Banks and Banking*, §§ 146, 147; *Morse on Banks and Banking*, § 493.

The precise question was answered in the negative by the United States Supreme Court in *Washington First Nat. Bank v. Whitman*, 94 U. S. 343, 24 U. S. (L. ed.) 230, the court saying: 'We think it is clear, both upon principle and authority, that the payee of a check, unaccepted, cannot maintain an action upon it against the bank on which it was drawn;' and, continuing in answer to a like contention made there that such unauthorized payment constituted an acceptance, that court said: 'It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check; but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawee; and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before. We cannot recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent.' In such matters it is important that uniformity should obtain in the different jurisdictions, and that but one rule should be applied to the business dealings of the citizens of the different states with each other, so closely interwoven is such business activity and association with the vast commercial life of the nation; and since the United States Supreme Court is the highest court of last resort, and does not follow the decisions of the state courts upon general banking and commercial questions, we will follow it. *Exchange Nat. Bank v. Coe*, 94 Ark. 387. We hold that there was no privity of contract between the holder of this draft, which had

been paid by the drawee bank upon the forged indorsement of the payee, which would entitle him to bring suit against said drawee bank, and that its action in the payment of such draft did not constitute an acceptance thereof that would release the drawer from its payment."

In *Freeman v. Savanuah Bank, etc. Co.* 88 Ga. 252, 14 S. E. 577, an action for money had and received, it appeared that the defendant bank received a check from a correspondent bank drawn on it in favor of the plaintiff, whose indorsement thereon had been forged, and credited the correspondent bank therewith and charged the drawer the amount of the check. Later the defendant bank learned that the indorsement of the plaintiff's name on the check was a forgery, whereupon it returned the check to the correspondent bank, charged the amount to that bank, and credited the drawer with the same amount. The court directed a verdict for the defendant.

It is, however, within the power of the bank to render itself liable to the holder and payee of the check, and this it may do by a formal acceptance written on the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. *Washington First Nat. Bank v. Whitman*, 94 U. S. 343, 24 U. S. (L. ed.) 229.

In *Bank of Republic v. Millard*, 10 Wall. 152, 19 U. S. (L. ed.) 897, the court said: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex aequo et bono* would be applicable, as the bank, having assented to the order and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore, under an implied promise to him to pay it on demand." See to the same effect; *Millard v. National Bank of Republic*, 3 MacArthur (D. C.) 54; *Commercial Nat. Bank v. Lincoln Fuel Co.* 67 Ill. App. 166.

UNDER NEGOTIABLE INSTRUMENTS ACT.

A holding that the payee of a check whose indorsement thereto has been forged, cannot maintain an action against the bank paying the check, has been based on the provisions of the negotiable instruments act. *Baltimore, etc. R. Co. v. Alexandria First Nat. Bank*, 102 Va. 753, 47 S. E. 837. And see the reported case.

In the negotiable instruments act, it is provided that the provisions applicable to a bill of exchange payable on demand shall apply to a check. It is provided further

that the acceptance of a bill of exchange is the signification of the drawee of his assent to the order of the drawer, but that the acceptance must be in writing and signed by the drawee, and must not express that the drawee will perform his promise by any other means than the payment of the money. It is also provided that an acceptance under the provisions of the act means an acceptance completed by delivery or notification. Under the foregoing provisions, it has been held that the payment by a bank of a check on a forged indorsement of the payee's name, the charging of the amount thereof to the account of the drawer, and the return of the check to the drawer on the settlement of his account with the bank, do not amount to an acceptance and thereby render the bank liable to the rightful holder of the check. *Baltimore, etc. R. Co. v. Alexandria First Nat. Bank*, supra.

Likewise, in the reported case, it is held that the payment of a check on the forged indorsement of the payee's name, the stamping of the check by the bank as paid, a method adopted by the bank for cancelling or extinguishing the check, and the charging of the same to the account of the drawer, do not constitute an acceptance. In its decision in the reported case, the court states that in view of the provisions of the negotiable instruments act it can no longer adhere to the rule announced in a previous case (*Dodge v. National Exch. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648, 30 Ohio St. 1). In the latter case, the payee recovered against the bank paying a check bearing a forged indorsement of his name, on the theory that the drawing and delivering of the check operated as an assignment pro tanto of the funds of the drawer in the bank.

ESTATE OF OLDFIELD.

BOWIE

v.

TROWBRIDGE.

Iowa Supreme Court—March 23, 1916.

175 Iowa 118; 156 N. W. 977.

Work and Labor — Recovery on Express Contract — Instructions.

In an action against a decedent's estate to recover for services rendered decedent under an express contract an instruction that direct evidence of such agreement was not necessary if from all the facts and circumstances in evidence the jury could find, by a preponderance, that there must have been such an

agreement is not defective as authorizing plaintiff to recover on an implied contract, since the instruction simply states the correct rule that an express agreement can be proved by facts and circumstances as well as by direct evidence.

Variance—As to Express or Implied Contract.

Under the rule that a case must be tried on the issues made by the pleadings, a party cannot recover upon an implied contract, where he pleads and relies upon an express contract.

Services by Member of Household—Express Contract—Instructions.

In an action against a decedent's estate to recover for services rendered decedent, the instruction that if the plaintiff established the rendition of services under an express agreement by which she was to be paid therefor, she would be entitled to recover, though such services may have been rendered at a time when she was furnished a home, food, and clothing and was living with decedent in his home and with his family, is not defective as assuming that there was evidence of an express agreement, and that such agreement did not contemplate payment for services by furnishing a home, food, clothing, etc., when considered in connection with other instructions that the furnishing of a home, food, and clothing to one performing services raises a presumption that neither expects to pay or receive compensation, but that the services are gratuitous, which presumption the plaintiff must overcome by a preponderance of the evidence, and, failing which, the verdict should be for the defendant.

Limitation of Actions—When Cause of Action Accrues—Continuous Services.

In an action against an estate to recover for services to decedent, where the services extended over a period of more than five years preceding the filing of the claim, but were continuous up to within a year of the commencement of the action, the services rendered more than five years before filing of the claim are not barred by the statute of limitations, since under such circumstances the statute did not begin to run.

Work and Labor—Recovery not Excessive.

Where plaintiff worked on decedent's farm for seven years, the work consisting of household duties and manual labor on the farm, a verdict of \$3,164 is not excessive.

Appeal and Error—Effect of Reversal—Right to Amend Pleading.

Where after a jury trial a case is appealed and reversed for new trial, amendments to the pleadings are not a matter of right, but may be allowed in the discretion of the court.

Breach of Promise of Marriage—Defenses—Death.

Where performance of a contract to marry is rendered impossible by death of one of the parties, no cause of action arises for the breach of the contract, since there is an implied condition to the contract of marriage

that the parties will be alive at the time appointed for performance.

[See 10 Ann. Cas. 725.]

Disease as Defense.

Where a man engaged to marry becomes afflicted with disease whereby the performance of marriage duties would aggravate his disease and hasten his death, either party to the contract may repudiate without being subjected to liability therefor, since the consideration for an agreement to marry is the giving and receiving by marriage all that is implied in the relationship, entailing mutual obligations of giving and receiving, for the failure of which by the act of God either party is entitled to refuse the performance.

[See note at end of this case.]

Same.

One becoming afflicted with a loathsome disease, contracted subsequently to the making of the contract, which upon consummation of the marriage may be communicated to the spouse and offspring, may repudiate an agreement to marry.

[See note at end of this case.]

Same.

To justify a repudiation of the contract, however, upon such ground, the danger to life and health which will be caused by the consummation of the marriage must be reasonably certain, as the inevitable consequence of the marriage relation, and not a mere problematical or possible contingency.

[See note at end of this case.]

Same.

Where one, after contracting to marry, contracts a malady which will cause death within a few months, he may repudiate the contract, and his estate upon his death will not be liable in damages as for a breach.

[See note at end of this case.]

Appeal from District Court, Carroll county: HUTCHISON, Judge.

Action by Nancy Bowie, plaintiff, against William Trowbridge, executor of Edward A. Oldfield, deceased. From judgment rendered both parties appeal. The facts are stated in the opinion. **AFFIRMED.**

Chas. C. Helmer for appellant.

Brown McCrary for appellee.

[119] GAYNOR, J.—I. The controversy in this suit is based on two claims, filed against the estate of Edward A. Oldfield, deceased. The plaintiff states her causes of action in two counts. In the first count of her petition, she seeks to recover damages for a breach of promise of marriage. In the second count, she seeks to recover for personal services rendered by her to decedent during his lifetime. It appears that Edward A. Oldfield died on December 2, 1910, testate; that his will was duly admitted to probate, and Wm.

Trowbridge, defendant herein, was appointed executor of the will. On the 11th day of January, 1911, the appellee (plaintiff) filed a claim against the estate, wherein she asks \$10,000 on account of a breach of promise of marriage which she alleges was made between her and the decedent. In the second count, she claims \$3,975 for services rendered by her for decedent from September 14, 1893, to September 2, 1910. To the first count of plaintiff's petition, based on an alleged promise of marriage the defendant interposed the following defenses: First, that [120] any agreement of marriage entered into was, by mutual consent of the parties, postponed and deferred from time to time up to the death of Edward A. Oldfield; that consummation of the agreement was prevented by said death; second, that, at the time the alleged breach of promise occurred, if any, the said Edward A. Oldfield was suffering from an incurable disease, known as pernicious anemia, which made it impractical and impossible for him to consummate a marriage with the plaintiff; that any marriage at that time would have aggravated said disease and shortened his life; that the incurable character and disastrous consequences of the disease were unknown to Oldfield at the time of the alleged promise; third, defendant pleads the physical condition of Oldfield in mitigation of damages. To the second count of plaintiff's petition, based on the claim for services rendered, the defendant pleads: first, that all of said claims and demands which accrued prior to five years before the filing of the claim are barred by the statute of limitations; second, that, during the time claimed for services rendered, the plaintiff was a member of decedent's family, receiving support therein as a member of the family; that, during all the time that plaintiff and her five children resided with Oldfield, she and they were furnished with food, clothing and other necessities of life in decedent's family; that Oldfield received no pay therefor except from the services rendered by the plaintiff and her children; that the necessities furnished were at least of the value of the services performed; and that she was fully compensated therefor by such support and maintenance; that, at the time plaintiff resided in the family of Edward A. Oldfield, the defendant avers that the said Oldfield believed that the services rendered by the plaintiff during such time were gratuitous, and were rendered by the plaintiff and received by Oldfield without the expectation on the part of either that payment should be made therefor. In addition to the foregoing defenses, the defendant pleads a general denial as to all matters alleged by the plaintiff in her respective claims.

[121] Upon the issue thus tendered, the cause was tried to a jury, and a general ver-

dict returned for the plaintiff for \$3,164. The jury found, however, specially that the plaintiff was not entitled to recover on the first count of her petition for the breach of promise of marriage. A judgment having been entered upon the verdict, both parties appeal. The defendant, having appealed first, is designated as appellant, and the plaintiff as appellee, when referred to hereafter in this opinion.

As defendant first appealed, we will give our attention first to a consideration of the claim based upon the second count of the petition, upon which the jury allowed plaintiff to recover.

In this count of her petition, she seeks to recover for services rendered, and alleges that, in the year 1893, Edward Oldfield lived on a farm in Sac County; that, at his instance and request, and by express agreement, this plaintiff came to his place to work; that, in 1894, she brought her family with her, consisting of five children; that she continued to work for him from September, 1893, to September, 1910, except when temporarily away on a visit; that the reasonable value of her services, during all the time, was \$5.00 a week; that her work consisted of household duties, work and labor in the house, and manual labor upon the farm. The plaintiff further alleges that payments were made to her from time to time during said period.

The first alleged error relied upon by the defendant for reversal is based on the action of the court in giving Instruction 25 to the jury, on its own motion. The theory upon which the error is predicated is that the plaintiff's petition seeks to recover for services rendered under express contract, while this instruction, it is claimed, authorizes her to recover on an implied contract.

A mere statement of what the instructions contain is sufficient to negative appellant's contention. The [122] court recognized the fact that the plaintiff predicates her right to recover upon an express agreement, and denied her right to recover except upon proof of such express agreement. The court said:

"The plaintiff alleges that she went to work for decedent under an express agreement that she should do so. Direct evidence of such agreement is, however, not necessary, if, from all the facts and circumstances appearing in evidence in the case, you can find by a preponderance of the evidence that there must have been such an agreement."

The court, in the instruction complained of, simply told the jury that the agreement alleged could be proven by facts and circumstances, as well as by direct evidence. Many facts about which there is controversy are so proven. The mouths of both parties to this controversy were closed; one by death, and one by operation of law. That.

there was, or was not, such an agreement as she alleged, was a substantive fact to be proven, as the court says, by direct evidence, or by facts and circumstances appearing in evidence,—not necessarily by direct evidence. If the facts and circumstances proven established in the minds of the jury a belief in the existence of the controverted fact, then the fact itself was proven, even though there were no direct evidence of its existence.

That a party cannot recover upon an implied contract where he pleads and relies upon an express contract, is elementary. No rule is more familiar to the profession than the one which requires a case to be tried upon issues made in the pleadings. No ultimate fact, not pleaded, can be considered in determining such liability.

This rule was recognized on the former appeal of this case, 158 Iowa 98, 100, in which it was said:

"Direct evidence of such an agreement for employment is not necessary, however. If from all the facts and circumstances appearing in the case it can fairly be said that there must have been such an agreement, it is sufficient."

[123] In the 28th instruction given to the jury, the court expressly said:

"In this case, plaintiff cannot recover anything for her services . . . unless she has established . . . that such services were rendered by her, under and by virtue of an express agreement with Oldfield for the performance of the same."

It is next contended that the court erred in giving the 28th Instruction, for the reason, as it is said in argument, that the instruction assumes that there is evidence of an express agreement, and that such agreement did not contemplate payment for such services by furnishing plaintiff with a home, food, clothing, etc., for herself and family. This instruction must be read in connection with instruction 26 and 27, immediately preceding, in order that its full import and purpose may be understood. The contention of the defendant was, that the plaintiff was a member of decedent's family; that the labor performed was performed by her as a member of the family; that there was no reasonable expectation on her part, of receiving pay, and that there was no expectation, on his part, of compensating her for the services; that in no event could she recover for services rendered, in the absence of an express contract such as alleged by her in her petition.

The 26th and 27th instructions given are as follows:

"Where one person performs services for another, and the other furnishes a home, food and clothing for the first, a presumption arises that neither expects to pay or receive

compensation. If, therefore, you find by a preponderance of the evidence that plaintiff did perform services for Oldfield, and Oldfield furnished a home, food and clothing to the plaintiff, and if you further find that the plaintiff has not shown by a preponderance of the evidence that Oldfield agreed or expected to pay her for her services, then the plaintiff is not [124] entitled to receive anything therefor, and your verdict should be for the defendant on this branch of the case.

"If you should find plaintiff to have been living with decedent as a member of his family and receiving support therein, a presumption would arise that such services as rendered by her were gratuitous, and the plaintiff must overcome this presumption in order to entitle her to recover for such services, by showing by a preponderance of the evidence that such services were rendered under an express agreement for the rendering of the same, as heretofore explained to you in these instructions."

Immediately following which is this portion of the 28th instruction, of which complaint is made, reading as follows:

"If she has thus established that such services were rendered by her under and by virtue of an express agreement with Oldfield for such services, and by which she was to be paid therefor, then, in such event, she would be entitled to recover herein for such services even though they may have been rendered at a time when she was furnished a home, food and clothing by decedent, and was living with decedent in his home, and with his family."

The contention of appellant is that the court ignores the claim made by the defendant, that the home, food and clothing furnished plaintiff fully compensate her for all the services rendered, and that the agreement contemplated that one should be in satisfaction of the other. We do not construe the instruction as so holding. In the 21st instruction given by the court, the jury was expressly told that one of the defenses is that plaintiff has been fully paid for such services by reason of payments made to her by decedent, and by reason of food, clothing and necessities furnished her and the members of her family, and said to the jury that they should determine from the evidence whether this contention was true or not, and should consider all the evidence, the circumstances under which the services were rendered, and the supplies furnished, and the extent of the same, and what services, [125] if any, were rendered by the children, in determining this question.

It is next contended that this record discloses such a state of facts that all of plaintiff's claim, prior to five years immediately preceding the filing of the claim, was barred by the statute of limitations.

This question was before the court on the former appeal, and the evidence on this point was substantially the same as in this record. This court said:

"The evidence as a whole tended to show that the service was continuous for the entire time, up to at least within a year or two of the commencement of this action, with the exception of one or two brief periods when plaintiff was absent on visits, and, such being the case, the statute did not begin to run," citing *Kilbourn v. Anderson*, 77 Ia. 501, 42 N. W. 431; *Asher v. Pegg*, 146 Ia. 541, 123 N. W. 739, 30 L.R.A.(N.S.) 890.

We think this disposes of this same contention made upon this appeal. See *Hensley v. Davidson Bros. Co.* 135 Ia. 106, 14 Annu. Cas. 62, 112 N. W. 227.

It is next contended that the verdict is excessive. In this contention, we cannot concur. We may further say that a review of the evidence in this case satisfies us that the verdict on this branch of the case is sustained by it.

We find no reversible error upon defendant's appeal.

¶1. This brings us to a consideration of plaintiff's appeal, and calls for a review of the record made upon the claim of plaintiff for breach of promise of marriage.

Assuming, for the purposes of this opinion, that the record disclosed a promise of marriage entered into between plaintiff and deceased, substantially as claimed by the plaintiff; assuming that this promise continued to be recognized by both parties as binding upon each; assuming that, in September, 1910, the deceased refused to fulfill his promise and marry the plaintiff; assuming that, at the time of the alleged breach of promise, Oldfield was suffering from pernicious anemia, and that the same was an [126] incurable disease, and that marriage would aggravate the disease and would have tended to shorten the life of the deceased, and that this was not known to Oldfield at the time of the making of the promise, and that the condition arose subsequently to the making of the promise, and that this disease caused his death on December 2, 1910, the question presented is, whether or not such a finding would excuse the conduct of the deceased in refusing to consummate his promise by marriage, and defeat plaintiff's right to recover damages based on such refusal.

The testimony of Dr. Patty is that he was first consulted by Oldfield in February, 1910; that Oldfield then said he had no appetite, was tired all the time and unable to work; that he was easily fatigued, short of breath and unable to sleep well; that he made an examination of him; that he had hemic murmurs of the heart; that his condition was

due to a loss of blood elements; that his condition was serious; that he had pernicious anemia; that when he first consulted him, he was pale, and his eyelids showed little color; that he informed Oldfield that his condition was serious; that he saw him on August 3rd of that year; that he had then become weaker and unable to do anything; that he informed Oldfield that his condition was fatal; that he died of pernicious anemia; that, at the time he first consulted him, he was unable physically to fulfill a contract of marriage.

Dr. Kessler testified that the disease of pernicious anemia may last two or three months,—possibly more than a year,—but usually a year is the limit; that, if it appeared in the early part of 1910 that Oldfield had no appetite, was tired all the time and unable to work, was easily fatigued, unable to sleep well and that an examination disclosed hemic murmurs of the heart, and his eyes were pale, and he died September 2, 1910, he would say that he died of pernicious anemia; that, if a man was suffering from pernicious anemia it would have a bad effect on his health to marry and have intercourse; that it would aggravate the disease and shorten his life; that, [127] in treating pernicious anemia, the patient is advised to refrain from labor, dissipation or excitement,—in other words, take everything as easily as possible and be quiet; that such things would aggravate the disease and shorten his life; that any excitement or exertion would tend to aggravate the disease and shorten the life of the patient; that the disease is debilitating in its character and tends to weaken the vital forces, and, in some cases, impair the mind, and said:

"I would advise a patient suffering from pernicious anemia to avoid excitement and exertion and keep quiet."

The plaintiff, Nancy Bowie, testified that she was away from September, 1909, until April, 1910; that the deceased told her, in February, 1910, that he had been to see a doctor and the doctor told him he could not live. "It was after that time that he told me he would not marry me."

Dollie Sawyer, daughter of the deceased, testified:

"I came back home in April, 1910, because my father wanted me to come back. He said his health was getting very bad. He wanted me to come back and stay with him. I stayed with him until he died. His health was bad during all the summer of 1910 and kept gradually growing worse. I heard him say before Mrs. Bowie that the doctor told him he could not live."

Under the heading, "Propositions of Law Requiring a Reversal," the plaintiff, the cross-appellant, urges but two propositions:

1. "After a case has been tried to a jury upon certain issues and appealed, after reversal, neither party has, as a matter of right, to so amend the pleadings as to raise new issues."

As a matter of right, perhaps no. As a matter of discretion in the court, yes. The amendment complained of was filed with the consent of the court and for reasons then urged before the court. It was a discretionary matter with the court to allow it or not in this particular case.

[128] 2. "Sickness or incurable disease incurred after a promise of marriage, is not ground for releasing him from his agreement to marry."

Upon this second proposition, the authorities are not agreed. Some courts hold that every contract to marry has coupled with it an implied condition that the parties will not endanger life or health in the consummation of the marriage; that, where illness or disease exists in either party to the contract, such as would render marriage dangerous to the life or health of either, a breach of the contract, based on such unavoidable and unanticipated condition, is excusable.

In *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621, 47 L.R.A. 581, the Supreme Court of Virginia said:

"It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with equal force to a marriage contract, the performance of which, owing to the causes subsequently intervening, and altogether independent of any default of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable," citing *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Shackleford v. Hamilton*, 93 Ky. 80, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L.R.A. 531.

The opinion further proceeds:

"In the case at bar the evidence (as to which, in our opinion, there is no real conflict shows that there was a predisposition in the defendant's family to physical troubles of the kind that had developed with him; that his father had died with a similar disease, and a brother with urinary [129] trouble; that, after his engagement with the plaintiff and before the time fixed for the

marriage, the defendant had, without fault on his part, developed and was suffering with a grave malady, involving the urinary organs, which had continued and kept him constantly under the advice and treatment of a physician, up to the time of the trial; that he had cystitis, with probable inflammation of the urethra, complicated with enlargement of the prostate gland, and that an indulgence . . . would aggravate his disease, and likely shorten his life; and that it would be, not only a wrong and an injustice to the defendant, but also to the plaintiff, for him to marry in his condition of health. Marriage is assumed in law to be for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation. On the contrary, an indulgence . . . would aggravate his disease and enhance the chances of a fatal result. . . . Our conclusion upon the law and the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of his contract to marry the plaintiff."

As supporting this rule, we have *Grover v. Zook*, 44 Wash. 489, 12 Ann. Cas. 192, 87 Pac. 638, 120 Am. St. Rep. 1012, 7 L.R.A. (N.S.) 582, in which the rule laid down in the *Sanders* case, supra, was quoted with approval. In this *Zook* case, the defendant was afflicted with pulmonary tuberculosis (commonly called consumption), in an incurable form. The woman sought to recover damages for the breach of the contract. This was interposed as a defense. The sufficiency of the defense was questioned on many grounds, but was sustained on the ground that the consummation of the marriage would endanger not only his life but the life of the woman, and would affect the offspring, if any, resulting from the marriage. It appeared in this case that several members of defendant's family had died of pulmonary consumption.

As recognizing the doctrine expressed in these two cases, [130] though not directly in point, see *Beans v. Denny*, 141 Ia. 52, 117 N. W. 1091; *Vierling v. Binder*, 113 Ia. 337, 85 N. W. 621; *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L.R.A. 854; *Shackleford v. Hamilton*, 93 Ky. 80, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L.R.A. 531.

In this last case, the defense interposed was that, long prior to any contract of marriage with the plaintiff, defendant had contracted a loathsome disease called syphilis, and was treated for it by skilled physicians until he was pronounced cured; that physicians advised him he was cured, and was in a fit state to marry and could safely do so: that, after this time, and with the belief in good faith that the malady no longer existed,

he made the contract with the plaintiff; that, after the engagement to marry, and without any fault on his part, the symptoms of the disease reappeared, and he was advised by physicians that he should not marry; that, prior to the bringing of this action, he made known the fact to the plaintiff. The lower court sustained appellee's demurrer to this contention as a defense, but allowed the plea to go to the jury in mitigation of damages. The Supreme Court said:

"The court below, entertaining the opinion that, as defendant had entered into this marriage contract, he is bound for its breach, although it might have been the duty of appellant, under the circumstances, to decline to execute it, sustained the demurrer to the defense. That the contract was unconditional, and the defendant being able, at the time the promise was made, to perform the contract, he must either execute it, or become responsible in damages for the breach. If such a contract as that of marriage is to be treated in the light of a mere bargain and exchange of chattels between parties competent to contract, then it seems to us there would be but little difficulty in sustaining the action of the court below; but if the agreement, when entered into, is to be treated as creating a status that forms the basis of our entire social system, and in which society has more interest in preserving its purity than the parties to the agreement, it must follow that the defense interposed to appellee's claim for damages [131] was, in law as morals, sufficient to prevent the recovery. Where the marriage contract is consummated, the parties taking each other for better, for worse, for richer, for poorer, and agreeing to cherish each other in sickness and in health, the fact that the social standing of the one party or the other, or their pecuniary condition, was not as represented, will afford no ground for relief; still, where there is a mere agreement to marry, there may be such a condition of one party or the other, as to health or bodily infirmity, arising subsequent to the agreement, as would authorize either party to decline to enter into the marriage relation; and to hold otherwise would be to place such a contract upon the same footing with sales of mere personal chattels. It is said by Mr. Bishop, in his work on Marriage and Divorce, that 'one after marriage cannot complain of an impediment known to him before; but, if he were ignorant of the existence of the defect, or of its incurable nature, though in himself, he may take advantage of it by suit of nullity. The marriage was a mistake: the ends intended by it cannot be answered.' 2 Bishop, Marriage and Divorce (5th ed.) Sec. 581. The text books establish the doctrine that without sexual intercourse the ends of marriage—the procreation of children, and

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the pleasures or enjoyments of matrimony—cannot be attained. The first cause and reason of matrimony, says Ayliffe, 'ought to be the design of having offspring; so the second ought to be the avoiding of fornication. And the law recognizes these two as its principal ends, namely, a lawful indulgence of the passions, to prevent licentiousness; and the procreation of children, according to the evident design of Divine Providence.' 1 Bishop, Marriage and Divorce (5th ed.) Sec. 322. It is not pretended, nor has it been so adjudged in any court, that a mere temporary disease, or such a change in the physical condition of a party to a marriage contract, after it has been entered into, and without his fault, as would render him less capable of discharging the duties growing out of the marital relation, would be sufficient to justify its breach; but when the party is afflicted with [132] bodily disease to such an extent as is dangerous to the lives of those with whom he comes in contact, and such as must, if he should marry, necessarily be communicated to his wife . . . and, through her, affect her offspring with the poison, connected with the fact that he was ignorant of the disease being upon him at the time he contracts to marry, he will be excused for the nonperformance of his undertaking. While the contract to marry is silent as to any condition, it must be implied that any subsequent change in the physical or mental condition of either party, without fault, so as to render it impossible, in the nature of things, to accomplish the object for which the marriage relation is brought about, will release the parties from the agreement. Impotency, insanity, or such a diseased condition of the body as would affect the offspring and endanger the life of the mother, if the contract was carried out, would certainly be within this rule. Any other doctrine would require the same construction to be given the agreement to marry that is given to contracts for the sale and delivery of personal property. Where the party can recover, it must be in damages for the breach, although impossible to perform it; in other words, it is urged that the woman must either have the husband or damages in his stead, if he is able to have the marriage ceremony performed. This is also the objection to the majority opinions rendered in the Court of Queen's Bench in the case of *Hall v. Wright*, El. Bl. & El. 745, 96 E. C. L. 745. We concur with the minority opinions in that case, that the contract of marriage is subject to implied conditions peculiar to itself. In that case, the defense was that, after the promise and before the breach, the defendant was afflicted with bleeding from the lungs, and by reason of the disease became incapable of marriage without great danger to his life, and therefore, unfit.

for the married state, of which the plaintiff had notice. After reviewing the authorities upon the question, Erle, J., said: 'The principle to be deduced from the cases seems to me to be that a contract to marry is assumed, in law, to be made for the purpose of mutual comfort, and is [133] voided, if by the act of God or the opposite party, the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract.' The majority opinion was rendered on the idea that disease was not such a state of health as made it improper for the defendant to marry, and, therefore, not impossible of performance; and, if a case like the one being considered had been presented, we doubt if any difference of opinion would have been expressed. Pollock and other text writers on contracts, in alluding to this opinion, say that it is so much against the tendency of the later cases that it is now of little or no authority beyond the point decided; but, if that opinion had been unanimous, although entitled to great weight, we would not be inclined to follow its reasoning, or concur in the conclusion reached."

Judge Pollock, in his work on *Contracts* (3rd Edition), page 546, said:

"In the early and very peculiar case of *Hall v. Wright*, the question, after some critical discussion of the pleadings, which it is needless to follow, came to this: 'Is it a term in an ordinary agreement to marry, that if a man from bodily disease cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the time appointed, he shall be excused from marrying then?' or, in other words: 'Is the continuance of health (that is, of such a state of health as makes it not improper to marry), an implied condition of the contract?' The Court of Exchequer Chamber decided by four to three that it is not, the Court of the Queen's Bench having been equally divided. The majority of the judges relied upon two reasons: that if a man could not marry without danger to his life, that did not show the performance of the contract to be impossible, but at most, highly imprudent; and that, at any rate, the contract could be so far performed as to give the woman the status and social position of a wife. It was not disputed that the contract was voidable at her option. 'The man, though he may be in a bad state [134] of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position, so far as in his power, though he may be unable to fulfill all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract.' As to the first of these reasons, the question is not whether there is or not

an absolute impossibility, but what is the true meaning of the contract; and in this case the contract is of such a kind that one might expect the conditions and exceptions implied in strictly personal contracts to be extended rather than excluded. As to the second reason, it cannot be maintained, except against the common understanding of mankind and the general treatment of marriage by English law, that the acquisition of legal or social position by marriage is a principal or independent object of the contract. Unless it can be so considered, the reason cannot stand with the principle affirmed in *Geipel v. Smith* (1872) L. R. 7 Q. B. (Eng.) 404, that when the main part of a contract has become impossible of performance by an accepted cause, it must be treated as having become impossible altogether. The decision itself can be reviewed only by a court of ultimate appeal, but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided, which, for the obvious reasons indicated in some of the judgments, is not at all likely to recur."

In the footnote on page 547, Pollock on *Contracts* (3rd Edition), it is said:

"In an action by a woman for breach of promise to marry, it is a defense either that the woman has physical defects making marriage improper which, if existing, were unknown to the defendant at the time the engagement was made, or that the defendant himself has such defects," citing *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; *Gring v. Lerch*, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314; *Vierling v. Binder*, 113 Ia. 337, 85 N. W. 621; *Shackleford v. Hamilton*, 93 Ky. 80, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L.R.A. 531; *Gardner v. Arnett* (Ky.) 50 S. W. 840; [135] *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L.R.A. 854; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621, 47 L.R.A. 581.

In *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444, the defendant failed to fulfill a contract of marriage upon the ground that he was afflicted with a venereal disease which rendered him unfit for the marriage state. The court, in disposing of the case, said:

"However once doubted, it is now generally conceded that, if the performance of a contract be rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance; and such a stipulation will be understood to be an inherent part of every contract. It is likewise true that, whenever the main part of an executory contract becomes impossible of performance, from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why

should not the same principle apply to a contract, the fulfillment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them."

In discussing the case, reference was made to *Hall v. Wright*, hereinafter more fully referred to. The court said:

"In making that decision, the court treated a contract for marriage as they would any other contract, saying that, though in bad health, the man might, nevertheless, so far perform his contract as to marry the woman, and thus secure to her the status and social position of his wife, and endow her with a wife's interest in his estate; and, if unwilling to do this, he should compensate her in damages for his refusal. We confess that we are not satisfied with this course of reasoning. In the first place, it is not possible to assimilate a contract like this to an ordinary contract for personal services, which, if not capable of being wholly performed, may be partially so; and, in the next place, we believe it to be contrary [136] to the understanding of men generally, that the acquisition of property or social position either does or should constitute a main and independent motive and inducement for entering into such a contract. The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are the comforts of association, the *consortium vitae* . . . ; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so. In *Pollock on Contracts*, 370 (a book in which the principles of contracts are treated more philosophically than by any author known to us), the decision of *Hall v. Wright*, *supra*, is referred to, with the remark that it is so much against the tendency of the later cases as to be now of little or no authority."

The case then proceeds to discuss the effect upon the woman and her offspring of consummating such a marriage, because that was the strongest argument to be urged against the consummation of the marriage. We think, however, it is not the only argument.

In *Boast v. Firth*, L. R. 4 C. P. (Eng.) 1, a master sued the father of his apprentice on his covenants in an apprentice deed, in

which it was provided that the apprentice should serve him (the plaintiff), during all the term. The defense was that the apprentice was prevented from so doing by permanent illness arising after the making of the indenture. The court held that it must be held to have been in the contemplation of the parties, when they entered into this covenant, that the prevention of the performance by the act of God should be an excuse for nonperformance, and the defense was held good. The court, however, was cited to the [137] case of *Hall v. Wright*, as supporting the contention that there should be liability, notwithstanding the illness of the apprentice. The court said:

"It seems to me, however, that that case is clearly distinguishable. In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfill all the obligations of the marriage state; and in rests with the woman to say whether she will enforce or renounce the contract."

Robinson v. Davison, L. R. 6 Exch. (Eng.) 269, involved a contract to perform services which not deputy could perform (the defendant was an eminent pianoforte player), and which, in case of death, could not be performed by the executors of the deceased. It was held that, by virtue of the terms of the contract, incapacity either of body or mind in the performer, without default on his or her part, is an excuse for nonperformance; and it seems to be the general holding that, where one is engaged to perform services which he alone can perform, if, by the act of God, he becomes disabled for the performance, he is excusable without damages.

See *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Fenton v. Clark*, 11 Vt. 557; *Green v. Gilbert*, 21 Wis. 396.

This brings us to the only two causes to which our attention has been called holding that sickness does not excuse a refusal to perform a marriage contract. The first is *Hall v. Wright*, decided in 1858. The case was first heard in the Court of Queen's Bench. In that court, the judges were four to three against defendant's contention. The Court of Exchequer Chamber on appeal held against such defense by a vote of three, each judge filing an opinion in support of his contention: thus holding that it was necessary to show, in order to escape damages, that the performance of the contract was impossible, and that, at any rate, the contract should be [138] so performed as to give the woman the status and social position of the wife, no matter what the condition of the defendant is at

that time, provided he is capable of sitting up long enough to have the marriage ceremony performed.

Judge Willes, speaking as a member of the court, said:

"The contract in this case is stated by the plaintiff and admitted by the defendant, to have been in terms an unconditional one . . . Its performance is not impossible, and it is not enough to show, in answer to an action upon a contract, that its performance is inconvenient or may be dangerous. The delicacy of health, alleged as an excuse, is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. . . . If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, . . . but this is not a question of sentiment. If it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman even more anxious to marry, in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart."

Judge Crowder said:

"It is quite impossible to construe the plea as alleging any physical impossibility to go through the ceremony of marriage, or any physical incapacity to perform the duties of marriage. Whether, if such allegations had existed, they would have afforded any answer to the action, I do not think it is necessary in this case to decide. . . . But I am of opinion that it is no excuse for the breach of a promise to marry, that the performance of the conjugal duties would be attended with danger to the defendant's life."

Erle, Judge, speaking for himself, said:

"The plea alleges that, before any breach of the promise, the defendant was afflicted with a dangerous bodily disease, [139] which had occasioned frequent and severe bleedings from the lungs, and by reason thereof, defendant was incapable of marriage without great danger to his life. . . . The plaintiff contends that a contract to marry is not subject to implied conditions peculiar to itself . . . ; and that, when the time is come, the woman has a right either to a husband or to damages in lieu thereof; and that the fatal consequence of the marriage to the husband is either immaterial to the wife, or a ground for greater damages; as a widow may get more of her former husband's assets than a wife. But there is no authority to support this view; and there seems to me to be much reason and authority against it. A contract to marry has some peculiar incidents arising from its nature. . . . The

principle to be deduced from these cases seems to me to be that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if, by the act of God or the opposite party, the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract. . . . The near approach of death by a fatal disease precludes any hope of personal comfort from cohabitation; and, if death is knowingly hastened thereby, each party, by performing the contract, might incur the criminal guilt of intentionally causing death."

Judge Pollock said:

"Some learned judges think it (a contract to marry) is of the same character as any other contract, and that no terms or conditions can be implied by the law; and that, if it be not performed in the terms expressed, the party failing to perform it must pay damages for the breach of it. Other learned judges think that there are implied conditions or exceptions, and that the matter stated in the plea is one of them; and, therefore, that the defendant cannot be called upon to pay damages for the nonperformance of the contract, . . . under the circumstances which appear on the whole record. It must be conceded . . . that there are contracts [140] to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them."

Judge Pollock further said:

"I prefer putting my judgment on the ground that there is an implied exception in a contract of marriage, including the state of facts alleged in the plea. . . . The question then is: Is the continuance of health, of such a state of health as makes it not improper to marry, another condition? I am of opinion that it is. There are conditions to be implied (I think) on both sides in such an agreement. . . . By the act of God, the contract had become void. . . . It has been suggested that in such a case the woman may be contended with the society of the man, and that the choice ought to rest with her; that if she be willing to marry, he must marry or pay damages. . . . I think, if the man can say with truth, 'By the visitation of Providence, I am not capable of marriage,' he cannot be called upon to marry, and I think this is an implied condition in all agreements to marry. I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority."

Our attention is called to what is said in Addison on Contracts, the great English authority (11th Edition), Chapter 7, Book 2, page 1315, as follows:

"If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for, if a man, by disease, accident, or mutilation, becomes impotent, he could [141] never maintain an action against a woman for refusing to marry him."

The only authority cited in support of the text is *Hall v. Wright*, supra, and the statement is practically taken from that case, and adds nothing to the holding of the English court.

Our attention has been called to *Smith v. Compton*, Court of Errors and Appeals, New Jersey, decided June 16, 1902, and reported in 52 Atl. 386. That court said:

"The case of *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621, 47 L.R.A. 581, is more liberal to the defendant, and lays down the rule that where the defendant, after the promise, contracts or develops a disease, without fault on his part, which renders it unsafe and dangerous to his health or life to perform his contract, it will constitute a defense to an action against him. On the contrary, *Hall v. Wright*, El. Bl. & El. 746, 96 E. C. L. 746, maintains that such physical defects cannot be set up in bar to the action. In the case under consideration, the declaration alleges that the promise made was to marry on the 15th day of June, 1900, and both the plaintiff and defendant admit that such was the promise. . . . The promise being admitted, and the refusal to perform at the stipulated time being also admitted, the plaintiff clearly established her right of action. In the case of *Hall v. Wright*, the promise counted upon being to marry within a reasonable time, it might with some plausibility be argued that the defendant's physical condition might be considered in determining whether a reasonable time had elapsed, and, if it had not, there would be no breach proven, and the right of action would not exist."

The court further proceeded:

"This is not a duty or a charge created by law, which the party is disabled to perform without any fault on his own part, but a contract entered into by himself, in which he might have provided against the contingency which he alleges has occurred. The contract is an unconditional one, into which [142] the defendant cannot read a condition which will defeat it. I agree with the declaration of the majority of the judges in *Hall*

v. Wright, that it is not enough to show, in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive of danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation incurred. This is in consonance with the well-established rule which governs contracts, and, unless it is adhered to, the loss falls upon the party to whom no fault can be imputed. There was no error in the charge of the court."

The instruction which the Supreme Court approved, so far as this case is concerned, is substantially as follows:

"Nothing will excuse the defendant for a breach of his promise, except such a disease, or complication of diseases, as renders the making of the marriage contract and the consummation of the marriage by marital intercourse, impossible."

These are all the authorities, pro and con, to which our attention has been called, or which we are able to discover upon our individual research.

In the case at bar, the doctors testified that the defendant was affected with pernicious anemia; that one survives this disease usually but two or three months, possibly not more than a year; that, usually, a year is the limit; that defendant had become afflicted with the disease in February, 1910, at least that was the first time it was discovered that he was so afflicted. If the doctor's testimony is to be relied upon (and [143] there is no evidence to the contrary), it appears that he then had but ten months to live. There is no evidence that he broke his promise of marriage. The plaintiff testifies that he told her in 1910, and after her return in April, 1910, from a visit, that he had been to see a doctor and the doctor told him he could not live; that it was after that that he told her that he could not marry. There is no evidence that the promise was made after he discovered his condition. There is no evidence that he sought to avoid the contract until after it was found that he was stricken with a fatal malady, and that he could not live, by reason of his disease, more than a few months at most. There was no definite time fixed for the performance of the mar-

riage, so far as this record discloses. If the malady had proven fatal before he had informed the plaintiff that he was unable to marry her because of his diseased condition, clearly plaintiff would have no cause of action under any of the authorities. Death would have dissolved the contract. There is in every contract of marriage the implied condition that the parties to the contract will be alive at the time appointed for its consummation.

The consideration for every agreement to marry is found in the consummation of that agreement by marriage. Each has bargained to give and receive, on that day, all that is implied in the marriage relationship—all that grows out of the marriage relationship. If, by the act of God, before the time fixed for the consummation of the marriage, either party is rendered incapable of giving that which the contract calls for, the other party may repudiate the agreement to marry, because of the failure, through the act of God, of the very consideration upon which the promise rests. It may be that the very condition that renders him incapable of giving, renders him wholly incapable of receiving any of the consideration, which, under the consummated contract, he is entitled to. The giving and receiving are mutual obligations. One is a condition for the other. If the woman may repudiate the contract because the man has become, by the act of God, in such a condition [144] physically as to render him incapable of giving her all that, under the consummated contract, she is entitled to, then the man may, the contract being mutual, refuse to perform when, by the act of God, he has become wholly incapable of receiving any of the consideration to which the consummated contract entitles him. One cannot give to another that which the other is wholly incapable of receiving. We would hold, rather, that the consideration for the original agreement to marry has been destroyed by the act of God, and that what is claimed to be a repudiation of the contract, is simply a communication to the opposite party of the happening of an implied condition in the original contract, which rendered the contract incapable of performance.

Take an extreme case: Two people have entered into a contract to marry on a certain day. All the arrangements are made for marriage on that day. On the day before that fixed for the consummation, the man is afflicted with a mortal wound, or is overcome by fatal malady. It becomes apparent from the conditions that he can live but a few hours or days. The woman appears at his bedside on the day fixed for the marriage and demands its consummation. Under the rule in *Hall v. Wright*, he must perform, if able to sit up and go through the ceremony

and consummate the marriage; and this, that she may receive some of the benefits of the contract, although he is totally incapable of receiving anything in return. If he failed to respond to her request, his estate is mulcted in damages, though he died within two hours after the demand.

Reversing the tables, we take the case of a man in the full vigor and strength of his manhood, promising to marry a wealthy widow, vigorous and strong at the time of the promise, who, on the day fixed for the marriage, is stricken with a fatal malady from which there is no hope of recovery. There is left her but a few days or weeks in which to live. On the day fixed, he appears and demands the consummation of the marriage. She tells him she is unable to marry [145] because of her fatal malady. However, she is able, at the particular time, to go through the form and ceremony of marriage, though in it is involved great peril to her life. She refuses to consummate, and her estate becomes liable to him in damages. If consummated, he is placed in a position to receive a large portion of her estate. She receives nothing in the consummation of the marriage but the hollow mockery of an empty ceremony. If the rule in the *Wright* case is adopted out of a chivalrous regard for the woman, it is thus seen that it may fail in its application.

This, we think, is the logical effect of the full application of the doctrine in *Hall v. Wright*, as followed by the New Jersey Court of Appeals. We are not inclined to follow these authorities.

We take from these authorities, based, as we think, on sound reasoning:

First, that one may repudiate an agreement to marry, when, subsequently to the making of the contract, he becomes afflicted with a loathsome disease, which, upon the consummation of the marriage, may be communicated to the spouse and to the offspring born of said marriage.

Second, when, after the making of the contract to marry, he becomes afflicted with a fatal and incurable malady, and the consummation of the marriage would hasten his death, he is not bound to perform by consummating the marriage, and therefore is not liable in damages for such failure. Or, in other words, that there is implied in every contract to marry that the parties will not endanger life or health in the consummation of the marriage; and that, where illness or disease comes upon one after making the contract to marry, such as would render marriage dangerous to his life, a breach of the contract, based on such unavoidable and such unanticipated condition, is excusable. We do not mean by this that the danger should be simply problematical, or a possible contingency.

cy—one that may or may not be a resultant consequence [146] of the act of consummating the marriage—but one which the evidence renders reasonably certain is the evitable consequence of such an act. Where the malady is of such a fatal character that he cannot enter into the marriage relation and receive any of the benefits which grow out of and are involved in the relationship established by the consummation of the marriage, he is excused.

Third, that, where one is stricken, before the time arrives for the consummation of the marriage, with a fatal malady, and has but a few days or weeks or months to live, and the evidence makes this reasonably certain, he is excused from the consummation of the marriage, and, being excused, his estate, upon his death, is not liable in damages for such failure.

These are implied conditions in the agreement to marry, and the agreement to marry is voided by their happening, and, the agreement being void, no liability for damages results from the failure to perform. The first proposition rests upon public policy, as well as upon the conditions herein suggested.

In the instant case, the evidence discloses without question that, before any time was fixed for the final consummation of this agreement to marry, the defendant was afflicted with a fatal malady—a knowledge of which came to him before any suggestion was made by him to the plaintiff of any disposition on his part to withdraw from the performance of the contract and the consummation of it by marriage; that the malady was of a progressive character; and that he died soon after his conversation with the plaintiff in which she claims he breached his promise to consummate the marriage. Under the facts in this case, we are satisfied that the plaintiff has not shown a right to recover for the alleged breach of promise of marriage, and, on this issue, the case must also be affirmed. Affirmed on both appeals.

Deemer, Ladd, Weaver and Preston, JJ., concur.

Evans, C. J., Salinger, J., dissent as to Division II.

[147] SALINGER, J. (dissenting).—While being afflicted with a loathsome venereal disease is suffered to be a complete defense to breach of promise, it has been understood always that this rests on a narrow exception engrafted upon the law of contracts; understood that such exception is not worked by tenderness to the defendant, but by reasoning that it will be a less evil to permit him to take advantage of his own wrong than to press him into a marriage which will offend public policy. The majority has extended the exception to what is not within the reason

for the extension—to pernicious anemia, which, while surely fatal, and usually so within a year, is neither infectious, contagious nor transmissible. This exception is not enlarged on considerations of public policy, but on the ground that, if performance of a contract will be injurious to one party to it, neither performance nor damages may be exacted of him. In my opinion, this violates both reason and authority. *Cessante ratione legis, cessat ipse law*, is disregarded. It, therefore, is not surprising that the opinion of the majority proves to be much more a strenuous effort to find reasons for a desired conclusion than the statement of a conclusion compelled by reasoning.

In Broom's Legal Maxims (7th ed.) *page 251, it is said:

"To a declaration for breach of promise of marriage, a plea that after the promise, and before breach, the defendant became afflicted with disease, which rendered him 'incapable of marriage without great danger of his life and, therefore, unfit for the married state' was recently held bad, in accordance with the general rule that a man who has voluntarily contracted shall either perform his contract or pay damages for breach of it, the plea, moreover, not showing an impossibility of performance."

Addison on Contracts, the great English authority, at page 1315 (11th ed.) says:

"If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance [148] of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease or mutilation, becomes impotent, he could never maintain an action against a woman for refusing to marry him."

For this, he cites *Hall v. Wright*, El. Bl. & El. 746, 96 E. C. L. 746, decided in Exchequer Chamber, reversing a contrary decision below. This case fully sustains the text. In it, the following plea was held to present no defense:

"That defendant after the promise and before the breach, became afflicted with disease occasioning bleeding from the lungs, and by reason of such disease became incapable of marriage without great danger to his life, and, therefore, unfit for the marriage state."

Willes, J., in speaking of the contract, said:

"Its performance is not impossible; and it is not enough to show, in answer to an action upon a contract, that its performance is inconvenient or may be dangerous. The delicacy of health, alleged as an excuse, is the man's misfortune, not to be visited, be-

yond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. The court has no right to say what is best for her. If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, if any there be, but this is not a question of sentiment. If it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman even more anxious to marry in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart."

Crowder, J., said:

"But I am of opinion that it is no excuse for a breach of promise to marry, that the performance of the conjugal [149] duties would be attended with danger to the defendant's life. Such a state of illness may make it matter of the greatest prudence on his part to break his contract, and to pay such damages as a jury may award against him for the breach. But, in my opinion, it is no legal answer to the action."

Boast v. Firth, relied on by the majority, so far from sustaining the opinion, is affirmatively against it. It says (L. R. 4 C. P. (Eng.) [1868] at page 8):

"In the case of a contract to marry, the man, though he may be in a bad state of health, may, nevertheless, perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfill all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract."

Hall's case was expressly approved in Smith v. Compton (N. J.) 52 Atl. 386. There the contention was that defendant had a complete defense because, without his fault, he, after promise, contracted or developed a urinary disease which kept him under treatment, and which would be aggravated by sexual intercourse and thus be an imminent hazard to his life.

On appeal, Justice Van Syckle said:

"I agree with the declaration of the majority of the judges in Hall v. Wright, not enough to show in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive [150] of

danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation incurred. This is in consonance with the well-established rule which governs contracts, and, unless it is adhered to, the loss falls upon the party to whom no fault can be imputed."

The majority attempts to avoid these direct and palpably sound authorities by stating that the tendency of the "later cases" is against Hall v. Wright. The "later cases" consist of the *one case* of Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L.R.A. 581, in which, on identical plea of urinary disease, a conclusion opposite to that of Smith v. Compton, supra, is reached.

It is sufficient comment upon the Sanders case that its only citations are the Shackelford case and the Allen case.

As to Shackelford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L.R.A. 531, it is the fact, and the opinion itself shows it to be the fact, that it was decided wholly on the ground that the marriage of a syphilitic might have such consequences as that public policy will permit that that disease be urged as a complete bar to a promise to marry. While it, in a way, approves a statement in a dissent by Erle, J., in Hall v. Wright, supra, an examination will show that even this much, which is said merely *arguendo*, deals with the rights of the party not breaching.

While Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444, has an abundance of rhetoric and language which, if broadly accepted, makes any disease a complete defense, it suffices to say that it, too, involves "a loathsome disease, incurable in fact, and of such a nature as to render him unfit to enter the marriage relation with anyone;" and that its ultimate conclusion is:

"We cannot understand how one can be liable for not fulfilling a contract when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself."

2.

[151] The "support" of the Sanders case which the majority marshals, is remarkable. The Shackelford and Allen cases have been discussed. Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 120 Am. St. Rep. 1012, 7 L.R.A. (N.S.) 582, which the majority thinks supports the Sanders case, cites the Shackelford case. The Zook case itself is decided wholly upon the ground that consumption is a complete defense because it is highly infectious and transmissible, and the ruling, once more is put wholly upon the grounds of public

policy. The only support it affords to the claim of the majority that aggravation of a disease which defendant has would justify his breach of promise is the remark that, "in addition to the thought of progeniture, there would be also that of the aggravation of the disease as to both himself and prospective wife, the medical experts showing that the intimate association of married life would tend to augment the ravages of the malady upon each." To make plain that this is merely incidental argument instead of the decision in the case, it is only necessary to examine the citations, which are *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833; *Atchinson v. Baker*, 2 Peake Add. Cas. (Eng.) 103, and *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 81 Am. St. Rep. 302, 51 L.R.A. 854,—which last case, the majority relies on affirmatively. It holds that discovery that defendant was afflicted with contagious venereal disease entitled him to postpone the marriage for a reasonable time, whether or not plaintiff, with knowledge of his condition, was willing for the marriage to take place.

Beans v. Denny, 141 Ia. 52, 117 N. W. 1091, involves the rights of the party *who is not diseased*, and the nearest it comes to touching the case at bar is in its statement that one is excusable for declining to carry out the promise of marriage where the other party is afflicted with an incurable venereal disease, unless the promise was made with knowledge that the other party had such disease. The other cases relied on by the majority are following, and seem to be utterly irrelevant:

[152] *Vierling v. Binder*, 113 Ia. 339, 85 N. W. 621, is that where the defendant pleads he did not engage to marry because of physical condition of the *plaintiff at the time when it is claimed he did make such engagement*, he cannot show that she had these ailments *at the time of the trial of her action for breach*. *Gring v. Lerch*, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314, holds it to be a valid defense to the action that the *woman* was unable to have sexual intercourse, and, although she promised to submit to a surgical operation to cure the difficulty, refused to do so. All that is decided by *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242, is that *plaintiff* may be asked, on cross-examination, whether she had told certain persons she had a tumor, for the purpose of showing that she was not capable of making or carrying out the contract at the time inquired into, without fraud or injury to the defendant.

3.

It seems to have been apprehended that the weight of direct case law is not with the opinion, and a labored attempt is made to

fortify it with "Act of God" law, and the general principles that govern mutuality of contract and failure of consideration. To make use of the act of God cases, the majority is obliged to assume certain facts erroneously, to make unsound deductions from what is assumed, and to misapprehend what "Act of God" is, in law. To make this plain, one need but point out that the opinion inquires whether death before breach would not be a complete defense, and answers that it would. This is true, but true because all the cases hold that that only is an act of God which makes any performance impossible. Death does that. As to the cases upon which the opinion relies—*Robinson v. Davison*, L. R. 6 Exch. (Eng.) 269, and the cases therein cited (and cited also by the majority), to wit: *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Fenton v. Clark*, 11 Vt. 557, *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7, and *Green v. Gilbert*, 21 Wis. 396—each and all of them in some form or other involve the proposition that, if one agree to perform [153] personal labor or services which cannot be done by deputy, and became too ill to perform, he is excused. Certainly. Where one agrees to do labor and, without fault of his, sickness makes it *impossible* for him to labor, there is a case which is in principle the equal of death. The law on this head is in no confusion. *Dewey v. Alpena School Dist.* 43 Mich. 480, 5 N. W. 646, 647, and *Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059, declare that the performance of a contract will only be excused as being prevented by the "Act of God" when there are intervening circumstances which render performance impossible, and not when they only make it difficult and undesirable; and hence the suspension of a school by reason of an epidemic of a contagious disease does not defeat the right of a teacher to compensation under his contract.

In *Ringeman v. State*, 136 Ala. 131, 34 So. 351, sureties on a bail bond pleaded on a judgment *nisi* that, after the execution, the principal was so ill of consumption that it became necessary to the preservation or prolongation of his life for him to go to another state; and that, at the time a forfeiture was taken, a return could not have been made without serious detriment to his health, nor without imminent danger to his life. It was held a bad plea because it did not aver impossibility of appearance by the principal resulting from an act of God; and that, while his death in such case would have been the act of God in legal contemplation, illness, however severe and critical, is not. In support, the case cites *Cain v. State*, 55 Ala. 170; *State v. Crosby*, 114 Ala. 11, 22 So. 110; 3 Am. & Eng. Enc. of Law (2d ed.) 717; *Taylor v. Taintor*, 16 Wall. 366, 21 U. S. (L. ed.) 287; *Piercy v. People*, 10 Ill. App.

219; Devine v. State, 5 Sneed (Tenn.) 623, and Scully v. Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62, 64.

Not a case may be found in which *vis major* is applied to anything short of utter inability to perform, at all. That it may not be in the very case at bar is squarely held in Broom's Legal Maxims, Addison's Contracts, Pollock's Contracts, and Boast v. Firth, relied on by the majority, and in Hall v. [154] Wright, and Smith v. Compton. These demonstrate that "Act of God" has no application where performance is not rendered impossible. To avoid them the majority is forced to reason thus: (1) Act of God is a complete defense because it makes any performance impossible; (2) a fatal disease is an act of God; (3) defendant had such disease; (4) *therefore*, it was *impossible* for him to marry, and he is excused.

It is manifest, the opinion was compelled to assume that his disease made performance by defendant *impossible*. This assumption counters the testimony adduced for defendant, including Dr. Patty, who said: "I do not mean to say he was unable to stand up and go through a ceremony of marriage." It assumes what is contrary to reason and common knowledge, and is against all the authorities that speak to the point, including those upon which the majority relies. See the authorities last referred to. It cannot be conceived how the mere going through the ceremony can have such or much effect on health or life—or though one be in never so parlous a state of health why he is incapable of becoming married.

The majority inquires whether, in the extreme case of a demand for performance, when the other party is immediately to die, and the ceremony involves "in it great peril to life," there should be a recovery. It is an extreme case, and the question might well be answered by asking whether, if death be certain, though a year away, performance would be excused; for the two cases involve nothing but a difference in degree. But even as to the extreme case suggested, it can be said, in the first place, that the going through the ceremony cannot involve great or any other peril to life; that cases do occur in which the man, though mortally wounded and about to expire, has insisted upon giving his name and the right of inheritance to the woman whom he had promised to marry; and that the situation presents no more than matter in mitigation. In such circumstances, the recovery would not be large, but that is no good reason for departing from the sound rules of the law of contracts. Better that recovery should be allowable [155] in any case than to disturb salutary elementary rules which prohibit a breach of contract based on the desires or convenience of the one repudiating.

4.

Realizing, no doubt, the weakness of argument based on the "impossibility" or injuriousness of going through the ceremony, it is insisted that marriage means more than being one party to the marriage service, and that marriage is "impossible" whenever one party is unable to respond to all that marriage means or should mean. This reasoning can be supported only by the application of general rules governing mutuality in contracts, or by assuming that the rearing of children is of itself the consummation of marriage, and its sole constituent. This last overlooks consortium, the privilege of bearing the name of the man, of being endowed with his social standing, and of the right of inheritance. Followed to the bitter end, any who are above a certain age may freely breach a contract to marry because there could be no off-spring from their marriage. As the opinion itself shows, Pollock declares that impossibility of performance as applied to breach of contract to labor by reason of sickness has no place here, because to apply it would be "against the common understanding of mankind, and the general treatment of marriage by English law according to which the acquisition of legal or social position by marriage is a principal or independent object of the contract," and (Contracts, 3rd ed. page 546) though defendant may be unable to fulfill all the obligations of the marriage, it rests with the woman to say whether she will enforce or renounce the contract—all of which amounts to saying that there is no impossibility of performance, as the law understands the term, merely because children are impossible. In Boast v. Firth, relied on by the majority, it is said that the contract to marry may be performed despite bad health, because the sick man can "give [156] her the benefit of social position so far as in his power, though he may be unable to fulfill all the obligations of the marriage state." In Grover v. Zook, also relied on by the majority, "the thought of progeniture" is treated as but one element, and the defendant is excused, not on that account, but because his pulmonary consumption made the marriage one against public policy. It has already been presented by the illustration of an agreement to marry entered into by very old people, and by death-bed marriages insisted upon by the one dying, that marriage on part of one who is mortally ill is not impossible, and that marriage involves more than children.

5.

The theory of failure of consideration is not persuasive, either. This is the first time it has been invoked for the one who is unable to furnish full consideration. It involves a

confusion of the parties. The woman might well refuse to marry because the condition of the man was such that his marrying her would furnish no consideration for her promise to marry him. Reversing this leads to the remarkable result that one who has agreed to furnish certain things, and is unable to furnish them, or some of them, may plead a failure of consideration, and say that, because he can furnish only half of what was agreed upon, that then, though the other party is satisfied with half, he need not perform at all, because he cannot furnish all. Such reasoning overlooks that where there may be a part performance, and the one able to perform fully is willing to waive full performance by the other, it does not lie in the mouth of the one who is in default to complain. Take the illness cases before adverted to. There would be a wholly different ruling if one agreed to do copying in an office and also to sweep the office, and it transpired he was too ill to do the sweeping, but able to do the copying, and the employer was willing to accept copying as full performance of the contract. The employer might well [157] refuse to perform if the other could not do all that was contracted for. But the opinion turns this round, and excuses one from doing what he can do, because it is less than he agreed to do, even though the other party is willing to accept the shortage.

Boast v. Firth, supra, involves inability to perform labor agreed to be performed, because of permanent sickness, and holds such illness to be an excuse; but it distinguishes *Hall v. Wright*, supra, by pointing out that, while the apprentice in the *Boast* case could not perform, on contract to marry, the man, though he may be in a bad state of health, may perform to some extent, and he may not avail himself of his disability, if the woman is willing to accept part performance.

One can understand how, on the reasoning of the majority, a young woman who had agreed to marry an octogenarian might decline performance on the ground that there was no consideration for her promise; but it is beyond me to understand how the old man can interpose such plea to excuse performance on his part, when the other party remains willing.

"Where the malady is of such a fatal character that he cannot enter into the marriage relation and receive any of the benefits which grow out of and are involved in the relationship established by the consummation of the marriage, he is excused," says the majority. And, if "either party is rendered incapable of giving that which the contract calls for, the other party may repudiate the agreement . . . because of the failure . . . of the consideration upon which the promise rests." And, one may "refuse to perform

when, by the act of God, he has become wholly incapable of receiving any of the consideration." Is the majority prepared to follow this where it may lead?

If one have spectacles fitted and immediately thereafter become blind, is he excused from paying for the work and the glasses because an act of God has made them of no use to him? Will the amputation of both feet after ordering boots absolve from payment? If one ordered lemons, and, [158] by the time they reached him in due course of transportation, he found himself suffering from some disease of the throat that would make it agony for him to use the lemon juice as he had intended, it would follow, on the reasoning of the majority, that he could refuse to pay.

6.

The majority says:

"If the woman may repudiate the contract because the man has become by the act of God in such a condition physically as to render him incapable of giving to her all that, under the consummated contract, she is entitled to, then the man may, the contract being mutual, refuse to perform when, by the act of God, he has become wholly incapable of receiving any of the consideration which the consummated contract entitled him to. One cannot give to another that which the other is wholly incapable of receiving."

This overlooks all that has just been said, and holds that, because one who has the right to repudiate chooses to waive that right, the other is thereby authorized to repudiate. So far as the doctrine of the mutuality of contracts is applicable, the cases do apply it. Either may defend on the ground that his or her disease is such that performance would violate public policy. To go beyond this is to apply one of the exceptional rules in specific performance to the case of this contract.

There is a rule in specific performance that one who was himself unable to perform when the contract was made cannot have this particular remedy, even though he becomes able to perform before he brings action. *Luse v. Deitz*, 46 Ia. 205; *Richmond v. Dubuque*, etc. Ry. 33 Ia. at 486. Self-evidently, this rule can have no application in any case where the contract is without power to compel specific performance. A marriage is manifestly one of the things that may not be compelled by court order. Consequently, that one is not bound to marry a plaintiff who is sick does not make a [159] law rule that, where plaintiff is willing to marry a defendant, though sick, such defendant may break his contract because he is sick.

If one can conceive the inconceivable case of a promise to marry being brought into

chancery on application for specific performance, then, the granting of the relief being discretionary, it might well be that, in a case where performance would entail physical danger to the party in default, the chancellor would use his discretion and relegate the one not in default to some remedy other than specific performance. But here, the essential position of the defendant is that, because it will work an injury to him and him alone,—because, if he kept his promise, the consortium he could give would be of less value than if he were well, therefore the party not in fault is entitled to no relief.

I would reverse on the appeal of defendant.

EVANS, Ch. J. (*dissenting*).—I am not averse in spirit to the condition imposed by the majority upon the marriage promise. Its reasonableness is that it softens harshness in the enforcement of a contract which, from its very nature, ought to be characterized by tenderness. However, to subject such contracts to such a condition as a continuing and necessary qualification thereof is to declare a measure of disability. This is a purely legislative prerogative, and not a judicial one. In the absence, therefore, of qualifying legislation, I feel constrained to join the dissent as declaring for the recognition of the contract as actually made by the parties.

NOTE.

Disease as Defense to Action for Breach of Promise of Marriage.

The earlier cases passing on the effect of disease of one of the parties as a defense to an action for the breach of a promise of marriage are reviewed in the notes to *Grover v. Zook*, 12 Ann. Cas. 192; *Travis v. Schnebly*, Ann. Cas. 1913E 914; *Shackleford v. Hamilton*, 40 Am. St. Rep. 186, and *Van Houten v. Morse*, 44 Am. St. Rep. 373. The present note collates the few recent cases on the subject.

The reported case is somewhat unique in that the diseased condition of the person refusing to perform the contract to marry was urged as a defense, and also in that the disease in question, pernicious anemia, was not asserted to be contagious or hereditary. It is held that if, after making a contract to marry, a person becomes afflicted with a fatal and incurable malady and it is reasonably certain that the consummation of the marriage would hasten his death, he is not bound to perform the contract and is not liable in damages for failing to do so. It is further held that apart from any possible effect of the marriage on the health of a person thus situated if his illness is such

that he has but a very short time to live, he is excused from the performance of the contract.

In *Parsons v. Trowbridge*, 226 Fed. 15, Ann. Cas. 1917C 760, 140 C. C. A. 310, an action by another woman against the same person who was the defendant in the reported case, the following instruction was given: "If it be a fact that Mr. Oldfield had a disease known as pernicious anemia, as illustrated by the testimony in this case, it would not be a sufficient excuse on his part for not carrying out the contract and having the ceremony performed. But if he had pernicious anemia, and believed that it would be fatal after a year or so from such time, you would have a right to consider that upon the question of amount of damages. Under the testimony offered, if he had pernicious anemia, which would be reasonably certain to bring about death within several months or a year, or something like that, she would have his society for such shorter time and would be entitled to recover a lesser amount. So you will consider the testimony with reference to pernicious anemia as bearing upon that phase of the case and that only." The appeal being by the plaintiff, the court said that the instruction "was as favorable as she was entitled to."

In *Jefferson v. Paskell* [1916] 1 K. B. (Eng.) 57, it was held that where it appears in an action for the breach of a promise of marriage that the plaintiff was by reason of illness unable to marry on the date fixed for the wedding the burden is cast on her to prove that she was physically fit to marry within a reasonable time thereafter. On the general question of the effect of disease as warranting a refusal to perform a contract to marry, *Phillimore, L. J.*, said: "On principle it would seem that there must be some cases of mental or physical infirmity (as it has been decided that there are cases of moral infirmity) which supervening after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry." To the same effect *Pickford, L. J.* said: "The plaintiff also contended that, even if she were suffering from tuberculosis, that afforded no defense, while the defendant's contention seemed to me to go so far as to allege that if a woman had ever suffered from that disease she could never enforce a promise to marry. I am not prepared, as at present advised, to accept a contention so wide as the defendant's, but I think there may be tuberculosis existing to such an extent and of such a nature as to make the woman unfit for marriage, and therefore to afford a defense."

In *Hively v. Golnick*, 123 Minn. 498, Ann. Cas. 1915A 295, 144 N. W. 213, 40 L.R.A. (N.S.) 757, the evidence was held to be suffi-

cient to sustain a finding against an allegation that the plaintiff was afflicted with epilepsy, the defense being based on a statute whereby the marriage of an epileptic was forbidden.

SALT LAKE CITY

v.

YOUNG.

Utah Supreme Court—January 11, 1915.

45 Utah 349; 145 Pac. 1047.

Municipal Corporations—Power as to Acts outside City Limits—Validity of Statute.

The legislature had power to enact Comp. Laws 1907, § 206, subd. 15, which gives to a city, to protect from pollution the streams from which its public water supply is taken, jurisdiction over the stream for ten miles above the point from which the water is taken.

[See 7 Ann. Cas. 521; 10 Ann. Cas. 132: Ann. Cas. 1912C 938.]

Police Regulations—Pollution of Water Supply—Pasturing Horses—Validity of Ordinance.

A complaint by Salt Lake City, which charged that defendant unlawfully and wilfully and continuously for ten days and more permitted twenty-seven head of horses to be at all times accessible to the stream from which the city secured its water supply, to pasture along its banks, to wade in the stream, and to run at large upon defendant's tract of land comprising about fifteen acres along the stream, contrary to a city ordinance, charges defendant with acts which the city may by its ordinance prohibit and is not demurrable.

[See note at end of this case.]

Appeal from District Court, Salt Lake county: LOOFBOUROW, Judge.

Prosecution of Seymour B. Young, Jr., for violation of municipal ordinance. Complaint dismissed. Plaintiff appeals. The facts are stated in the opinion. **REVERSED.**

H. J. Dininny, Aaron Meyers, W. H. Folland and W. W. Little for appellant.

Thurman, Wedgwood & Irvine and Young & Moyle for respondent.

[350] FRICK, J.—Salt Lake City, a municipal corporation, the appellant here, filed a complaint against the defendant, respondent here, charging him with having violated the

provisions of the following municipal ordinance, to wit:

"Sec. 821. It shall be unlawful for any person to construct or maintain any corral, sheep pen, pig pen, chicken coop, stable or other offensive yard or outhouse along any stream of water used by the inhabitants of Salt Lake City, anywhere within ten miles above the point where said stream is taken by said city, where the waste or drainage therefrom will naturally find its way into said stream of water; or to deposit, pile, unload or leave any manure, or other offensive rubbish, or the carcass of any dead animal along any stream of water used by the inhabitants of Salt Lake City, anywhere [351] within ten miles above the point where said stream is taken, where the waste or drainage therefrom will naturally find its way into said stream of water; or to drive, or to permit, or cause any other person to drive any loose cattle, horses, sheep or hogs through any canyon from the stream of which water is or shall be taken for the use of the inhabitants of said city, or to permit any cattle, horses, sheep or hogs to remain in or near, or to pollute any stream of water used by the inhabitants of said city anywhere within ten miles above a point where said water is first taken by said city."

Said ordinance was passed pursuant to Comp. Laws 1907, subd. 15, section 206, which confers certain powers upon the city, and which, so far as material here, is as follows:

"To construct or authorize the construction of waterworks, without their limits; and for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works; and over all reservoirs, streams, canals, ditches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken, for ten miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect."

There is a proviso to this statute requiring the city to provide a "highway" extending through the limits of its jurisdiction, as stated in the statute, on which cattle, horses, sheep, and hogs may be driven.

The complaint, omitting the formal parts, charges the offense in the following terms, to wit:

"That the said defendant, Seymour B. Young, Jr., being then and there the owner and in possession of that certain tract of land of approximately fifteen acres through which runs that certain stream of water in Parley's canyon known as Parley's creek, at a point within 10 miles above the point where said

stream of water is taken by the City of Salt Lake for the use of the inhabitants of said city, to wit, 6 miles above said intake of said city, unlawfully and willfully did then and there and continuously for 10 days and more prior [352] thereto, permit 27 horses to pollute said stream of water by permitting said horses to be at all times accessible to said stream and to pasture upon and along the banks of the same, and to wade in and to drink from the same, and to drop their dung into said creek, and to run at large upon said tract of land where the waste and drainage therefrom naturally finds a way into said stream, contrary to the provisions of section 821 of chapter 29 of the Revised Ordinances of said Salt Lake City, in such cases made and provided."

The respondent demurred to the complaint, setting forth seven distinct grounds why the complaint should be held insufficient. About all of the grounds may, however, be considered under the head that the complaint is defective in substance in that the facts therein alleged do not "constitute a public offense." The district court sustained the demurrer and entered judgment dismissing the complaint and discharged the respondent. The city appeals and seeks a reversal of the judgment on the ground that the court erred in sustaining the demurrer and in entering judgment dismissing the complaint.

The question presented for decision may be more easily understood by giving respondent's reasons why the demurrer was properly sustained, and hence I shall follow that course. Those reasons, as I understand respondent's counsel, in substance are: (1) That the ordinance in question is "not authorized by any law or statute of the State of Utah;" (2) that said ordinance violates article 1, section 7, of the Constitution of this state, which provides, "No person shall be deprived of life, liberty, or property without due process of law;" (3) that it also violates section 22 of article 1 aforesaid, which provides, "Private property shall not be taken or damaged for public use without just compensation;" (4) that said ordinance also violates section 1 of the fourteenth amendment to the Federal Constitution; and (5) that subdivision 15 of section 206 (which I have set forth above) is void because it is in conflict with the several constitutional provisions referred to above. It is only fair to state that counsel concede that both the ordinance and statute admit of a construction [353] which, if adopted, might not invade the constitutional provisions referred to.

It has heretofore been determined by the Supreme Court of Utah that whenever the pollution of a stream by any person amounts

to a public nuisance under Comp. Laws 1907, section 3506, the offender may be criminally prosecuted. *People v. Burtleson*, 14 Utah 258, 47 Pac. 87. Under that section any person who is injuriously affected by the nuisance may sustain an action to enjoin or to abate the nuisance. Since *People v. Burtleson* was decided, the Legislature passed a further act (Comp. Laws 1907, section 1113x), in which a "nuisance" is defined as follows:

"Whatever is dangerous to human life or health, and whatever renders soil, air, water, or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person, either owner, agent, or occupant, having aided in creating or contributing to the same, or who may support, continue, or retain any of them, shall be deemed guilty of a misdemeanor."

See Laws Utah 1899, p. 66.

The violation of the foregoing section constitutes a misdemeanor, and, in addition to the right of an action by an individual, the board of health is also authorized to abate such a nuisance. Again, by Comp. Laws 1907, section 4274, the befouling of the "waters of any stream, well, or spring of water used for domestic purposes," in the manner in that section defined, is declared a nuisance. It is apparent therefore that the Legislature of this state has exerted the police power of the state in different ways for the purpose of protecting and maintaining the natural purity and wholesomeness of the waters flowing in the streams of this state. The reason why such great care is manifested by the Legislature to maintain the purity of our streams may perhaps be attributed to the fact that this state lies wholly within the arid belt, and for that reason the common law may have been deemed insufficient to afford adequate protection. Moreover, the common-law rule that waters may not be appropriated and diverted from a stream has been entirely abrogated in this [354] state, and every person may appropriate and divert any quantity or all of the waters flowing in any stream, provided he uses such water for a beneficial purpose. I advert to these matters primarily for the purpose merely of directing attention to the ever present fact that riparian rights in the streams of this state, if not entirely abrogated, have nevertheless been modified to a large extent. But, in addition to the several state regulations to which reference has been made, the Legislature has also conferred certain powers and imposed certain duties upon the municipal corporations of this state for the purpose of protecting and maintaining the wholesomeness and potability of the water used by the inhabitants of such municipalities. The statute conferring such powers and the

ordinance by which it is sought to be exerted in this case I have hereinbefore set forth at large. In view that the statute expressly confers the power, respondent's contention that the ordinance in question is not authorized by any statute or law of this state is therefore clearly untenable.

Nor do I think that the contention can be sustained that the statute and ordinance both are, or that either of them is, void because they or either is violated of the constitutional provisions upon which counsel rely and to which reference has been made. It is universally conceded by both courts and text-writers, that, in enacting statutes and ordinances such as those in question here, the legislative bodies, whether state or local, are exerting the police power which inheres in every sovereign state. In exerting the police power to protect the general health or welfare of the inhabitants, or in directing its exercise by the municipality for such purpose, the state is exerting one of the greatest prerogatives of sovereignty. Indeed, this power is considered of such vast importance that the sovereign is not permitted to surrender it or to be estopped from exerting it at any and all times when the public interests require its enforcement. And this is so although its exercise may interfere with property or property rights, or, under certain circumstances, may even cause the destruction of the same. The attempt to define this power has so often been made by the most able jurists that it would smack of pedantry for me to attempt it here. Perhaps as good and as comprehensive [355] a definition as can be given is the one by Mr. Chief Justice Shaw in *Com. v. Alger*, 7 Cush. (Mass.) 53. See also, *Cooley's Constitutional Limitations* (7th ed.) pp. 830, 831, for reliable definitions. It has likewise become well settled that the discretion with respect to when and how this power shall be exercised is primarily vested in the legislative, and not in the judicial, branch of constitutional government; and in case of its exercise that the courts will not interfere unless a statute, when properly passed, is palpably in contravention of some constitutional provision. *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 U. S. (L. ed.) 205; *People v. Hupp*, 53 Colo. 80, 123 Pac. 651, 41 L.R.A. (N.S.) 792, Ann. Cas 1914A 1177; *Durango v. Chapman*, 27 Colo. 169, 60 Pac. 635; *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L.R.A. 177, 76 Am. St. Rep. 130; *State v. Wheeler*, 44 N. J. L. 88; *State Board of Health v. Diamond Mills Paper Co.* 63 N. J. Eq. 111, 51 Atl. 1019; *Durham v. Eno Cotton Mills*, 141 N. C. 627, 54 S. E. 453, 7 L.R.A. (N.S.) 321. The prevailing doctrine is stated in *Mugler v. Kansas*, supra, by Justice Harlan in his usual terse style thus:

"It belongs to the legislative department to exert the police power of a state, and to determine primarily what measures are appropriate and needful for the protection of the public morals, the public health, or the public safety."

Again, in *Bland v. People*, 32 Colo. 319, 76 Pac. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80, in referring to this subject, the court says:

"It is said that the police power of the state is founded largely upon the maxim: 'Use your property in such manner as not to injure that of another.'"

It is further said:

"The welfare of the people is the supreme law,' is a maxim of the law; and it is upon these two maxims that the police power of the state is largely based. In the exercise of the police power, the Legislature has a large discretion, and it is our duty to sustain such legislation unless it is clearly and palpably and beyond all question in violation of the Constitution."

[356] The foregoing cases, without exception, are thoroughly considered, well reasoned, and all except the first one are based on some statute or ordinance prohibiting the befouling of water, and in a number of them the statutes or ordinances were assailed upon the same constitutional grounds on which the statute and ordinance in question are assailed. In those cases it is directly held that, although in enforcing the police power the use of property may be interfered with to the extent that the owner thereof may have to modify or change the manner of its use from one which is more to one which is less convenient to him, yet, if such interference is merely incidental to a proper enforcement of the power and does not deprive the owner of the reasonable use of his property, he cannot successfully maintain that his property is being taken or damaged for public use. While respondent's counsel do not seriously question the soundness of the principle laid down in the foregoing cases, yet they somewhat strenuously insist that the provisions of the ordinance in question transcend the rule just stated. In this connection they contend that the ordinance, in prohibiting every person from permitting "any cattle, horses, sheep, or hogs to remain in or near, or to pollute any stream of water used by the inhabitants of said city anywhere within ten miles above a point where said water is first taken by said city," practically amounts to the confiscation of property when used for the purposes for which respondent uses his property as such use is made to appear from the complaint in question. This contention is not based so much upon the acts with which respondent is charged in the complaint, as it is upon that portion of the ordinance which

prohibits any cattle, etc., to "remain in or near" any stream from which the water is used as stated in the ordinance. The rule is invoked that the validity of a law or ordinance must be tested by what may be, and not by what in a particular case is sought to be, done under it. The rule, that in case two constructions of a statute or ordinance are possible one of which, if adopted, will defeat the law, while the other will uphold it, it is our duty to adopt the construction which will uphold the law, is too well settled to require argument at this time. Moreover, the rule that, for the purpose of ascertaining [357] the intention of a statute or ordinance, it is not only our duty to consider it as a whole, but we must also keep in mind the object or purpose of the enactment and the evil consequences the lawmaker intended to guard against by its adoption, is elementary.

By applying these rules of construction to the ordinance in question, I think the objections that are inveighed against it by respondent's counsel largely disappear. For instance, it is contended that to prohibit cattle to be near a stream is too vague and uncertain to admit of reasonable enforcement. It is true that by segregating the phrase referred to from all other matter contained in the ordinance it appears to be somewhat obscure. But the manifest purpose of the whole ordinance is to prevent the pollution of water which is used for domestic purposes. With that thought in view, therefore, all acts which directly tend to affect or destroy the potability of the water flowing in our streams are prohibited. A careful reading of the ordinance makes clear that it was not intended to prohibit the mere casual straying of one or a few head of cattle, horses, sheep, or hogs along or near a stream. What the ordinance prohibits is "to permit any cattle," etc., "to remain in or near" the stream. It requires no argument to show that the prohibition is not against one, but it is against a number of cattle, and it is not directed against a mere incidental or casual straying into or near the stream, but what is prohibited is to permit a number of cattle, etc., to remain in or near the stream. To permit a number of cattle to remain in a stream must necessarily result in polluting the water for domestic use, and to permit them to remain at one place for any considerable length of time near the stream, where the accumulating filth naturally produced by them can drain into it, must unavoidably have the same effect. The filth and excrementitious matter coming from a number of animals, or even from one, if permitted to accumulate and get into the stream, must result in its pollution.

Again, the ordinance must receive a reasonable construction and application. Such

a construction simply prohibits the owner of any cattle, etc., from permitting them to be so near a stream, whether it be ten or one hundred feet, or more [358] or less, which will result in appreciably befouling the stream. I think no one would insist that an owner of cattle should be punished for keeping his cattle at such a place, where their presence could have no effect on the purity of the water in the stream, although they were kept what may be termed to be "near" a stream. If therefore we keep in mind the purpose of the ordinance as an entirety, there is no difficulty in determining what is meant by the phrase "near the stream." The mere fact that the word "near" is coupled with the word "in"—that is, in or near the stream—clearly indicates that the intention was to prevent cattle, etc., from being and remaining in or so near to the stream as will result in polluting the water flowing therein. Nor does the ordinance apply to every stream, but it applies to such only from which the water is used by the inhabitants of a city. It is manifest therefore that to drive or keep any cattle, etc., at any place where they do not and cannot sensibly or appreciably pollute or befoul the water in the stream, does not come within either the purpose or the spirit of the ordinance. Suppose a stream were flumed or cemented, or otherwise protected by either natural or artificial means so that it was impossible for animals to get into the water, and that their filth could not pollute it, would any one contend that the ordinance was violated by merely permitting horses, cattle, or other animals to be near it? I think not.

This brings me to the crucial question in the case. Respondent's counsel contend that the complaint discloses that he is to be punished for doing or permitting a lawful thing upon his own land in the usual and customary manner, namely, the pasturing of his horses thereon. It is alleged in the complaint that the stream in question "runs through" respondent's land. He insists therefore that he is a riparian owner with all the rights and privileges incident to such ownership. Upon these premises his counsel insist that he at least has the legal right to make a reasonable use of his land and the acts charged do not show that he has abused that right. Indeed, they contend that the very acts charged merely show a reasonable and not an unreasonable use. Counsel have cited one case, namely *Helfrich v. Catonsville Water Co.* 74 Md. 269, 22 Atl. 72, [359] 13 L.R.A. 117, 28 Am. St. Rep. 245, which seems to sustain their contention. That case, in my judgment, is, however, not so well considered as are the cases to which I have before referred. While the Maryland case may be applicable to the conditions pre-

vailing in that state, yet it cannot be said that it can be applied to the conditions present in this state where pure water means life. By examining the notes to that case in 28 Am. St. Rep., it will be seen that the annotator also expresses some doubt respecting the soundness of the doctrine there announced. But assuming without deciding that reasonable use is the test, yet whether a use is reasonable, even as between riparian owners, depends largely upon conditions and circumstances. As has been well said:

"Whether the use to which he (the owner) wishes to devote it (the property) is reasonable must be determined by the circumstances." *Ferguson v. Firmenich Mfg. Co.* 77 Ia. 576, 42 N. W. 448, 14 Am. St. Rep. 319.

To arrive at a just result, therefore, not only the local conditions and circumstances surrounding the *locus in quo* must be kept in mind, but, in my judgment, conditions generally prevailing throughout the state, or, at least, throughout the locality where the stream is located, and the uses to which the water flowing therein is applied, must also be considered.

Again, the doctrine laid down by Judge Cooley, in his excellent work on Constitutional Limitations, 7th Ed. 880, may also be important. It is there stated in the following words:

"So a particular use (or disposition) of property may sometimes be forbidden, where, by a change of circumstances, and without the fault of the owner, that which was once lawful, proper, and unobjectionable has now become a public nuisance, endangering the public health or the public safety."

The question is discussed by Mr Justice Peckham, of the New York Court of Appeals, in the case of *Health Dept. v. Trinity Church*, 145 N. Y. 32, 42, 43, 39 N. E. 833, 836, 837, 27 L.R.A. 710, 45 Am. St. Rep. 579. It is there said:

"Within this reasonable restriction the power of the state may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his [360] neighbors or to the public generally. . . . Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. (Citing cases.) The state, or its agent in enforcing its man-

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date, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof, the individual is put to some expense in complying with the law, by paying mechanics or other laborers to do that which the law enjoins upon the owner; but, so long as the amount exacted is limited as stated, the property of the citizen has not been taken in any constitutional sense without due process of law."

Therefore, whenever in this opinion I refer to a "reasonable use," I refer to one which is not of itself a nuisance or which does not unnecessarily and appreciably pollute the waters of a stream. Further, that if in using property a stream is necessarily polluted and such pollution can be avoided without destroying the owner's ability to use the property, he must take reasonable steps and precautions to avoid such pollution, and, if he willfully or negligently fails to do so, he may be punished for his acts. Any use which results in an appreciable pollution which is preventable by incurring reasonable expense or making reasonable effort cannot be deemed a reasonable use for the purpose of withstanding the enforcement of a police regulation which is intended to protect the public health.

But in answer to all this respondent insists that he is not charged with maintaining a public nuisance. Whether he is or not, as I shall endeavor to point out hereafter, is not controlling here. The real question is whether the use made by respondent of his land is a reasonable one under all the circumstances and within the purview of the rule heretofore laid down. What use is it that respondent makes of his land, and under what circumstances is it applied? The amount of land owned by him and on which it is alleged he keeps twenty-seven head of horses is so situated that the stream in question runs [361] through it. The amount of land is alleged to be fifteen acres but in what shape or form these fifteen acres lie and through what part the stream runs is not disclosed. For the purpose of this decision I shall assume that the land in question is a square piece of ground and is so situated that the stream runs through the whole of it from end to end or side to side, as the case may be. I do this for the purpose of giving respondent all possible advantage. If the stream in fact only runs through a small part of the land, then the rule that I shall apply is more favorable to him than it would be if the stream runs as I have assumed. If therefore the fifteen acres constitute a square piece of ground, the length of one side or one end thereof, as the case may be, must be within a few feet of forty-nine rods.

In view therefore that the stream divides the piece of ground, the horses at times must

necessarily go from one side of the stream to the other to feed. In order to prevent the horses from polluting the stream by depositing their filthy excrement therein as charged in the complaint, they must be kept out of the water, and this I shall assume can be only done by erecting two fences, one on each side of the stream, with a fenced passageway which will permit the horses to pass from one side of the field to the other at will, or, by putting up bars through which they may be led or driven by some one from one side of the stream to the other as aforesaid. Assuming therefore that fences will have to be erected for the full length of the land the combined length of such fences will be about one hundred rods. In connection with this, some passageway must be devised for the horses to cross over the stream if they are to be kept entirely out of it. And in addition to the foregoing, some method by which water is provided for the horses to drink must also be devised. These things are so simple and in such general use that I may take judicial knowledge of the fact that their cost is, to say the least, not prohibitive, and, in view of the end to be attained, clearly not unreasonable. Will any one seriously contend that in this day and age it is necessary or even reasonable to permit twenty-seven head of horses, or any other number, more or less, to go into a stream and to deposit their filthy excretions [362] therein from day to day, the water of which stream is continually being used by a community of approximately 100,000 persons for culinary purposes? Would not all with one accord exclaim that, in order to keep this water reasonably free from pollution, it were better that the owner of the horses be required to provide water for them in some other way than by permitting them to go into the stream? It would seem that under such circumstances, to require the owner to have recourse to even the primitive method of carrying water with a bucket for some distance into an ordinary trough for the horses would be much more reasonable than the present method of going into and polluting the stream. But it is a matter of general knowledge that a much more convenient method without great expense, and one that acts automatically, can be devised to provide fresh water for the horses. Further, can it successfully be maintained that, if the owner of the land is required to fence his horses away from the stream as suggested, he is unreasonably inconvenienced, or that his property is taken for public use?

I have devoted an unusual length of time and an unusual amount of labor to find some case in the books wherein it has been held that merely to inconvenience a landowner to the extent herein suggested, for the purpose

and under the circumstances here present, constitutes a taking or confiscation of property; but I have found none. Moreover, the cases I have cited all squarely hold that a landowner cannot complain because he is inconvenienced in the use of his property, where such inconvenience arises out of the proper enforcement of the police power to protect the public health, and where such enforcement does not amount to the taking or destruction of his property. If such were not the law, communal life in this arid country would be well-nigh impossible. All the streams would be polluted and the use of the water made unwholesome, if not absolutely dangerous to health, by what is termed to be a reasonable use. Further, if the purity of the streams could only be maintained by compelling the cities and towns of this state to condemn the land along such streams, it would be necessary to condemn practically the whole watershed of the streams. This would be as impossible [363] as it is impracticable. Neither is such a course imperative, since the water in every stream may be kept reasonably pure and fit for even culinary use without entirely depriving a reasonable number of cattle, horses, and other animals from eating the grass which grows along the watershed of our streams. The whole matter can be regulated by giving a reasonable construction to our statutes and ordinances and by applying reason and common sense in their enforcement. If there is one subject which should be governed by reason and common sense more than any other, it certainly is the subject of police regulation.

The respondent insists that under the ordinance in question he cannot permit any of his horses to remain on any part of the land for the purpose of eating the grass growing thereon, since in doing so they still will void their excrement on the land, which, in case of rains and floods, will be washed into the stream. It no doubt is true that where there are filthy substances deposited along the sides of the canyons—and most of our streams flow through canyons—such substances, in case of rains, will, to some extent at least, be washed into the stream; but this is unavoidable. To permit cattle, however, or horses to deposit their excrement on the land while they are grazing all over it from day to day is one thing, while to permit them to go into the stream and to deposit it into the water, or to permit them to deposit it in any quantity near the stream where it will be directly washed into it, is quite a different thing. The cattle wander over the land during the summer season, and that is the only season in which they can be pastured, eating grass, and in doing so never deposit a very large mass of excrementitious matter

in one place, but in the natural order of things will scatter it over an entire field or pasture. With regard to such deposits, the magic influence of sunlight and air which bring about chemical decomposition must not be overlooked. Most of the offensive gases escape under such conditions, and as pointed out by Vice Chancellor Stevens in the case of *Doremus v. Paterson*, 73 N. J. Eq. 483, 69 Atl. 225, where the question now under consideration is exhaustively treated, only the solids or the mineral portions of the excrementitious matter eventually find their way into the [364] stream and these ordinarily are either harmless or settle down so as to become so. From these sources, therefore, the stream, provided it carries any considerable quantity of water, is not sensibly or appreciably polluted, and thus not made unfit for use.

Recurring now to the claim made by counsel that respondent is not charged with committing a nuisance. It is true that such is not the direct charge, but can it be said that to permit twenty-seven horses to go into a stream each day during the summer season, and to permit them to deposit their filthy excrement into the water flowing therein which is being used for culinary purposes by the inhabitants of a large city, if not a nuisance *per se* is, nevertheless, near the border line of constituting a very offensive one? If respondent, however, were either actually committing or maintaining a nuisance, he would not have any standing in court whatever. His counsel frankly concede that if he were guilty of maintaining a public nuisance it could be abated, and this, too, without considering whether the abatement would injuriously affect him in his property rights or not. But they strenuously insist that what is charged does not amount to a nuisance. Let me say here, once for all, that statutes and ordinances such as are in question here do not depend for their enforcement upon the question of whether the acts that are prohibited thereby constitute a nuisance or not. If such acts constituted a nuisance, the parties charged, if the acts came within the statute or ordinance, would be guilty as a matter of course, but they may also be found guilty although the acts do not, as yet, amount to a nuisance. If respondent were guilty either of committing or maintaining a nuisance, the city, under the common law, as a mere riparian owner, could require him to abate the same, or the board of health might do so. In either case it would be wholly unnecessary to have recourse to an ordinance like the one in question. Such ordinances are not enacted to prohibit the maintenance of existing nuisances; but their enforcement is intended to prevent the creation of nuisances which may

become dangerous to the public health. If no one could be prevented from polluting water until his acts amounted to the committing or maintaining of [365] a public nuisance, then police regulations to prevent the pollution of our streams would be almost entirely shorn of their beneficial effect, and much harm to the public health would be possible, which, by the enforcement of such ordinances, is or may be prevented. To this effect are all the cases to which I have referred herein.

Whether respondent has violated the provisions of the ordinance in question or not is a question of fact. He cannot be found guilty under the charge preferred against him unless it is found beyond a reasonable doubt that he has permitted the acts complained of and that such acts sensibly or appreciably pollute or have polluted the stream. The pollution must be one which constitutes an appreciable befouling of the water, because in the very nature of things it was not intended to punish for a mere technical contamination or pollution of water. Such a pollution is not preventable. Impure, noxious, or offensive matter cast into a stream, however small in quantity, to some extent pollutes the water therein. That, however, is not the pollution which ordinances like the one in question seek to prohibit or punish. On the other hand, such ordinances are intended to prevent the deposit of filthy substances in or near our streams, which, if continued, might seriously endanger the public health. These ordinances are also intended to prevent individuals, by independent action, from polluting streams, although their acts cannot be construed as amounting to a nuisance. If the courts should refuse to enforce such ordinances, then each one of a number of individuals acting independently who own lands along a stream might pollute it, but not to such an extent as to constitute a nuisance, while the combined acts of all would so pollute the water of a stream as to make its use dangerous to health, and yet none could be punished, because the individual and independent acts taken singly would not so pollute the stream as to constitute a nuisance or make the use of the water necessarily dangerous to health.

I desire to add here that in the nature of things it is not possible for me to say, upon this demurrer, whether respondent is so affected in the use of his land as to amount to a taking as he contends. From the face of the complaint, no [366] such result is discernible. The acts that are sought to be prohibited clearly come within police regulations, and, unless the prohibition of the use of his property in the manner it is used is tantamount to a taking of it or which deprives him of the use thereof, he cannot complain. Although he were found guilty and

then were prohibited from using his property in the manner complained of, yet he would not, by reason of that fact, be prevented from seeking or from obtaining redress in the proper courts in this state, provided the prevention aforesaid would result in preventing him from making a reasonable use of his property as such reasonable use is herein defined.

I am constrained to hold therefore that, for the reasons stated, the ordinance in question is not invalid; that the statute on which it is based is a valid statute; and that the complaint states sufficient facts to constitute a public offense.

The judgment of the district court is therefore reversed.

STRAUP, C. J. (concurring).—It undoubtedly was within the province of the Legislature to confer power upon municipalities by ordinance to protect waters of streams used by the inhabitants thereof for domestic and culinary purposes, and to prevent pollutions of such waters. Whether the ordinance in question, in all its parts, is within such conferred power, need not, as I view the matter, be now considered or determined. It is sufficient to ascertain, and the inquiry need be no broader, as to whether the acts or wrongs alleged in the complaint are such as the municipality under its conferred power could and did by ordinance forbid and penalize. Certain it is that a municipality, by ordinance, under the conferred power, may forbid and prevent pollutions, and punish those committing them, which result from an unlawful, wrongful, negligent, unreasonable, or unnecessary use of, or interference with, such waters, or of premises through which they course or are adjacent to them. Whether the municipality under such conferred power may also forbid and prevent pollutions—a very flexible and comprehensive term, for any feces or refuse getting in the water of a stream may, in a degree, constitute a pollution—and punish [367] those committing them, which result wholly from a lawful, careful, reasonable, and proper use of such premises by the owner or an occupant thereof, is a question concerning which I entertain serious doubt. The ordinance, however, seemingly forbids the one as well as the other. The location and physical conditions of premises of an owner, and of the stream coursing through or near them, may be such that to pasture or keep any animals, such as horses or cattle, on the premises, would necessarily result in pollutions of the waters to some extent, for it must be conceded that any appreciable quantity of feces washing or getting into the stream would in some degree injuriously affect the purity and potability of its waters. Hence it may well be questioned whether a municipi-

ality, under the conferred power, by preventing and penalizing such an act, under such circumstance would not deprive the owner of a rightful use and enjoyment of his property and thus, in effect, amount to a taking or damaging of property without compensation.

But the complaint, in effect, charges a wrongful, negligent, unreasonable, and unnecessary use of the waters of the stream and of the premises through or along which it courses; the complaint in such particular being that the defendant, "unlawfully and willfully, . . . and continuously, for ten days or more," permitted, "at all times," twenty-seven horses to pasture upon and along the banks of the stream, to wade in and drink therefrom, and to "drop their dung into said creek." That pretty nearly charges that the defendant willfully, unlawfully, and continuously, for a period of ten days or more, used the stream as a depository for horse feces. I think the acts charged in the complaint are such as the municipality, under its conferred power, could by ordinance prohibit, and are such as are forbidden by the ordinance; and therefore that the demurrer to the complaint ought to have been overruled.

MCCARTY, J.—I concur. I am of the opinion that the complaint is not vulnerable to the objections urged against it. That the Legislature may confer upon municipalities the power generally [368] to protect from pollution streams of water used by the inhabitants for culinary and domestic purposes is no longer an open question. A municipality may not, however, in the exercise of its police power in that regard, destroy or appreciably impair the value or utility of vested rights of others in and to such streams. It is common knowledge that municipalities throughout this state, with but few exceptions, obtain the culinary water used by the inhabitants thereof from streams of water that have their sources in the mountains and which flow through canyons to the valleys and lowland where it is diverted for the uses mentioned. It is equally well and generally known that, in many of the canyons through which these streams of water flow, there are, at different points, small tracts of meadow, pasture, and arable land ranging in quantity from a fraction of an acre to a quarter section or more which usually extends back from either side of the stream to or near the base of the walls of canyons. Much of these lands, because of their altitude and close proximity to the mountain ranges and public grazing lands, are specially valuable for raising hay, and for grazing, pasturing, and feeding cattle, horses, and other domestic animals, and, in a limited way, for raising grain, potatoes, and a few other cereals that grow and thrive in

high altitudes and that are indispensable in the maintenance of a cattle and horse ranch.

There may be, and no doubt are, instances where parties, at an early date in the settlement of this arid mountain region, homesteaded tracts of these lands and have fenced and otherwise improved the same, and have occupied and used the lands for raising hay, pasturing, grazing, and corraling cattle, horses, and other domestic animals, and have used the waters rising thereon and that flow through the premises for irrigation, culinary, and domestic purposes, before parties lower down on the stream acquired any interest in or title to the water. In such case, the homesteader and his successor in interest may, after a municipality acquires a right to the water, after it leaves the premises, for the use of its inhabitants, continue to make a reasonable use of the land for the purposes mentioned. He may farm the land, pasture, graze, and corral horses, cattle, and other domestic animals thereon, [369] to the same extent as he did before the municipality acquired an interest in the water. And if in making such reasonable use of the land the drainage therefrom finds its way into the stream, which under the circumstances and conditions mentioned is generally unavoidable, he is not amenable to either the criminal or civil law. In such case the municipality has a remedy, and may, under the eminent domain law, acquire an easement or title to the land, or a sufficient amount thereof, bordering on the stream, to enable it to protect the water from pollution. Section 22 of Article 1 of the Constitution of this State provides that "private property shall not be taken or damaged for public use without just compensation." A municipality, under the conditions such as I have suggested, cannot evade this prohibitory provision of the Constitution and directly or indirectly deprive a party of his property or materially impair the value thereof by restricting its use without compensating him for the property taken or the damage sustained.

It is suggested that in the case at bar respondent might at a nominal expense construct a fence along either side of the creek where it passes through his land, and thereby protect the stream from the pollution mentioned in the complaint. As I have stated, it is common knowledge that the meadow, pasture, and arable lands in the canyons through which these streams of water flow is limited to small tracts situated along the beds of the canyons. In many instances this land consists of narrow strips on either side of the creek. There may be, and no doubt are, instances in which the homesteader, in order to include in his entry as much of this tillable land as possible, has "taken up"—filed on—two, three, or more contiguous "for-

ties" along the bed of the canyon. In such case the homestead may consist of a tract of land eighty rods in width and 320 rods (one mile) in length. Under these conditions, it would require two miles of fence to prevent the loose animals kept on the ranch from going into the stream at will. To construct and maintain such a fence would not only be expensive to the homesteader, but in many cases the fence would very materially impair the usefulness of the ranch and thereby decrease [370] its value. This is an expense—a burden—that the municipality cannot, either under the Constitution, statute, or its police power, compel the owner to assume. If, under such circumstances, the municipality may prevent the homesteader, or his successors in interest, from pasturing animals on the portion of the ranch through which the stream of water flows (which may be the only part of the premises fit for pasturage), it necessarily follows that the municipality may also prevent the irrigation of the land because the waste water therefrom unavoidably flows into the creek, washing therein the offal of animals and other refuse, such as manure, debris, etc., hauled from the corrals and yards, and scattered over the arable portion of the ranch to fertilize the soil. The fact that the municipality may, in some cases, be compelled, as suggested, to purchase or acquire by condemnation proceedings entire watersheds in order to protect the stream from pollution, does not relieve it from doing what the provision of the Constitution referred to requires, namely, compensate the owner for his property or so much thereof as may be necessary for the municipality to acquire in order to enable it to protect the stream from the impurities mentioned.

What I here state is in no sense in conflict with the case of *People v. Burtleson*, 14 Utah 258, 47 Pac. 87. In that case the defendant was convicted of having committed a public nuisance by unlawfully and wilfully driving, herding, and keeping about 2,000 sheep upon a small stream of water which was used by the inhabitants of a small town or village. The record in that case, what there is on file in this court, shows that the defendant was herding and grazing his sheep on the public domain at the time he committed the nuisance for which he was convicted.

I do not wish to be understood as holding that a party may go upon the public domain and acquire title to land through which a stream of water flows that is being used by the inhabitants of a municipality for culinary and domestic purposes and make any use of the land that will result in befouling the water. Nor do I wish to be understood as holding that in cases where a party, or his predecessor in interest, was the first to locate

on a stream of water and acquire title to land through which it flows, and later other parties lower [371] down on the stream appropriate and make use of the water for culinary and domestic purposes, the first appropriator, or his successor in interest, may, in the use he makes of his property, wilfully or wantonly pollute and befoul the water of the stream. He may not maintain thereon, corrals, stables, privies, outhouses, pigsties, or a slaughterhouse where the drainage therefrom will naturally find its way into the stream. What I do say is that where a party files on public land through which a stream of water flows, fences, tills, and otherwise improves the land, and makes the same use of it as is usually made of land of that character, such as farming, raising hay, pasturing and feeding cattle, horses, and other domestic animals, and a municipality or its predecessor in interest later on acquires a right to use the water after it leaves the premises for culinary and domestic purposes, the municipality may not compel the owner of the land to dispense with one or more uses to which the land is peculiarly and specially adapted, and to which it has been devoted, because such use unavoidably befouls the water. To arbitrarily prohibit the owner of a ranch from pasturing his animals thereon and making the same use of it as ranch property situated in the mountains is generally devoted, or to impose conditions that would make such use impracticable, would in effect be, at least, a partial confiscation of the property. This, neither the State nor any political subdivision thereof can do without disregarding and overriding the provision of the Constitution herein set forth.

Whether the respondent is within his rights in pasturing horses in the inclosure through which the stream of water in question flows depends on the circumstances and conditions under which he is using the land for that purpose. Of course, if he wilfully and wantonly permits twenty-seven or any number of horses in his pasture to wade into the stream at will and befoul the water under conditions that would enable him at a nominal expense and with but little inconvenience to protect the stream from pollution, he is amenable to the ordinance under which he is being prosecuted, regardless of whether his right to pasture his land antedates the right of the municipality to the use of the water.

NOTE.

The reported case holds that, under a statutory power to protect from pollution the streams from which the public water supply is derived, a municipality may prohibit the allowing of horses and cattle to run at large

along the banks of such streams, the restraint on the use of riparian property by its owner not being unreasonable in view of the public purpose to be subserved. The validity and construction of statutes forbidding the pollution of streams is discussed in the note to *People v. Hupp*, Ann. Cas. 1914A 1177; and the validity of a statute or ordinance prohibiting bathing in a pond or stream is considered in the note to *State v. Morse*, Ann. Cas. 1913B 218.

MASON

v.

STATE.

Texas Court of Criminal Appeals—June 3, 1914.

74 Tex. Crim. 256; 168 S. W. 115.

Criminal Law — Continuance — Time for Preparation.

Under Code Cr. Proc. 1911, art. 557, permitting a case to be called for trial two days after the defendant has been served with a copy of the indictment, and article 558, providing that a counsel appointed for the defendant shall be granted one day in which to prepare for trial, the refusal of the court to grant a continuance in a case set for trial thirteen days after a copy of the indictment was served, twelve days after an attorney had been appointed by the court to represent the defendant, and seven days after another attorney had been employed by the defendant in the case, is not an abuse of the court's discretion, where it is not shown that the defendant was deprived of any testimony of any witnesses, or that he had subsequently ascertained any additional facts that would have been beneficial to him.

Arraignment — Necessity of Presence of Counsel.

Where defendant's counsel was granted ten minutes to confer with witnesses, and could not be found at the expiration of twenty-five minutes, whereupon the court proceeded to arraign the defendant, who was present, and whose counsel returned during the reading of the indictment and entered a plea of not guilty, the absence of counsel does not render the arraignment erroneous.

Trial — Suspension of Trial to Permit Consultation with Witnesses.

Where a homicide case went to trial Tuesday and the prosecution rested Saturday at noon, the refusal of the court to postpone the case to give defendant's counsel time to consult witnesses from that time until Monday morning because of the expense of the witnesses in attendance, is not erroneous,

where the court granted each request of defendant's counsel for time to confer with witnesses.

Remark of Court — Comment on Evidence.

A remark by the trial judge in overruling an objection to a certain question, that it was a part of the *res gestae*, is not a comment on the weight of the testimony.

Evidence — Statement of Conclusion — Appearance and Manner of Accused.

In a prosecution for homicide, testimony by a witness that the defendant stated to him the evening after the homicide, and before his arrest, that he had not been in the city where the homicide occurred, and that while he was talking defendant was nervous and excited and had a haggard appearance, which was unusual for him, is admissible.

Criminal Law — Evidence — As to Allegation that Manner of Killing Was Unknown.

Where an indictment for homicide charged that deceased was killed with some sharp instrument to the grand jury unknown, it is not error for the district attorney to testify as to the efforts of the grand jury to ascertain the character of instrument used.

Harmless Error — Admission by Counsel During Exclusion of Testimony.

Where the trial court excluded testimony offered by defendant but later changed his ruling after the witness had gone home, and the prosecuting attorney admitted the facts which defendant offered to prove by that witness, the defendant is not thereby prejudiced.

Witnesses — Impeachment — Proof of Insanity.

The state may, to impeach the credibility of a witness for the defense, establish by cross-examination that the witness had been adjudged insane, and that said judgment had never been set aside.

Argument of Counsel — Comment on Failure of Accused to Testify — What Constitutes.

Where accused did not testify in his own behalf, but introduced testimony tending to show that between two certain hours on the evening of the homicide he was not at the place where it was committed, comment by the state's attorney that the testimony did not show where accused was prior to those two hours is not erroneous as a comment on defendant's failure to testify.

Instructions — As to Reasonable Doubt — Application to Particular Issue.

Where the court applies the doctrine of reasonable doubt to the whole case and gives an approved charge on circumstantial evidence, it is not necessary to apply the law of reasonable doubt to each fact in the chain of circumstances.

Appeal and Error — Bill of Exceptions — Conclusiveness.

One convicted of crime, who accepts a bill of exceptions as qualified by the trial court, is bound by the qualification.

Trial — Conduct of Court — Restraining Misconduct of Counsel.

A bill of exceptions complaining of the action of the court in refusing to permit defendant's attorney to state reasons for objection to testimony and upon his insisting, ordering him to sit down and thereafter ordering the sheriff to set him down, presents no error, where the bill shows that the same objections had been made to the testimony of other witnesses for reasons then stated, and the court qualified the bill by adding that the counsel gave him considerable trouble and would not stop talking when commanded to do so.

New Trial — Proof of Misconduct of Jury — Conflicting Affidavits.

Where a motion for a new trial is supported by an affidavit of certain jurors that the jury commented on the defendant's failure to testify, but nine other jurors make affidavit that the only mention was a statement by one juror, after the reading of the instructions, that they could not consider the failure to testify, the motion for new trial is properly overruled.

Evidence — Exculpatory Statements of Accused — Admissibility for Prosecution.

Statements made by a defendant, charged with homicide, subsequent to the commission of the offense, that he was not in the city where the homicide was committed, are admissible on behalf of the state in a prosecution, where defendant's witnesses testified that he was in the city where the homicide was committed, but at a different place in that city, since exculpatory statements are not confessions and need not be shown to have been voluntarily made.

[See note at end of this case.]

Appeal from District Court, Bowie county:
O'NEAL, Judge.

Criminal action. Eugene Mason convicted of murder and appeals. The facts are stated in the opinion. **AFFIRMED.**

J. S. Crumpton and O. B. Pirkey for appellant.

L. E. Keeney and C. E. Lane for appellee.

[259] HARPER, J.—Appellant was prosecuted and convicted of murder, and his punishment assessed at confinement in the penitentiary for life.

In the first bill of exceptions it is complained that the court erred in overruling appellant's application for a continuance. It is shown by the bill that the attendance of all witnesses for whom process had been issued was secured, but appellant's attorneys make an equitable application to the court on the ground that they had not had time to make proper investigation and preparation for the trial. The offense is alleged to have been committed on the 2nd of December, 1913, and

appellant was arrested the next day. In a day or two thereafter he conferred with his present attorney, and employed him in the case, conditioned upon a certain amount of money being paid in cash. Appellant's two brothers agreed to pay this money, but failed to do so. The indictment was returned into court on the 16th day of December, and on that day the court conferred with the attorney whom appellant had sought to employ and whom he did afterwards employ, in regard to the setting of the case, and the case was set for December 29th. The employment not being consummated, the court on the 17th day of December appointed an attorney to represent appellant, Mr. O. B. Pirkey. This was twelve days before the case was called for trial. On the 22nd of December the employment of Mr. Crumpton was consummated, and that day process was issued for appellant's witnesses, and all those issued for attended court.

Our Code permits a case to be called for trial two days after a defendant had been served with a copy of the indictment (art. 557, C. C. P.), and where counsel is appointed, the Code provides that such counsel shall be granted one day in which to prepare for trial (art. 558). This case was not called for trial until thirteen days after appellant was served with a copy of the indictment, and twelve days after Mr. Pirkey had been appointed by the court to represent him, and seven days after Mr. Crumpton had been employed in the case. This seems to have given him ample time as contemplated by our laws, and the "court was not guilty of undue haste," as contended by appellant. In the application it is only stated that appellant "hoped to be able to develop other facts" without stating what such facts were or would be, and in the motion for a new trial it is not attempted to be shown that he was deprived of any testimony, [260] or the testimony of any witness, or that he had ascertained any other or additional facts that would be in the least beneficial to him. Under such circumstances we must hold that the court did not abuse the discretion confided to him by law.

The next contention is that the court erred in having appellant arraigned during the absence of counsel. The facts would show that after the jury had been selected and empaneled, before proceeding further, appellant's counsel requested a ten minutes recess that he might confer with some witnesses. This was granted by the court. Instead of taking only ten minutes, the trial judge states he waited twenty-five minutes, and being unable to find counsel, he ordered the district attorney to arraign the appellant, and he did so, appellant's counsel coming in the court-room while the indictment was being

read to the jury, and arriving in time to enter a plea of "not guilty." We know of no provision of the Code which requires that counsel shall be present at all stages of the proceedings in a criminal case. It does so provide as to the defendant (art. 757), but it only states that counsel shall also be called. In this case the court states he had the officers try to find counsel and they failed to do so. While the law provides that in a felony case the appellant shall be present at all stages of the proceedings, yet it has been held since the law was passed allowing a defendant to remain on bond, if he wilfully or intentionally absents himself while some proceeding takes place, it will not present reversible error, unless the record discloses he may have suffered injury thereby. As before stated, the defendant was present, and as appellant's counsel had over-stayed more than twice the length of time they had been granted by the court, and the officers of the court had failed to locate them, the fact that appellant was "arraigned" while they were not in the courtroom, but no further action taken, in the absence of any injury shown, presents no error. Appellant cites us to no case from this State sustaining his contention, but refers us to the case of *State v. Moore*, 61 Kan. 732, 60 Pac. 748. In that case it is shown that under the laws of Kansas pleas to quash, etc., must be filed before arraignment. In this State there is no such provision, and while the Kansas case holds the right to have counsel present at the arraignment to be a fundamental right, yet we do not think it so under our Constitution and laws. It is true that our Constitution guarantees one the right to be represented by counsel in a capital case, and if by the arraignment he had been deprived of any right, or the right to file any plea, or he could in the remotest sense have been injured in his rights by being arraigned while his counsel was not in the courtroom, we would hold it error, but nothing of that character appears in this case.

It appears that this case went to trial on Tuesday, and State's counsel rested its case Saturday at noon. Counsel moved a recess of court until Monday morning; that was denied, and the court took a recess until Monday morning; that was denied; and the court took a recess only until 1:30 P. M. Appellant complains of this action of the court, saying he had not time to converse with his witnesses. The court in approving the bill states: "I never at any time refused to permit defendant's [261] counsel to confer with any or all the witnesses. This case was delayed time and again to permit counsel to talk to witnesses. I declined to postpone this case from Saturday noon to Monday because there was in attendance a great number of witnesses from Cass County, at great ex-

pense to the State, besides counsel had a week in which to confer with the witnesses, at noon hours, also after adjourning hour. With this explanation this bill is approved and ordered filed." As thus qualified the bill presents no error.

It appears that while Mrs. Nellie Poarcher was testifying, she was asked by counsel for the State, "About what time did you find and ascertain that he had been killed and robbed up there?" Appellant objected to the question. In overruling the objection the court stated, "I think that is a part of the *res gestae*." While it is always better for the court to rule without making any additional remarks, yet it is only where such comment is upon the weight of the testimony that such action presents error. In this case the remark cannot be construed into informing the jury as to what weight to give the testimony. The answer to the question is not presented in the bill, nor the testimony adduced, and we could not, therefore, judge whether or not it would have been hurtful if it had been upon the weight of the testimony.

In bill of exceptions No. 5 it is complained that Ross Powell was permitted to testify, and then, without reciting the testimony, says see statement of facts, page 77. The bill should have contained the testimony objected to. If we turn to the statement of facts we could not by reading page 77 get the connection of that page of the testimony with his entire testimony, for the testimony of this witness covers a number of pages. But if we read his entire testimony we learn that Mr. Powell had a conversation with defendant the evening after the homicide, and before defendant's arrest, and in that conversation he denied going to Texarkana, and claimed to have gotten off the train beyond where it left the yard at Springdale; that he told appellant that he, the witness, understood that he had gone to Texarkana with deceased, but appellant denied that he had done so; that while he was talking with appellant, appellant was nervous and excited; that he had a haggard appearance, and looked to have lost sleep. That he had known appellant for years, and he had never seen him in this condition before. In the light of the testimony in this case, and all the testimony of this witness, this testimony was clearly admissible, for it made manifest that appellant was made aware that he was under suspicion, and his acts and conduct when not under arrest and when no officer was present, would certainly be admissible in a case depending on circumstantial evidence.

The bill of indictment in this case alleges that deceased was killed by being cut and stabbed with some sharp instrument to the grand jury unknown. The district attorney testified as to the efforts made by the grand

jury in trying to ascertain the character and kind of instrument used. In this there was no error.

It is made to appear that while Lige Roberts was testifying, that appellant [262] desired to prove by him that he, appellant, on the day he went to Texarkana with deceased invited and insisted on Roberts going to Texarkana with him. The court excluded this testimony at the time it was first offered, but later changed his ruling and told counsel he would admit the testimony. Mr. Roberts having gone home, State's counsel admitted as a fact that appellant on that occasion did insist on Roberts going with him. As this testimony was admitted to go to the jury as a proven fact, the bill presents no error.

J. A. Bramlett was a witness for the defendant, and on cross-examination the State was permitted to elicit from this witness that some eighteen months prior to this trial he, Bramlett, had been adjudged insane, and that said judgment had never been set aside. This was admissible on the credit to be given the testimony of the witness. In law, under such circumstances, he would be insane at the time of this trial, unless it should be affirmatively shown that he had regained his mental faculties, and if insane, certainly his testimony would be entitled to but little credit.

Appellant did not take the stand as a witness to testify in his behalf, but he did introduce testimony as to his whereabouts after 9 o'clock that night in Texarkana, and one of the main contentions of appellant is that taking the time that deceased is shown to have been killed, at the place where he was killed, and for him to have been with Charles Ellum at the union depot in Texarkana from 9 o'clock to 10 o'clock, rendered it impossible for him to have been at the scene of the homicide. That the depot was two miles away from the place of the homicide, and taking into consideration the time he was killed until 9 o'clock, he could hardly have gotten to the union depot by 9 o'clock. Under such circumstances it was not improper for State's counsel to comment on the fact that it was not shown by the testimony where appellant was from the time the train arrived in Texarkana until 9 o'clock. To refer to the fact that the testimony did not disclose the whereabouts of defendant during that time was not a comment on defendant's failure to testify, for during those hours he was certainly in the town of Texarkana, and he could have called some witness as to his whereabouts if he did not object to it being known. He certainly knew where he was, of course, and could have testified to that fact, but he also knew who he was with, and from the fact he had called no one to testify in regard thereto was a legitimate matter of comment.

The court's charge on circumstantial evidence has been frequently approved by this court, and is not subject to the criticisms contained in appellant's objections to the charge. (*Moseley v. State*, 59 Tex. Crim. 90, 127 S. W. 178; *Reese v. State*, 50 Tex. Crim. 430, 128 S. W. 1126; *Trevino v. State*, 38 Tex. Crim. 64, 41 S. W. 608; *Boggs v. State*, 38 Tex. Crim. 82, 41 S. W. 642; *Baldez v. State*, 37 Tex. Crim. 413, 35 S. W. 664; *Bell v. State* (Tex.) 71 S. W. 24.) And having given the charge he did, it was not necessary to give the special charges requested on this issue, nor was it necessary to apply the law of reasonable doubt [263] to each fact in the chain of circumstances, when the court applied the doctrine of reasonable doubt to the whole case, and gave an approved charge on circumstantial evidence.

The other criticisms of the court's charge present no error, and the special charges in so far as they are the law of this case were fully covered by the court's main charge.

It appears during the trial of the case and while Mr. Watlington was on the witness stand, the State desired to prove some statements made by appellant, and defendant was objecting thereto. The court overruled the objection, when appellant's counsel insisted on stating the reasons why he thought the testimony was inadmissible. The bill shows that the same objections had been made to the testimony of three other witnesses and reasons then stated, and the court would not permit counsel to again state his reasons. Upon counsel insisting the court ordered him to sit down, and counsel not doing so, the court ordered the sheriff to set him down. In approving the bill the court states: "I had considerable trouble with the attorney in this case. When I would rule on a question, he would continue to talk and I could not get him to stop; I was compelled to call on the sheriff to seat counsel. Counsel was very disrespectful to the court." Appellant accepts this bill as thus qualified, and he is bound by the qualification. Under it the bill presents no error.

Appellant attached to his motion for a new trial the affidavits of some of the jurors stating, "That after the jury had retired and was considering their verdict, some one of the jurors mentioned the fact of the failure of the defendant to testify." The State contests this ground of the motion, and attaches the affidavit of the foreman and eight of the other jurymen to the contest. The foreman testifies that while he was reading that portion of the charge of the court instructing them: "A defendant in a criminal case may or may not testify in his own behalf just as he pleases. If he fails to testify such failure shall not be taken as a circumstance against him, neither shall such failure to testify be dis-

cussed or commented on during the trial. It shall not be even alluded to. The defendant has not testified in this case. This is his privilege and right and when you retire to consider your verdict in this case, you will not discuss, comment on, or even allude to such failure to testify. It shall not be considered by you at all for any purpose whatever, but you shall wholly ignore such failure to testify," one of the jurymen said: "The defendant did not testify in this case, but we must not consider it at all," and that this was all that was said. The other eight jurymen sustain him. The judgment shows that the court heard evidence on this ground in the motion, but the evidence is not before us except in so far as shown by these affidavits. Under such circumstances we can but hold the court did not err in the premises.

These are all the questions presented by the record except one, which is presented in six different bills of exception. On all the questions hereinbefore discussed the entire court agree, but on the question hereinafter discussed Judge Davidson does not agree to the disposition made [264] thereof, but thinks it presents such error as should cause a reversal of the case, while the writer of the opinion and Presiding Judge Prendergast think the testimony was admissible, and the bills present no error.

By these bills it is shown that appellant was arrested at his home the night after the homicide, and that shortly after his arrest to some six different persons he stated that while he did get on the train with Mr. Thaggard, the deceased, at Springdale, he got off the train at Alamo and walked back home; that he did not go to Texarkana that night. This in substance is the testimony he objected to each of the witnesses testifying to. In approving one of the bills the court says: "Examined, approved and ordered filed as a part of the record in this case with the following explanation: This testimony was allowed to go before the jury over the defendant's objection, on January 2, 1914, but later, on the 5th of January, same was withdrawn from the jury and the court in his charge to the jury asked that they not consider said testimony. This statement of the defendant was exculpatory, because if defendant got off the train at Alamo as he stated, he could not have been in Texarkana at the time the murder was committed. This evidence was admissible under the decisions of our Court of Criminal Appeals decided in the case of *Whorton v. State*, in 69 Tex. Crim. 1, 152 S. W. page 1082. A number of the witnesses testified to the same statement made by the defendant when he was not under arrest as appears in the record." The court was correct in holding that the evidence was admissible under the rule of law as

announced in the Whorton case, *supra*, and the only error he committed was in excluding the testimony and instructing the jury not to consider it. But this was error in favor of the defendant and against the State, and the only way be complains of this action is that the court erred in originally admitting the testimony, and such error was not cured by withdrawing the testimony. Had the testimony been inadmissible, as this fact was proven by a number of witnesses who talked with defendant about the matter prior to his arrest, when the court withdrew that portion of the testimony which showed the same statement to have been made after his arrest, it would not present reversible error. It is, however, useless to cite the authorities on that question, as we hold the testimony admissible, being exculpatory in its nature, and showing a state of facts which if true would render it impossible for appellant to have committed the offense, and, therefore, such statement could not by any stretch of the imagination be construed to be a confession of guilt. In Whorton's case we discussed the distinction between exculpatory statements and inculpatory statements, or confessions, and frankly admitted that the authorities in this State were in conflict, and we then carefully considered those cases now cited by appellant, and overruled them, but that no mistake may hereafter be made, we here and now expressly overrule each of the cases, holding that exculpatory statements come within the same rule as confessions of a defendant. In addition to the authorities in Whorton v. State, 69 Tex. Crim. 1, 152 S. W. 1082, we have had our attention [265] called to Wigmore's work on Evidence, sec. 821, Vol. 1. That learned writer says:

"What is a Confession? Denials, Guilty Conduct, and Self-contradictions, distinguished. A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it. It is to this class of statements only that the present principle of exclusion applies. In this sense, therefore, there are in particular three things which fall without the meaning of the term 'confession,' and are thus not affected in any way by the present rules, namely, (1) guilty conduct, (2) exculpatory statements, and (3) acknowledgments of subordinate facts colorless with reference to actual guilt.

"(1) The conduct of an accused person falls clearly without the present principle, which rests on the theory that the trustworthiness of the accused's assertions is destroyed or weakened by circumstances supplying a motive for false assertion (post, sec. 822). That which is not an assertion, in some form or another, can therefore not be

within the scope of such a principle; its probative use is not testimonial but circumstantial; and the frequency of its employment, free from the present rules, may be seen by perusing the numerous rules of circumstantial evidence (ante, secs. 272-284) which apply to such evidence. The accused's conduct, therefore, consisting in fleeing from arrest, concealing the traces of crime, fabricating evidence, suppressing testimony, and other behavior indicative of a guilty consciousness, falls without the present rules.

"(2) Exculpatory statements, denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed. This necessary meaning for the term 'confession' is generally conceded."

In commenting on this rule of law, Mr. Wigmore says: "The authorities dealing with this class of evidence sufficiently show that it is admitted without regard to the confession-rules. In the courts of Texas alone, it would seem, the heresy prevails that conduct may be treated as a confession." Again he says: "In Texas, the sound doctrine, *originally accepted*, seems to have been ignored later," citing Ferguson v. State, 31 Tex. Crim. 93, 19 S. W. 901. The Ferguson case was cited and followed in Davis v. State (Tex.) 24 S. W. 651, and by examining our reports it will be found that the rule of law announced in the Ferguson case was followed from the organization of our courts until the rendition of some later opinions when the court undertook to give to the term "confession" as used in our Code a meaning never theretofore attributed to the word, and which now has not the sanction of any text-writer so far as we have been able to ascertain. As supporting the rule of law as announced by Mr. Wigmore, and that the doctrine in the Bailey case, 40 Tex. Crim. 150, 49 S. W. 102, is a "heresy" as said by that eminent law writer, he cites cases from almost every State in the Union, and gives a history of the rule showing much research and learning. *Pentecost v. State*, 107 Ala. 81, 18 So. 146; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; [266] *Mora v. People*, 19 Colo. 255, 35 Pac. 179; 1810, *Swift*, Evidence, Conn. 133; *Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 279; *State v. Spillers*, 105 La. 163, 29 So. 480; *Taylor v. State*, 37 Neb. 788, 56 N. W. 623; *State v. McDowell*, 129 N. C. 523, 39 S. E. 840; *State v. Vaigneur*, 5 Rich. L. (S. C.) 400; *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170; *Michaels v. People*, 208 Ill. 603, 70 N. E. 747; *State v. Campbell*, 73 Kan. 688, 9 Ann. Cas. 1203, 85 Pac. 784, 9 L.R.A. (N.S.) 533; *State v. Thomas*, 135 Ia. 717, 109 N. W. 900; *State v. Royce*, 38 Wash. 111, 3 Ann. Cas. 351, 80 Pac. 268. We could

continue these citations from this and other works indefinitely, but in addition to the authorities herein cited and cited in the Whorton case, *supra*, we will only quote the following short excerpts from Mr. Wigmore's work:

"1846, Ruffin, C. J., in *State v. Broughton*, 29 N. C. 96, 45 Am. Dec. 507, at page 101: 'It is altogether a mistake to call this "evidence of a confession by a prisoner." It has nothing of that character. It was not an admission of his own guilt, but on the contrary an accusation of another person. That from the inference that may be drawn from it it was preferred on oath in no way detracts unfavorably to the prisoner, as being a false accusation against another and thus furnishing with other things an argument of his own guilt.'

"1862, Rice, J., in *State v. Gilman*, 51 Me. 206, at page 225: 'The declarations of accused persons are not necessarily confessions, but generally, on the other hand, they are denials of guilt, and consist in attempt to explain circumstances calculated to excite suspicion.'

"1895, DeWitt, J., in *State v. Cadotte*, 17 Mont. 315, 42 Pac. 857 (the accused took the stand to explain how in self-defense he killed the deceased; the State offered various previous explanations of his, showing self-contradictions): 'The other objection was that a portion of this testimony was a confession by the defendant, and it was not shown that such confession was made freely. . . . We are satisfied that the statements of the defendant sought to be proved were not confessions at all. Instead of being confessions of guilt, they were statements of his self-defense, statements in which he admitted the killing, and endeavored to show that he was obliged to kill to save his own life. They were admissions, to be sure, of the killing, but self-defending statements as to the same. And this was precisely the position he occupied upon the trial. He relying on self-defense for acquittal, it was competent to attack his credibility by proving statements made out of court as to the self-defense, contrary to those which he made as a witness on the trial.'

"1899, Granger, J., in *State v. Novak*, 109 Ia. 717, 79 N. W. 465: 'Inaccurate use of such words as "confessions," "admissions," and "declarations," has led to some confusion in the cases; but, on authority and reason, there is a clear distinction between a confession and an admission or declaration, unless the admission or declaration has within it the scope and purpose of a confession, in which its distinctive feature, as an admission or declaration, is lost in the broader term "confession." A confession is a voluntary admission or declaration by a person of his

agency or participation in a crime. . . . To make an admission or declaration a confession, it must in some way be an acknowledgment [267] of guilt. . . . The manifest purpose of (the defendant's) statements was to show himself innocent, and, if his statements are true, he is innocent of the crime charged; so that by no possibility could he have been induced, because of the promise of secrecy, to relate what was untrue, to his prejudice.'"

The effort made in some of the cases in this court to give to the term "confession" as used in the statute, a definition and meaning to include all character of statements, is, in our opinion, unwarranted, against the great weight of authority, and as said in the Whorton case, *supra*, we adhere to the rule announced in the case of *Ferguson v. State*, 31 Tex. Crim. 93, 19 S. W. 901, which Mr. Wigmore says in the sound doctrine, and that in Texas alone is the "heresy" announced in the *Bailey* case, 40 Tex. Crim. 150, 49 S. W. 102, given any recognition, and that case and those following it, as hereinbefore stated, are overruled.

The judgment is affirmed.

Affirmed.

DAVIDSON, J. (*dissenting*).—I cannot agree to the affirmance. The State's theory was that deceased was killed a mile and a half or two miles from where appellant introduced evidence to show he was at the time of the homicide. The witnesses he introduced placed him at such time and place as that if true could not have been the party who committed the homicide, but this evidence placed him in the City of Texarkana about the distance above mentioned from the place of the homicide. The substance of this evidence was to the effect that he was in Texarkana on the night of the homicide, but was so situated that he could not have committed it. In other words, he proved an alibi but yet placed himself in the City of Texarkana. He was arrested the next day or within a day or so after the homicide. While under arrest the State was permitted to prove by parties having him under such arrest, statements that he, appellant, made to these officers. These statements were, in a sense, exculpatory, that is, the statements were to the effect that he was not in Texarkana on the night of the homicide, but was at a different place or different places some miles from the city. Of course this evidence was introduced by the State to meet and disprove the evidence introduced on the trial by him to show his presence in the City of Texarkana, but absent from the homicide. My brethren, sustaining the ruling of the trial court admitting this testimony, place it purely and simply upon the proposition that it was exculpatory and

therefore beneficial to him. The State did not so regard it and did not introduce it for that purpose, but to show that the testimony given on the trial was false. Taken in that sense, it is to be treated as a confession, or at least inculpatory testimony, and being under arrest, under all the authorities it was not admissible either as original or impeaching testimony. The question of impeachment, of course, is not in this case as defendant did not take the witness stand. The rule is well settled in Texas, that the unwarned statements of the defendant while under arrest cannot be used against him for any purpose. See [268] Branch's Crim. Law, sec. 234, for collation of authorities; *Ware v. State*, 36 Tex. Crim. 597, 38 S. W. 198; *Morales v. State*, 36 Tex. Crim. 234, 36 S. W. 435, 846; *Brown v. State*, 55 Tex. Crim. 572, 118 S. W. 139; *Bailey v. State*, 40 Tex. Crim. 150, 49 S. W. 102, and quite a number of other cases cited by Mr. Branch. The rule is as well stated perhaps as can be and as tersely by Mr. Branch in his work on Criminal Law in section 218 of that work. He uses this language: "The statute relating to confessions is not confined strictly to a technical confession, but covers any act in the nature of a confession, statement or circumstance done or made by the defendant while in confinement or custody and not having been properly warned, which may be used by the State as a criminative fact against him." There can be no question that his statement that he was out of the City of Texarkana on the night of the homicide and at a different place some miles away was used by the State as a criminative fact. It was introduced for no other purpose by the State and it could have no other effect. It was a direct attack upon his testimony introduced showing his presence in the City of Texarkana, but absence from the homicide. The writer does not understand how this testimony could be admissible. It was criminative and as used critically so, and evidently the jury so regarded it, as did the court. In *Hernan v. State*, 42 Tex. Crim. 464, 60 S. W. 766, appellant set up the defense that he was in another part of Texas when the alleged burglary occurred. This court held it was error to permit the State to prove that after his arrest he told the officer he was in Arkansas when the burglary occurred. In *Bailey v. State*, 40 Tex. Crim. 150, 49 S. W. 102, this court held it was error to permit the State to prove that after the arrest of the accused he said he knew nothing about the difficulty. In *Wright v. State*, 36 Tex. Crim. 427, 37 S. W. 732, which was a manslaughter case, the defendant's defense was to the effect that deceased had a knife. It was held error on the trial to permit the State to introduce the unwarned statement that the deceased had a pistol. In

Williams v. State, 10 Tex. App. 526, in a horse theft case, it was held error to permit exculpatory statements as to where the defendant got the horse. This exculpatory statement was in contradiction of the defense on the trial. In *Parks v. State*, 46 Tex. Crim. 100, 79 S. W. 301, being a cattle theft case, it was held error to permit exculpatory statements, the defendant having adopted another defense on the trial. See also *Parker v. State* (Tex.) 57 S. W. 668. These are a sufficient number of cases to show the general line of decisions. These decisions, of course, refer to matters like that included in the bills of exception in this case. So far as the writer has observed or noticed the cases with the rule announced in this dissent has been the rule in Texas until the *Whorton* case cited by my brethren and written by Judge Harper. I do not care to elaborate this matter. The *Whorton* case and the opinion of the majority in this case will have the effect to overrule all the decisions heretofore rendered in Texas on this question. They are clearly in error. This judgment ought to have been reversed under all the authorities, unless it be the *Whorton* case.

For these reasons I respectfully enter my dissent.

NOTE.

Admissibility of Prior Exculpatory Statement by Accused to Contradict Evidence Given by Him or on His Behalf at Trial.

A confession is defined to be the voluntary admission or declaration made by a person who has committed a crime or misdemeanor, to another, or his agency or participation in the crime. Although there is authority to the contrary, the better rule is that the term does not apply to a mere admission or declaration of an independent fact from which guilt may be inferred. 1 R. C. L. title *Declarations and Admissions*, p. 551. Neither does the term apply to prior exculpatory statements by the accused. *Wharton v. State*, 69 Tex. Crim. 1, 152 S. W. 1082. Consequently those statements are not subjected to the rules of formality governing the admission of confessions, and are admissible to contradict evidence given by the accused or on his behalf at the trial. *State v. Cadotte*, 17 Mont. 315, 42 Pac. 857; *Baker v. State* (Tex.) 187 S. W. 949. And see the reported case. See also *Quintana v. State*, 29 Tex. App. 401.

Thus in *State v. Cadotte*, supra, the defendant who was on trial for murder pleaded self-defense. He went on the stand as a witness and stated on his examination what he claimed to be the facts in regard to the kill-

ing, and in regard to what he claimed was his self-defense. The county attorney then asked him a number of questions as to whether he had not made certain statements at certain times and places, in the presence of certain people. Those statements, as recited by the county attorney, appeared to be the defendant's accounts of the killing. In holding that evidence of the statements was admissible, the court said: "We are satisfied that the statements of the defendant sought to be proved were not confessions at all. Instead of being confessions of guilt, they were statements of his self-defense, statements in which he admitted the killing, and endeavored to show that he was obliged to kill to save his own life. They were admissions, to be sure, of the killing, but self-defending statements as to the same. And this was precisely the position he occupied upon the trial. He relying on self-defense for acquittal, it was competent to attack his credibility by proving statements made out of court as to the self-defense, contrary to those which he made as a witness on the trial."

In *Baker v. State* (Tex.) 187 S. W. 949, wherein the accused, testifying on his trial for murder, presented a vigorous case of self-defense, it was held that certain exculpatory statements which he had made to a deputy sheriff shortly after his commission of the crime were admissible. In a review of the facts the court said: "In bills 8 and 5 it is made to appear that the deputy sheriff, Henry Staudt, was permitted to testify that shortly after the cutting he approached appellant with the intention of arresting him, but before doing so, or saying anything that would lead appellant to believe he intended doing so, he called appellant to one side and said to him, 'I understand you had a little trouble a while ago,' and appellant replied, 'I haven't had a d—n bit of trouble.' Witness then made a further statement, 'Somebody cut or stabbed Dudley Laurie pretty bad,' appellant replying, 'I don't know a d—n thing about Dudley Laurie;' that he then arrested appellant. Appellant was also questioned about this matter on cross-examination, and it is to the testimony of Mr. Staudt and the cross-examination of appellant that the exceptions were reserved. Appellant had testified on this trial, and to a most vigorous case of self-defense, and the defense of his daughter and son; and why should not his statements made a few minutes after the cutting be admissible to show he made no such claim at that time? He was denying all knowledge, and would be still denying it, we suppose, but for the fact that, with his dying breath, Henry Laurie had told Dr. Roberts and Mr. Wied who had cut him. It is true, if his statement had been a confession that he committed the deed, our statute, if he

was under arrest, would exclude it; but under no construction of the language can his words be construed into a confession that he committed the act, but instead is a most emphatic denial that he did so, and is wholly exculpatory."

So in *Quintana v. State*, 29 Tex. App. 401, the defendant was on trial for having brought a horse into the state after having stolen it. He testified that he had no connection with or possession of the horse. To impeach him and to show his contradictory statement a witness was permitted to testify that the defendant, while in jail, said that he had had possession of the horse and had received it from a Mexican. In holding that the testimony was admissible the court said: "Certainly, if he go upon the stand himself as a witness and testify as to matters contradictory of his statements while under arrest, the statements made by him while so under arrest can be used to impeach him. It is not intended here to pass on the question of the admissibility of his confessions or statements when sought to be used as original evidence against him. That question is not involved in the matters now before us. When defendant went upon the stand as a witness he waived his attitude and position in the case as a defendant and assumed that of the witness, and having done so, must abide the consequences of his election."

The cases cited in the dissenting opinion of the reported case as supporting a doctrine contrary to the rule laid down by the majority opinion, are expressly overruled by the latter opinion.

STATE EX REL. REYNOLDS ET AL.

v.

JOST ET AL.

Missouri Supreme Court—April 2, 1915.

265 Mo. 51; 175 S. W. 591.

Mandamus — Review — Findings of Fact.

The supreme court is not bound by the findings of fact made by its commissioner in mandamus, and will examine the facts when challenged, whether formal exceptions are filed or not.

Municipal Corporations — Police Department — Metropolitan Police — Legislative Power to Establish.

The peace and safety of its citizens being a matter of general state concern, the state can provide a metropolitan police system for

cities and compel them to pay the expenses thereof.

[See note at end of this case.]

Same.

The creation of a metropolitan police system for Kansas City by Rev. St. 1909, § 9787 et seq. is within the power of the state, though the city acts under a special charter adopted under Const. art. 9, § 18; such charters being subservient to general laws.

[See note at end of this case.]

Same.

The law creating a metropolitan police system for Kansas City is not unconstitutional because of the flexible provisions in Rev. St. 1909, § 9787, by which the determination of the population and the number of police districts is left to the police commissioners.

[See note at end of this case.]

Census — As Sole Source of Information — Construction of Statute.

The law requiring an "estimate" of population "from the best known source," for the purpose of fixing the number of patrolmen for a metropolitan police system, does not refer to the federal census as the only source of information; a "census" being a finding of the population and not an "estimate."

Appropriations — Reasonableness — Judicial Review.

The reasonableness of the appropriation demanded by Rev. St. 1909, § 9787 et seq. for the support of the metropolitan police system for Kansas City, is for the legislature and not for the courts.

Original action for mandamus. William C. Reynolds et al., relators, and Henry L. Jost et al., respondents. The facts are stated in the opinion. PEREMPTORY WRIT ORDERED.

Robinson & Goodrich and Willard P. Hall for relators.

Henry L. Jost, Andrew F. Evans and A. F. Smith for respondents.

[62] GRAVES, J.—Original action in mandamus. Relators constitute the majority of the Board of Police Commissioners of Kansas City, acting as and for such board. The respondents are the mayor and members of the common council of said city.

Before the beginning of the fiscal year of 1914 the Board of Police Commissioners certified to the mayor and common council the amount that would be required [63] to maintain the police force and the police department of the city. This estimate was \$725,000. The mayor urged that such sum could not be appropriated, and the Board of Police Commissioners cut out some items and finally made their demand for \$650,000. The first demand included the following items:

For the cost of the department as now organized:
Salaries\$445,120.00

For the cost of maintenance, repairs, rents, provisions, materials, supplies and incidental expenses \$61,763.83

For the cost of the proposed increase in the number of policemen necessary for the discharge of the duties imposed upon and entrusted to the Board of Police Commissioners as authorized by the statutes 158,760.00

Renting of apparatus for police alarms, fire alarms, or for the purchase of new or additional equipment, arms or other apparatus 43,336.17

Necessary repairs, repainting and overhauling of stations.. 16,000.00

Total\$724,980.00

As modified, by cutting out, the demand stood:

For the cost of the Department as now organized:

Salaries\$445,120.00

For the cost of maintenance, repairs, rents, provisions, materials, supplies and incidentals 26,120.00

For the cost of proposed increase in the number of policemen necessary for the discharge of the duties [64] imposed upon and entrusted to the Board of Police Commissioners as authorized by statute 168,760.00

\$650,000.00

The petition for our writ averred that the respondents refused to appropriate more than \$500,000 for the police department of such city, and prayed for our writ of mandamus to compel the respondents to appropriate the full amount of \$650,000. Our alternative writ was issued and respondents made return thereto. This return, as amended, would seem (1) to challenge the right of relators to make a valid demand at all, and (2) that if they had such right the demand made was unreasonable, and respondents were therefore justified in refusing it. The return is quite lengthy, but when the admissions made therein are taken with the other matters pleaded, the foregoing is the substance thereof. If other matters pleaded become necessary they can and will be noted in the course of the opinion.

Relators base their authority in the premises upon section 9778, Revised Statutes 1909, which reads:

"It shall be the duty of the board of police at the beginning of each fiscal year to estimate what sum of money will be necessary

for the ensuing fiscal year to enable them to discharge the duties hereby imposed upon or entrusted to them, and they shall forthwith certify the same to the common council or municipal assembly of the city, who are hereby required in the first apportionment ordinance of that fiscal year to set apart and appropriate the amount so required, payable out of the next annual revenue of the city. If the board shall be required to call out an extra police force and the expense thereof shall not have been contemplated in their first estimate, they shall immediately certify the expense of such additional force, and the additional amounts so required shall be appropriated [65] for that purpose. The estimate made at the beginning of each fiscal year shall embrace the cost of the department as they organized, the cost of any proposed increase in the number of policemen necessary for the discharge of such duties and authorized hereunder, and the cost of any proposed erection of station houses, the renting of apparatus for police alarms; fire alarms, or the purchase of new or additional equipment of arms or other apparatus. The term common council, as used in any provision hereof, shall be construed to mean the municipal assembly or other body having legislative authority in such city."

Respondents seek to hide behind the powers which they claim to be granted to them by the city charter adopted under the provisions of section 16, article 9, of the Constitution.

The two questions suggested, *supra*, are at least, the two vital questions. There are other minor questions, which can be best stated in connection with the points made. This sufficiently outlines the case.

I. It is urged by relators that as no formal assignment of exceptions was made to our commissioner's finding of facts, the respondents and this court is bound by such findings. In this relators are in error. We have no statutory regulations as to the powers and duties of the commissioner appointed by this court in cases of this kind. We usually prescribe his duties by an order made at the time. Sometimes we direct him to make findings both as to the facts and the law. At other times we limit his work to the findings of facts alone. We always require him to not only take, but to report the testimony to this court. There would be no necessity of reporting the testimony if we were going to be bound by the commissioner's finding of fact. It could, of course, be [66] argued that we would have to have the evidence in event there were exceptions filed to his findings of facts. But we neither have a statute nor a rule of court fixing this practice. We have therefore provided for no exceptions. These

cases are usually cases of vast importance, and we would be loth to permit a commissioner—a mere arm of the court—to cut off a full investigation of either the facts or law of the case. The better rule, and one which we have usually followed, is that the findings of facts made by our commissioner is merely advisory, but in no sense binding upon us. We have reserved and should reserve the unrestricted right to reach our own conclusions as to the facts, and with a free hand apply our views of the law. We have, at times, required our commissioner to report to us his conclusions of law, but we have never deemed such conclusions as binding upon the court. They are advisory merely. So likewise should be the findings as to facts. The court is the body which is responsible for the final disposition of these very important cases, and we do not feel like announcing any rule which would, in any sense, restrict a full examination of the facts by the court, either upon a suggestion of a party to the suit, or upon our own motion. It would follow that we should go into the facts when challenged, whether formal exceptions were filed before argument or not. The better practice for the lawyers in the case would be to formally point out by exceptions what findings were challenged, and in this way the scope of the case might be more compact upon the argument. Whether this be done or not, the court should reserve to itself the right to go to the entire record for the facts. This view disposes of relators' contention contrary to their ideas.

II. Whilst we have reserved the right to go into the record, and find the facts contrary to the findings made by the commissioner, yet our examination of this [67] record discloses that our learned commissioner has not only been fair, but he has been exceedingly careful and painstaking in making his findings of facts. We shall note the more serious objections made to his findings, as it becomes necessary to use the particular findings of fact in the further course of this opinion. If such particular finding does not accord with the evidence, we shall so state.

III. The importance of this case is apparent from the statement made, *supra*. The life of the metropolitan police system of Kansas City is at least at stake, if not more. In fact it might well be said that the metropolitan police systems of the State are involved, because if some of the contentions of respondents be good, there is no such thing as a metropolitan police system. In other words, if the State has the mere control of the police body, with the power left in the municipality to starve the police force to death by refusing to appropriate funds for its support,

then there can be no metropolitan police force. The municipality, the creature of the State, can rise up against the State and kill any metropolitan police force which the State may establish. No set of officers can or will serve without pay, and if the pay of a metropolitan police system is left to the caprice of a municipal government, oftentimes at war with the State government, there can be no effective police force under State control. The question is therefore a vital one to the State. The first questions are: (1) Can the State establish a police system for one of its municipal creatures, and compel that creature to properly sustain such police system out of the funds gathered for municipal purposes; and (2) if it can, is the demand made by the relators in this case within the State power, under the law it has enacted, *supra*? These questions we take in their order.

[68] IV. The brief of counsel for respondents attacks the validity of the statutes relied upon by relators, i. e., section 9778, Revised Statutes 1909, and other sections relative to the metropolitan police system established for Kansas City. That the State can establish in a municipality a metropolitan police force, and require such municipality to pay for the same, has been thoroughly and well settled by the lamented Judge Gantt in a very able opinion in the case of *State v. Mason*, 153 Mo. 23, 54 S. W. 524. The doctrine announced is a trite one, i. e., the creature is not greater than its creator. In that case Gantt, C. J., said:

"The fundamental principles underlying the Acts of 1861 and 1899, creating boards of police commissioners for the city of St. Louis, are the same, and the constitutionality of such legislation has stood the test of the most critical judicial examination and review. Laws like these and those of other states providing a metropolitan police system for large cities, are based upon the elementary propositions that the protection of life, liberty and property and the preservation of the public peace and order in every part, division and sub-division of the State, is a governmental duty which devolves upon the State and not upon its municipalities any further than the State in its sovereignty may see fit to impose upon or delegate it to the municipalities. The right to establish the peace and order of society is an inherent attribute of government, whatever its form, and is co-extensive with the geographical limits thereof, and touching every part of its territory.

"From this duty existing in the very nature of the State government, flows the corresponding power to impose upon municipalities of its own creation a police force of its own

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creation, and to compel its support out of the municipal funds. Such is the conceded doctrine by the most learned of our writers upon constitutional [69] law, and such the consensus of judicial decision throughout the United States.

"Wherever the Legislature has the right to assume control of a municipal office, it has likewise the right to compel the city to provide for defraying the expenses of such office, and while it is sometimes difficult to draw the line and distinguish whether a given office is of a public or State character or is simply one to subserve a municipal function, it is almost universally conceded that police boards and metropolitan police forces are State officers and fall clearly within legislative control."

The distinguished jurist then reviewed the authorities upon the question, and quoted at length from both Cooley and Dillon, showing the views of both of those great jurists were in harmony with his own. Cases from Michigan, Massachusetts, Maryland, Louisiana, and Kansas, were likewise cited and quoted from to the same effect. At the expense of brevity I quote from the *Mason* case, *supra*, the language of Judges Cooley and Dillon. In the *Mason* case it was further said:

"Judge Cooley in his work on *Taxation* (2d ed.) p. 681, says: 'One of the first and highest of all duties devolving upon the State is to preserve the public peace. For this purpose, peace officers are chosen, judges selected, the militia organized, and the executive armed with very high powers to meet the contingencies of riot and disorder. . . . In general, the belief has prevailed that the public peace and good order were better preserved by apportioning the duty among the several municipal divisions, retaining only a State supervision over all. . . . But if the local authorities were allowed unlimited discretion to levy or refuse to levy the necessary taxes for the support of the local police force, it might possibly happen, that, from neglect or refusal to do so, one part of the State might be left a prey to disorder and violence, to the general detriment of the State at large. Of course no State could [70] safely, for a single day, tolerate such a condition of affairs. A city or township could no more be left at liberty to decline taxation for police purposes, when the police laws and police force, and the tax which supports them are made by local law, than if all were general. The police organization of the State is really general, however it may vary in different localities, and the obligation to support it is general, however it may be apportioned. . . . The power that prescribes police regulations and varies them to meet the needs

of different localities has undoubted authority to apportion the money raised for general purposes, on its own view of the local needs. The Legislature may, therefore, require a county to appropriate part of its revenue to the special needs of the police board within its limits, and an act for that purpose is liable to no constitutional objections.'

"Judge Dillon in his admirable work on Municipal Corporations (4 ed.), in note 1, section 60, says: 'There is nothing in the maxim that "taxation and representation go together," that can preclude the Legislature from establishing in a city a metropolitan police board, with power to estimate the expenses of the police, and compelling the city authorities to raise by taxation the amount so estimated. Every city is represented in the State Legislature; and it is for that body to determine how much power shall be conferred by the municipal charters which it grants.'

"Judges Cooley and Dillon in these extracts clearly sum up the result of the authorities."

It would be a step backward for us now to say that the State of Missouri can't provide a police system for its great cities. It is a mistaken view to urge that the cities alone are interested in this matter of a police force adequate to maintaining the public peace and safety of our citizenship. The State has a vital interest. The citizens of the State, and all parts of it, are forced to these metropolitan centers for business [71] and other reasons. They may not linger long, but while there, they are entitled to that protection which only an adequate and efficient police force can give. It is not for the cities to say to the State that "we will give your citizens just such protection as we think is best." Nor can such cities say to the State, "You may man and control the police force if you desire, but if so we will starve your system to death—we hold the purse strings." These municipal corporations are subordinate to the sovereign power of the State, and whilst they do in a sense hold the purse strings, they so do by the consent of the State. Without the authority of the sovereign they would not even have a purse, much less the strings of one. The power which gave them the purse can limit the use of it. The power which placed upon that purse the strings, can loosen the strings.

So that we reiterate, by saying that it would be taking a step backward in jurisprudence to hold that the State cannot provide a metropolitan police force for our cities and compel those cities to pay the expenses thereof. Upon this question we are fully satisfied with the ruling in the Mason case, *supra*, and adhere to that ruling.

V. Counsel for respondents urge that inasmuch as Kansas City is operating under a special charter adopted under the provisions of section 16 of article 9 of the Constitution it is beyond the control of the State in matters of local self-government, and *arguendo* they insist that such city has control of the police located therein. This is not the first time that Kansas City has made this contention with reference to its police department. [Vide *State v. Police Com'rs*, 80 Mo. App. 206, 184 Mo. 109, 71 S. W. 215, 88 S. W. 27.] In this case it was contended that the charter of the city was a law unto itself and the State law must give way to the provisions of the charter. But neither the Court of [72] Appeals nor this court took that view of it. In an elaborate and cautiously written opinion, Ellison, J., for the Kansas City Court of Appeals, said:

"The important question to determine and which, as we have just said, was not considered in the Vallins case, 140 Mo. 523, since it did not arise therein and was not referred to by court or counsel therefore, is whether the Laws of 1874 and of 1875 and 1881 amendatory thereof, are yet in force and govern the Board of Police Commissioners, and, in any point of substantial repugnancy, which must give way, the law or the charter. Kansas City is organized under a special charter adopted by its own people. In matters of purely municipal concern the provisions of the charter supersede the provisions of the general law on the same subject existing when the charter was adopted, when not inconsistent, or out of harmony, with the general law. Thus, though the general law of the State provided a procedure for the exercise of the power of eminent domain in the condemnation of streets, yet this was superseded by the provisions of the charter in that respect, those provisions preserving the same substantial rights to parties affected which were guaranteed by the general law. [*State v. Field*, 99 Mo. 352; *Kansas City v. Marsh Oil Co.* 140 Mo. 458.]

"While much important governmental power concerning matters of strictly municipal or local concern may be legally embodied in the charter, yet the charter must remain in subjection to the general law. This is constantly iterated by the Supreme Court in what are known as the Park cases. [*Kansas City v. Marsh Oil Co.* 140 Mo. 458; *Kansas City v. Ward*, 134 Mo. 172; *Kansas City v. Scarritt*, 127 Mo. 642.] In the Oil Company case it is said that whenever a charter so framed comes under judicial review the inquiry is, is it in harmony with and subject to the law of the State? It is there further said, that the charter must not invade the

province [73] of general legislation, or attempt to change the policy of the State. In respect to all matters involving the relation of the city to the State and the full exercise of what is commonly known as the police power of the State the act of the Legislature will annul provisions of such a charter on the same subject. [St. Louis v. Dorr, 145 Mo. 466.]

"There are a number of illustrations of these general statements. Thus, there was a conflict between the general law and the charter of St. Louis as to the method of extending taxes and it was held the charter must give way. [State v. St. Louis, etc. R. Co. 117 Mo. 1.] In the same city there were specific provisions as to the licensing of dramshops and the collection of the revenue therefrom. In 1893 the Legislature provided for the appointment by the Governor of an excise commissioner, who, under the provisions of the act, took charge of that general subject, including the city license and revenue. The act has been upheld and the city ordinances, passed under the charter, superseded. [State v. Bell, 119 Mo. 70.] The same recognition of the rule that special charters like those of Kansas City and St. Louis are subject to the general law of the State is found in numerous other cases. [State v. Tolle, 71 Mo. 645; State v. Miller, 100 Mo. 439; State v. Higgins, 125 Mo. 364.]

"After the people of St. Louis had adopted their special charter, the Legislature passed an act concerning elections and for the appointment of a recorder of voters in all cities having a population of one hundred thousand or over, which included St. Louis. By the provisions of the charter and ordinances of that city it was the duty of the mayor thereof to appoint judges and clerks of election ten days before election day. An election was about to take place in said city for president of the board of assessors. The mayor was engaged in appointing the judges and clerks and [74] at the same time the recorder of voters, appointed by the Governor under the act of the Legislature, was also about to appoint men to the same positions. On an injunction to restrain the recorder the Supreme Court held that provisions of the charter and ordinances inconsistent with the act of the Legislature were annulled. It was said by the court that the charter was subject to the law; and that cities acting under such charters were not to be considered as a sovereignty within a sovereignty."

Later on in the same case Judge Ellison further says: "But where, in the discretion and judgment of the board the force is more numerous than it should be, it has the additional power under the law to reduce the

number by discharge from the service without notice or hearing. That the charter cannot change the State law in this respect is apparent, unless we set up the charter as superior to the State law. To grant such potency to the charter we would be brought to the position, as stated by the Supreme Court, that the power of appointment could be taken from the Governor and invested in some city functionary. And furthermore that a wholly different system of police could be introduced by the city, or indeed none at all; and thus the policy of the State be subverted."

The case reached this court, and in 184 Mo. l. c. 132, 71 S. W. 215, 88 S. W. 27, this court said:

"This narrows the case to this: Under the charter the relator was wrongfully discharged, but under the State law his discharge was legal. Which law governs? The Kansas City Court of Appeals, in an able and elaborate opinion, by Ellison, J., held that the State law controlled, and that the discharge was legal, and that conclusion was right.

"It is unnecessary, and would be futile at this time, to tread again the mazes of adjudication, perhaps to become lost in the labyrinth of the ingenious and divergent reasons which pervade the cases in respect [75] to the power of the State over municipalities incorporated under article nine of the Constitution, and in respect to the power of municipalities to adopt charters regulating matters of mere local concern, with which the State at large has no concern, which have the effect of repealing prior general State laws on the same subject, or which place such cities in respect to such matters beyond State control. The views of the author hereof on these questions are well known, and were expressed, in Owen v. Baer, 154 Mo. 434, at great length, with painful care, after exhaustive investigation, and with such poor results, that repetition or reiteration here would be offensive.

"No discussion of such questions is appropriate in this case, for this court held in State v. Mason, 153 Mo. l. c. 43, that an act creating a board of police commissioners and regulating the appointment of a police force for any city in this State is constitutional, and that such board and such metropolitan police officers are State officers. In that case Gantt, C. J., said: 'Laws like these and those of other States providing a metropolitan police system for large cities, are based upon the elementary proposition that the protection of life, liberty and property and the preservation of the public peace and order in every part, division and sub-

division of the State, is a governmental duty which devolves upon the State and not upon its municipalities any further than the State in its sovereignty may see fit to impose upon or delegate it to the municipalities. The right to establish the peace and order of society is an inherent attribute of government, whatever its form, and is coextensive with the geographical limits thereof, and touching every part of its territory.'

"Hence the Act of 1874 related to a matter which primarily belongs to the State, in which every citizen of the State had an interest, and which was therefore not simply a matter of local concern. This being true, [76] no decision that has so far been rendered gives any color or countenance to the power of the city to repeal such a State law by adopting a special charter under section 16 of article 9 of the Constitution which contains inconsistent or variant provisions touching the same subject.

"In fact that section of the Constitution expressly provides that the city may adopt a charter for its own government, but it limits this by requiring that the charter so adopted must be 'consistent with and subject to the Constitution and laws of this State.'"

In fact the very constitutional provision behind which respondents seek to hide, limits the scope of their charter powers. Such document, upon matters of general State concern, as is the peace and safety of its citizens, must be subject not only to the Constitution, but the laws of the State as well.

The first board of police commissioners for Kansas City was created by the Act of 1874. [Laws 1874, p. 327.] By this act the Governor appointed all three of such commissioners. By Act of 1875 (Laws 1875, p. 193), the law was amended so that the mayor was made *ex officio* a member of the said board, and the Governor appointed the other two. This provision continues to this day, although many amendments to the original act have been made. In these acts the city was specifically named. After 1875 the laws began to assume the plane of general laws. But we need not go into detail. There is a law of the State which covers this governmental question of State interest, and it makes no difference whether such law antedates the city charter or not, such city charter must give way to the general law. [State v. Police Com'rs, 80 Mo. App. 206, 184 Mo. 109, 71 S. W. 215, 88 S. W. 27; State v. Bell, 119 Mo. l. c. 75, 24 S. W. 765; State v. St. Louis, etc. R. Co. 117 Mo. l. c. 11, 22 S. W. 910.]

There is therefore no substance in this contention of the respondents. A metropolitan police force is a [77] matter of general

State concern, so that even if there were diverse provisions in the city charter (a matter we do not discuss, because not necessary) such provisions of the charter must yield to the State law. The establishment of a metropolitan police system for the large cities is but the exercise of the police power of the sovereign State.

VI. Counsel for respondents are finally driven to the position that the law applicable to Kansas City is different from the St. Louis law considered in the Mason case, supra, and for reasons not discussed in that case, this law is bad. It is first said:

"There are, in fact, a number of essential differences between the statute applicable to St. Louis (Secs. 9802 et seq. R. S. 1909) and the statute applicable to Kansas City (Secs. 9764 et seq. R. S. 1909).

"(a) By section 9806, the police commissioners of St. Louis are required, without discretion, to employ a specific number of policemen.

"By section 9787, Revised Statutes 1909, the police commissioners of Kansas City 'may, as the service requires, appoint' not a specified number of policemen, but 'as the service requires,' in their discretion, officers and policemen."

Counsel do not make a fair comment upon this section 9787. The section in full reads:

"The board may, as the service requires, appoint officers and patrolmen, as follows: A chief of police, at a salary of four thousand dollars per annum, and he shall not receive any fees or perquisites; one chief of detectives, at a salary of two thousand eight hundred dollars per annum; a secretary of the board, at a salary of two thousand and one hundred dollars per annum; captains, not to exceed one for each police district, at a salary of one thousand and eight hundred dollars each per annum; lieutenants, not to exceed one [78] for each police district, at a salary of one thousand and five hundred dollars each per annum; sergeants, not to exceed four to each police district, at a salary of one thousand and two hundred dollars each per annum; secretary of the chief, at a salary of one thousand and five hundred dollars per annum; a police surgeon, at a salary of not to exceed one thousand and eight hundred dollars per annum, to be fixed by the board, and he shall perform such additional duties as may be prescribed by ordinance; detective sergeants, not to exceed one for every fifteen detectives, at a salary of one thousand and five hundred dollars each per annum; police detectives, not to exceed one for every fifteen patrolmen, at a salary of one thousand and three hundred and eighty dollars each per annum; patrolmen, not to exceed one for

every seven hundred inhabitants, the estimate to be taken from the best known source for obtaining such information: *Provided*, however, that for extraordinary emergencies the board may raise such additional force as may be deemed necessary in its judgment. The salary of regular patrolmen shall be one thousand and eighty dollars each per annum, and probationary patrolmen shall receive seven hundred and eighty dollars each per annum; police matrons, at a salary of seven hundred and twenty dollars each per annum; police signal operators, not to exceed three for each police station, at a salary of seven hundred and twenty dollars each per annum; one property clerk, at a salary of one thousand and two hundred dollars per annum; hostlers, not to exceed two for each police station, at a salary of seven hundred and twenty dollars each per annum; turnkeys, not to exceed two for each police station, at a salary of seven hundred and twenty dollars each per annum; drivers, not to exceed two for each police station, at a salary of seven hundred and twenty dollars each per annum."

[79] This statute places a limit upon every act of the commissioners save and except the number of police districts and as to that nothing is said. In every other respect there is a limit beyond which the Board of Police Commissioners cannot go. The number of the patrolmen is the real basis of the force. That is definite which can be made definite. The utmost limit of patrolmen is one for every 700 inhabitants, the population from time to time to be determined by the Board of Police Commissioners. The Legislature has thus fixed a limit beyond which the Board of Police Commissioners cannot go in establishing the force. The salaries of each class is fixed. It is true that it is left to the commissioners to determine the population, but this does not invalidate the act. It may also be true that such commissioners are left to fix the number of police districts, and if they increase or decrease the number it makes but little change in the force. The basis of the force, under the statute, is the number of patrolmen, and that number cannot exceed one for every 700 population. To add a district would only add one captain, one lieutenant and four sergeants. To cut off a district would only cut off these six men. The law was intended to be flexible, and rightfully so, but this does not make it violative of any constitutional provision.

There are these and some other differences between the St. Louis law (long since declared to be constitutional) and the Kansas City law, but we are pointed to no constitutional provision which would be violated by this law, which would not be violated by the

St. Louis law. In fact, the amended return in this case does not charge that the law creating the metropolitan police system for Kansas City is unconstitutional in anyway, save and except that it is claimed that under the Constitution the charter provisions have precedence over the law. The only thing in this [80] amended return which even touches the constitutionality of the law reads as follows:

"Respondents allege that Henry L. Jost is a duly elected and qualified mayor of Kansas City, Missouri, and that the other respondents in said cause constitute the Upper and Lower House of the common council and as such are controlled by the provisions of the charter of said Kansas City, which city charter was adopted under the provisions of section 16, article 9, of the Constitution of the State of Missouri, and that such charter provides 'that within the first month of each fiscal year the mayor and common council shall by ordinance as far as practicable make an apportionment of the revenues to be raised for such year to the expenses of the several departments and for all public work under the proper headings and for such other objects as it may be necessary to provide for, and the money then in the treasury subject to the apportionment and municipal revenues shall be distributed accordingly.'

"The respondents say that in accordance with the provisions of the said charter, after estimating the revenues of the city for the fiscal year beginning April 20, 1914, at the sum of \$2,820,000, which said estimate was proper and reasonable, an ordinance was introduced in the common council of Kansas City, Missouri, apportioning said amount among the several departments of the city which sums so apportioned comprised an estimate of all revenue that would be derived from all sources during the fiscal year of 1914, and said ordinance being ordinance No. 19780 and entitled an ordinance apportioning the general fund and revenue of Kansas City, Missouri, for the fiscal year 1914, made the following apportionment."

From the beginning to the end of this amended return this is the only hint of a constitutional question, and it goes to a point already disposed of in this opinion, i. e., that the charter provisions, whilst promulgated [81] under section 16, article 9, of the Constitution must give way to a State law. The constitutionality of the St. Louis law was directly reviewed from several angles, but this court held it constitutional. That ruling, with what we have added here, as to the Kansas City charter provisions being subservient to the State law, leaves the metropolitan police law applicable to Kansas a

valid and live law. Respondents themselves do not further question it, as indicated by this excerpt from their return, *supra*, and we shall discuss that branch of the case no further.

VII. Proceeding now upon the theory that the law relating to the police system of Kansas City is a valid and binding law, how stands the case? Respondents urge that Kansas City hasn't a population of 275,000, but say that we must take the United States census of 1910 as the basis. The law does not say so. The number of patrolmen must not exceed "one for every seven hundred inhabitants, *the estimate to be taken from the best known source for obtaining such information.*" This means at the date and time the estimate is made. Under the law the police commissioners are empowered to *estimate* the population, but they need not go to the last United States census for it. They, under the law, may go to "the best known source for obtaining such information." The law uses the word "estimate," which does not indicate that the United States census is the only source of information referred to by the legislators. A census is a finding of the population and not an estimate of the population. The lawmakers had in mind that some cities might forge far ahead between the decennial periods of the Federal census, whilst others might fall back. They aimed to meet this situation in this law, by authorizing an estimate of the population. [82] The police commissioners took into consideration the last school returns, the last election returns, the estimate of the waterworks department of Kansas City, based upon recognized rules for estimating population, and other similar sources. Upon this question, the commissioner appointed by this court made the following finding:

"Therefore, I find that the estimate of the population by the Board of Police Commissioners was fair and reasonable and that on the 20th day of April, 1914, the number of the inhabitants in Kansas City, Missouri, was at least the sum of two hundred and seventy-five thousand."

As to the appropriation demanded the commissioner of this court found:

"From the foregoing, and considering also a large volume of other evidence on the subject not summarized here, I find:

"First. That there existed on April 20, 1914, a necessity for the addition of more men to the police force of Kansas City, Missouri.

"Second. That the sum of money demanded by relators, to wit, \$650,000, will provide an adequate police force for the protection of the lives and property of the citizens of Kansas City, Missouri; and that there exists

a reasonable necessity for the expenditure of said sum for that purpose in the fiscal year.

"Third. That the expenditure of said sum will not produce a police force in excess of the number authorized by the provisions of section 9787, Revised Statutes 1909."

It should be stated that our commissioner also found that the appropriations actually made by respondents to other departments of the city were necessary to the needs of those departments. All of these findings are well founded in the facts of the case, and we shall accept them as correct. In fact, counsel for respondents do not deny that \$650,000 is not a reasonable [83] sum for the police department of the city, but only claim that it would tend to cripple other departments to take that much out of their general fund for this one purpose.

The mayor of the city, in a splendid argument of his case before this court, did not deny the fact that more police protection was necessary, but argued that he could not afford more than \$500,000 out of the funds he had at his disposal, and properly take care of a deficit created before his term, and the other departments of the city government. These admitted facts bring us to face a plain legal proposition, and this we take up now. It is found that the demand made by relators was clearly within the law. It is found that the number of policemen provided for in the demand of relators is not in excess of the number provided by law. In other words the Board of Police Commissioners have made a demand fully authorized by the law, and even less than they might have demanded. On the other hand it is contended that, considering the demands of other departments, the demand of the police commissioners is unreasonable. We have here the square issue. Even if it be conceded that there is a discretion in the police commissioners as to the demands of their department, what governs that discretion? If the law gives them a discretion, and they have exercised that discretion clearly within the limits fixed by the law, can it be disturbed? We think not. Their discretion goes to the demands of the police department solely.

But let us go deeper. If, as we have held, the State can by law establish a metropolitan police system, and if by law, as, we have held, the State can compel the municipality to pay the support of such system, then isn't the fault with the Legislature and not with the officers called upon to enforce the legislative act. Had this law said there must be one policeman for every 700 inhabitants and fixed the salaries as it does, [84] what could the city have said when the demand was made for the necessary funds for support. Evidently she could have only said that the Legislature had passed an unreasonable and

harsh law, if in fact it was such a law. But the law is not bad for that reason. The Legislature is the sole judge of the reasonableness of the law. Even the courts cannot declare laws void, because the courts may deem them unreasonable. The remedy is with the Legislature and not elsewhere.

Now, if the respondents could not evade the demand under a law where the State had said you must pay for one patrolman, and other necessary officers with the patrolmen, for every seven hundred inhabitants, how can they evade the demand of the police commissioners, the State's agents, who are empowered to fix a number within a given maximum? Under the Mason case, *supra*, they could not evade the demand in the first-mentioned case. Can they in the latter? We think not. Under the Kansas City law the State empowers a given body to fix the required force from time to time, within given limits. This body in good faith, and clearly within the terms of the act fixes the force. In the absence of fraud or bad motives, these acts cannot be questioned. We need not discuss bad motives, for it is conceded in this case that the police department for efficiency needs the men. The law may be unreasonable, but that does not empower this court to act. The Legislature is the judge of that. Had the Legislature said to Kansas City and other cities of her class, you must use one-half of your funds for the metropolitan police system established by the State, this court might think the law an unreasonable law, but we could not permit an evasion of it for that reason. We can declare ordinances void for being unreasonable in their particular application, but not laws.

If therefore we concede the power of the State to establish a metropolitan police system, as we must, [85] and if we concede the power of the State to demand of the city the support of that system, as we must concede, then the reasonableness of the State's demands as to amounts as fixed by law is not for the courts. So in this case if the demand made is one thoroughly within the law, this court is powerless to help the respondents.

The very able mayor of this unfortunate city has asked us to point to the place where he can get the money to meet the demands. Counsel for relators undertake to point to the place. But we will not go into the matter of facts. We will only say that the record before us shows increased appropriation for most of the departments from 1910 to date, whilst it shows a decrease for the police department. We can only say to those officers of Kansas City that the law points to them the way. It requires the police commissioners to make their estimate and demand at the beginning of your fiscal year.

If that demand is within the law, you are then in position to meet it. At the time the law requires it to be made you have before you the whole city loaf to be cut and distributed. The law says that at the instance of the sovereign State you must cut a certain slice of that loaf for police protection to your citizens and the other citizens of the State. You then had it within your power to meet the demands of the law. If the law is a harsh one go to the Legislature.

There are other minor matters in the briefs, which we have examined and found to be without substance.

From what has been said it follows that our peremptory writ should go, and it is so ordered. Brown, Bond and Blair, JJ., concur; Woodson, C. J., dissents in an opinion filed; Faris, J., dissents; Walker, J., not sitting.

WOODSON, C. J. (*dissenting*).—I am unable to fully agree with the conclusions reached in the majority opinion filed [86] in this case, and must therefore express my views as to points of diversion.

I do not endorse the extreme views taken by counsel for either party.

In my opinion, it was not the intention of the lawmakers to empower the Board of Police Commissioners with unlimited authority to compel the city to appropriate whatever sum of money it might see proper to demand for the use of the police department regardless of the requirements of the city for the support and maintenance of the various other departments thereof. If that was true then the Board of Police Commissioners would have the power to compel the city to appropriate for its use and support the entire revenues of the city, the \$1,800,000, and thereby completely destroy the city government.

Nor upon the other hand, do I believe that it was the intention of the lawmakers to invest the city with the arbitrary power to withhold all support from the police department. If so, then the city would totally destroy the metropolitan police system, a State institution as well as a city institution, and thereby place its authority above the power of the State; and at the same time endanger the peace and safety of the city, by destroying all police protection and regulations.

My opinion is that it was the intention of the lawmakers that the entire revenues of the city should be ascertained for each fiscal year, and after that had been done, the police board and the city authorities should meet and consult together and consider the various departments of the city, including the police department, and estimate the proportionate amount each will contribute to the peace, safety, health and wellbeing of the city, and

the relative amount of money that will be required for their support and maintenance, and then apportion the entire revenues of the city among all of the departments upon that basis.

[87] In other words, the laws creating the other departments of the city are just as valid and binding as that creating the police department, and just as useful for the wellbeing of the city, differing only in degree, all of which must be maintained out of the revenues of the city, and that should be done in proportion to the amount of good each contributes to the wellbeing of the city. This is unquestionably what the lawmakers intended, and if that mode of distribution of the revenues of the city is followed, then all departments will be maintained upon an equal footing, and equally prepared to perform their duties to the city and State; and at the same time prevent the city from crippling the police department, and the latter from crippling the city or any of her departments.

Getting down to the facts of this case: During oral argument I was of the opinion that the deficits of the city were not legal obligations against it, and should not therefore be taken into consideration in the distribution of the revenues among the various departments. But since investigations made I have changed my opinion in that regard; and find that they are legal demands against the city, and she must pay them, which must come out of the revenues of the city.

With these preliminary observations as to the rules of law which should govern these matters, and after applying them to the distributions made to each department, when considered in the light of their relative benefits to the city, as shown by the evidence in the case, I am unable to see wherein any unjust discrimination has been made against the police department.

I therefore dissent.

Rehearing denied April 12, 1915.

NOTE.

Validity of Statutes Creating Metropolitan Police

Introductory, 1112.

General Rule, 1112.

Application of Rule, 1113.

Introductory.

The purpose of this note is to review the recent cases passing on the validity of a statute creating a metropolitan police force. The earlier decisions are considered in the notes to *Horton v. Newport*, 8 Ann. Cas.

1097, and *People v. Freeman*, 13 Am. St. Rep. 122, 132.

General Rule.

The rule obtains generally that the legislature has the power to enact laws for the organization of the police force of a municipality and to appoint its police officers either directly by statute or through a police board or commission appointed by a state officer, thus depriving the municipality or its voters of the right to control the local police organization or to name its police officials and placing the control in the state. *Ex p. Paducah*, 125 Ky. 510, 101 S. W. 898, 31 Ky. L. Rep. 170; *State v. Shakespeare*, 41 La. Ann. 156, 6 So. 592; *State v. Mason*, 153 Mo. 23, 64 S. W. 524; *Hardy v. Reamer*, 84 S. C. 487, 66 S. E. 678. And see the reported case. See also *State v. Edwards*, 38 Mont. 250, 99 Pac. 940; *State v. Canavan*, 155 Wis. 398, 145 N. W. 44.

The court in *Ex p. Paducah*, supra, quoting from *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477, 24 Ky. L. Rep. 384, 101 Am. St. Rep. 361, 57 L.R.A. 775, said: "A municipality has a dual character. In its character as a state agency, it exercises governmental, political, public and administrative powers and duties. In its capacity as a private corporation, it exercises rights and powers inherent in the people of the community, which have never been surrendered to any part of the government, and which are property rights within the protection of the constitution. It may be admitted that the line which distinguishes those matters with respect to which cities as state agencies, exercise governmental functions, from those as to which it acts in its private corporate capacity representing the people of the community, is not always well defined. The better opinion as to the police system seems to be that inasmuch as the state is charged primarily with the preservation of public peace, and the protection of life and property in the cities, as well as in the rural districts, city police is in a large measure at least a part of the state constabulary, and its members perform the functions of state officials in the exercise of delegated state sovereignty. Therefore, in so far as the police system of our cities forms a part of the state government, they are subject to legislative control."

In *Hardy v. Reamer*, 84 S. C. 487, 66 S. E. 678, commenting on the power of the legislature to regulate the police force of a city the court said: "A municipal corporation of this state has no inherent right to exercise police functions. The right to police the city was merely vested by statute in the mayor and aldermen. . . . They could

not delegate this power. The board of police commissioners is a state office, performing functions inherent in the sovereign state as distinguished from local municipal functions, and the mayor and aldermen could not, without the authority of the state legislature, create such a board. The ordinance of April 8, 1902, therefore derives its creative power from the Act of February 26, 1902, and the board of police commissioners for the city of Columbia is a board created by the state, and cannot be abolished by the municipality when not so authorized. The Act of 1902 gives no such authority, and none can be found elsewhere."

An enactment by the legislature which provides for the appointment of police officers does not conflict with the right of local self-government existing in the municipality as a political subdivision. The legislature has full power in respect to municipal corporations, and unless limited by the constitution it may deprive the municipality of any management in its own affairs. *Fox v. McDonald*, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L.R.A. 529; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *State v. Bennett*, 22 Neb. 470, 35 N. W. 235; *Ex p. Tracy* (Tex.) 93 S. W. 538; *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640. The court in *Ex p. Tracy*, *supra*, speaking of the power of the legislature to pass laws authorizing the governor to appoint police officers said: "A chief of police and policemen being state officers, or quasi state officers, the question recurs: Can the legislature, in granting a charter to a city, authorize the governor to appoint such officers? Under the authorities from other states above referred to, it is held that it is not an innovation of local self-government to authorize the governor to appoint them. This is not a matter to be determined by conceptions of public policy or expediency, but is purely a judicial one, so far as we are concerned; and, although it may be an invasion of our traditions with reference to local self-government in thus, through an act of the legislature, foisting minority government pro tanto on a town or city, that is something over which we have no control. Our simple duty is to construe the law as we find it written. We are unable to point out any provision of our constitution which requires policemen to be elected by the suffragists of a municipality. . . . In almost every case where this question has been before the courts of the other states, they have differentiated between a purely municipal officer, and those termed quasi state officers, holding, in the latter class of cases, that the governor could appoint, where the constitution did not prohibit such action. This is strongly persuasive to my mind, in the absence of some constitutional

prohibition on the subject, express or implied, that the governor can be empowered to make such appointment; and such is our view."

But it has been held that a statute providing that not more than two of the members of a municipal police board shall be members of the same political party is invalid as an invasion of the right to local self-government. *Rathbone v. Worth*, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408, *affirming* 6 App. Div. 277, 40 N. Y. S. 535. As to the power to prescribe political qualifications for office see the note to *State v. Wright*, Ann. Cas. 1915A 588.

Application of Rule.

A legislative enactment which provided for the appointment of a chief of police by a board of fire and police commissioners to be appointed by the governor has been held not to be repugnant to the constitution. *State v. Seavey*, 22 Neb. 454, 35 N. W. 228; *State v. Bennett*, 22 Neb. 470, 35 N. W. 235. It has been held that a statute which created a board of commissioners of police for a city, and provided that the commissioners should be appointed by the probate judge of the county, was not unconstitutional. *Fox v. McDonald*, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L.R.A. 529.

A charter of a city which provided for a board of police commissioners and placing in them the power of removing the chief of police, giving the mayor power only to suspend such officer for a short time, has been held not to conflict with a constitutional provision which gave the mayor authority to remove the officers of the municipality; since the constitutional provision did not invest the mayor with power to remove state officers. *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 32 Am. Rep. 640. The court in that case gave the reason why police officers should be under state instead of under municipal control thus: "That the chief of police is within the influence of the same principle is apparent from the most cursory reflection. Under the charter of the city of Lynchburg—and the same is true elsewhere—he has generally the power to do whatever may be necessary to preserve the good order and peace of the city. It is his duty at all times to see that the police force preserves the public peace, to prevent the commission of crime, and arrest offenders, and protect the rights of persons and property. (Sec. 36, §§ 1, 2, 3, 4, page 128, Acts of 1871 and 2; Police Regulations, § 14.) Among the thousands of citizens and strangers that enter a great city in the course of a year, in pursuit of business or pleasure, there is not one that is not interested to a greater or less degree in this officer, not only as a conservator of the peace generally, but in the special pro-

tection he affords against violence and wrong. When the mob rages in the streets, when the incendiary and the assassin are at work, they do not offend against the city, but against the state. When they are detected and arrested it is by the chief of police and his subordinates, under the authority of the state laws and as an officer of the state; and when they are tried and convicted, it is by officers representing the state and her sovereign power."

It has been held that a statute which provided for the appointment by the governor of a bureau of public safety, consisting of five members and confiding in such bureau "full power and control and the management of the police department, and the fire department, the organization and government and discipline of such department and the custody and control of all public property, books, records, and equipments thereto belonging to such department," was unconstitutional in so far as it referred to the fire department, but it was said that had the act been confined to the police department it would have been constitutional. *Davidson v. Hine*, 151 Mich. 294, 14 Ann. Cas. 352, 115 N. W. 246, 123 Am. St. Rep. 267, 15 L.R.A. (N.S.) 575, 14 Detroit Leg. N. 957.

It has been held that an act by the legislature of Louisiana creating a police board for the city of New Orleans to be elected by the city council was not unconstitutional as depriving the city of self-government. *State v. Shakespeare*, 41 La. Ann. 156, 6 So. 592, wherein the court said: "Those matters, which are of concern to the state at large, although exercised within defined limits—such as the administration of justice, the preservation of the public health, and the regulation of public morals—are still under legislative control, while the enforcement of municipal by-laws are matters for purely local legislation and control. In its public capacity, as a part of the state machinery, the corporation of the city of New Orleans owes a responsibility to the state government in the performance of acts for the public benefit, and in the regulation of this responsibility—the manner in which these acts shall be done, and by whom—the authority of the state is supreme. *Dil. Mun. Corp. § 66.*"

It has been held that where the legislature provides for a commission form of government for cities it has the power to prescribe the qualifications for the police commissioners of those cities. *State v. Canavan*, 155 Wis. 398, 145 N. W. 44.

In *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, the court in an extensive discussion of the power of the legislature to enact laws governing the appointment of municipal officers distinguished the police act from other acts thus: "The general purposes of

the police act were such as appertain directly to the suppression of crime and the administration of justice. There is, therefore, no constitutional reason for holding it to be other than a regulation of matters pertaining to the general policy of the state, and subject to state management."

It has been held that an act which made a county chargeable with part of the expense of a police force of a city within its boundary was not in violation of the constitutional provision against the taking of private property for public uses without compensation as the police force is an agency of the state government and performs public duties. *State v. St. Louis County Ct.* 34 Mo. 546.

HOPKINS ET AL.

v.

CITY OF RICHMOND.

COLEMAN

v.

TOWN OF ASHLAND.

Virginia Supreme Court of Appeals—
September 9, 1915.

117 Va. 692; 86 S. E. 139.

Municipal Corporations — Police Power — Segregation of Races in Residential Districts.

An ordinance making it unlawful for any white person to occupy as a residence any building on any street on which a greater number of houses are occupied as residences by colored people than by white people, and making it unlawful for any colored person to occupy as a residence any house on any street on which a greater number of houses are occupied as residences by white people than by colored people, is constitutional in so far as it applies to persons whose rights as owners or tenants have accrued since the passage of the ordinance, and is invalid only so far as it restricts the right of any white or colored person to move into and occupy property of which he was the owner at the time of the going into effect of the ordinance.

[See note at end of this case.]

Same.

The invalidity of so much of an ordinance providing for the segregation of the races as limits the rights of any white or colored person to occupy property of which he was the owner at the time the ordinance went into effect does not render invalid so much of the ordinance as applies to persons whose rights

as owners or tenants accrued since the passage of the ordinance.

[See note at end of this case.]

Implied Powers of Municipality.

A municipal corporation has the powers granted to it in express words, and the powers necessarily implied or incident to the power expressly granted, and the powers absolutely essential to the declared object and purpose of the municipal corporation, and not simply convenient, but indispensable, and those granted by statute to such corporations generally.

Same.

Any fair, reasonable doubt of the existence of a power of a municipal corporation is resolved by the courts against the corporation, and the power is denied.

Express Grant as Negating Pre-existing Power.

The passage of a statute expressly conferring power on a municipal corporation does not necessarily preclude the pre-existence of the power.

Segregation of Races — Validity.

Under Code 1904, § 1038, conferring on cities and towns the right to preserve the peace and good order within their limits, a town has the implied and incidental power to pass an ordinance segregating the white and colored races, if it tended to promote peace and good order, under the exercise of the "police power," which includes the inherent sovereignty, which is the right and duty of the government, or its agents, to exercise whatever public policy demands for the benefit of society at large, to guard its morals, safety, health, and order, or to insure such economic conditions as an advancing civilization requires.

[See note at end of this case.]

Same.

An ordinance making it unlawful for any white person to occupy as a residence any building on any street on which a greater number of houses are occupied as residences by colored people than are occupied by white people, and making it unlawful for any colored person to occupy as a residence any house on any street on which a greater number of houses are occupied as residences by white people than by colored people, does not depend on any subsequent action or consent of any one, but becomes effective on its passage, and there is no delegation of authority by the legislative body.

[See note at end of this case.]

Reasonableness of Ordinance — Judicial Review.

Whether an ordinance is unreasonable, and hence void, is for the court; but, in determining the question, it must regard the circumstances of the municipality, and the objects sought to be attained, and the necessity existing for the ordinance.

[See Ann. Cas. 1914B 204.]

Segregation of Races — Validity.

An ordinance making it unlawful for any white person to occupy as a residence any house on any street on which a greater num-

ber of houses are occupied as residences by colored people than are occupied by white people, and making it unlawful for any colored person to occupy as a residence any house on any street on which a greater number of houses are occupied as residences by white people than by colored people, is prospective only in its application, and does not deprive any person of his rights or property existing at the time of its passage.

[See note at end of this case.]

Police Power — Restriction on Use of Property.

A municipal corporation, invested by its charter or by general statute with power to preserve the peace and health, may restrict the use of private property in the interest of the public, providing the restriction is reasonable.

Abridgment of Privileges of Citizen — Scope of Federal Constitution.

The Fourteenth Amendment (9 Fed. St. Ann. 392) draws a distinction between a citizen of the United States and a citizen of a state, and classifies the privileges of citizens into those which they have as citizens of the United States and those which they have as citizens of the state wherein they reside, and forbids the abridging of the privileges of a citizen of the United States, but does not forbid the state from abridging the privileges of its own citizens.

Constitutional Law — Persons Entitled to Raise Question — Validity of Ordinance.

A colored man, who purchased a residence in the district of a municipality set apart by a prior ordinance to white people, cannot assail the ordinance as depriving him of liberty or property without due process of law.

[See 19 Ann. Cas. 175; Ann. Cas. 1915C 57.]

Segregation of Races — Validity.

An ordinance providing for the segregation of the races within a municipality does not deny to any person the equal protection of the laws, for there is no discrimination between the races, and it operates alike on all persons and property under the same circumstances and conditions.

[See note at end of this case.]

Constitutional Law — Presumption of Validity of Statute.

Any doubt in favor of the validity of a statute must be resolved in favor of validity.

[See 6 R. C. L. tit. *Constitutional Law*, p. 97.]

Municipal Corporation — Ordinance — Effect as Law.

An ordinance properly enacted has all the force of a law within the limits of the municipality.

[See Ann. Cas. 1917C 687.]

Segregation of Races — Validity.

Ordinances providing for the segregation of the races, when intended to operate as bona fide police regulations and reasonably necessary for that purpose, operate reasonably, without unduly interfering with private rights, and are constitutional.

[See note at end of this case.]

Error to Hustings Court of Richmond.

Prosecution of Mary S. Hopkins et al., for violation of municipal ordinance. Defendants convicted and bring error. **AFFIRMED.**

Error to Circuit Court, Hanover county.

Prosecution of John Coleman for violation of municipal ordinance. Defendant convicted and brings error. **AFFIRMED.**

[694] The following is a copy of the ordinance of the city of Richmond:

AN ORDINANCE

(Approved April 19, 1911.)

To secure for white and colored people respectively the separate location of residences for each race.

Be it ordained by the council of the city of Richmond:

1. That it shall be unlawful for any white person to occupy as a residence or to establish and maintain as a place of public assembly, any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by colored people than are occupied as residences by white people.

2. That it shall be unlawful for any colored person to occupy as a residence or to establish and maintain as a place of public assembly, any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by white people than are occupied as residences by colored people.

3. That no person shall construct or locate on any block or square on which there is at that time no residence, any house or other building intended to be used as a residence, without declaring in his application for a permit to build, whether the house or building so to be constructed is designed to be occupied by white or colored people, and the building inspector of the city of Richmond shall not issue [695] any permit in such case unless the applicant complies with the provisions of this section.

4. That nothing in this ordinance shall affect the location of residences made previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent the occupation of residences by white or colored servants or employees, on the square or block on which they are so employed.

5. Every person either by himself or through his agent violating, or any agent for another violating, any one or more of the provisions of this ordinance, shall be liable

to a fine of not less than one hundred nor more than two hundred dollars recoverable before the police justice of this city of Richmond, and, in the discretion of the police justice such person may, in addition thereto, be confined in the city jail not less than thirty nor more than ninety days.

6. This ordinance shall be in force from its passage.

The following is a copy of the ordinance of the town of Ashland:

AN ORDINANCE.

(Approved September 12, 1911.)

To secure for white and colored people respectively the separate location of residence for each race.

Be it ordained by the council of the town of Ashland, Va.:

1. That it shall be unlawful for any white person to occupy as a residence or to establish and maintain as a school or place of public assembly, any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by [696] colored people than are occupied as residences by white people.

2. That it shall be unlawful for any colored person to occupy as a residence or to establish and maintain as a school or place of public assembly, any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by white people than are occupied as residences by colored people.

3. On all streets upon which no house is occupied the color of residence, schools and places of public assembly shall be governed by the adjacent streets, and any person desiring to build on such vacant street shall state whether the house or building so to be constructed is designed to be occupied by white or colored people, and the building committee of the town of Ashland shall not issue any permit in such case unless the applicant complies with the provisions of this section.

4. That nothing in this ordinance shall affect the location of residences made previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent the occupation of residences by white or colored servants or employees, on the lot on which they are so employed.

5. Every person either by himself or through his agent violating, or any agent for another violating, any one or more of the provisions of this ordinance, shall be liable to a fine of not less than twenty nor more than fifty dollars, recoverable before the mayor of the town of Ashland, Va., and, in the discretion of the mayor such person may,

in addition thereto, be confined in jail not less than thirty nor more than ninety days.

6. This ordinance shall be in force from its passage.

Alfred E. Cohen and J. R. Pollard for Hopkins et al.

J. R. Pollard, C. B. Jones, Jr., and Bremner & Bazile for Coleman.

H. R. Pollard for city of Richmond.

James E. Cannon and H. R. Pollard for town of Ashland.

[697] BY THE COURT.—These cases are before us on writs of error to judgments of the Hustings Court of the city of Richmond and the Circuit Court of the county of Hanover, respectively, maintaining the constitutionality of so-called segregation ordinances of the city of Richmond and the town of Ashland. These ordinances appear in the official report. The cases involve the same questions, were heard together, and we shall dispose of them accordingly.

We are of opinion that the ordinances are constitutional and valid in so far as they apply to persons whose rights, either as owners or as tenants, have accrued since the enactment of the ordinance. In case No. 1 the plaintiff in error, Mary S. Hopkins, is a negro and the plaintiff in error, Amedio Toni, is a white man. Neither of these parties, however, owns the property, but they were renters of the premises into which each moved as tenant subsequent to the enactment of the city ordinance and in violation thereof. In case No. 2, the plaintiff in error, John Coleman, is a negro, and subsequent to the enactment of the ordinance of the town became the owner of and moved into the property affected. The question, therefore, as to the effect of the ordinances upon persons whose *right of occupancy* [698] as owners vested prior to the enactment of the ordinances does not specifically arise in these cases. It is contended, however, that the ordinances are not separable and that all their provisions must stand or fall together. We cannot accept this view, and are of opinion that they are divisible. It is true that sections one and two of each ordinance employ general terms which apply alike to persons owning property at the time the ordinances take effect and to persons acquiring property thereafter, but the effect is not different from what it would have been if these sections had each been subdivided so as to embrace in one paragraph persons owning property at the time the ordinance became effective, and in another paragraph persons subsequently acquiring property. If the ordinances were thus subdivided, and if it be conceded (as we feel constrained to hold) that they cannot be upheld as to property owners whose right of

occupancy had vested at the time of their enactment, then we think it would be perfectly clear under the authorities that we could strike out and disregard the invalid subdivisions and uphold the validity of the remaining sections. *Black v. Trower*, 79 Va. 123, 127; *Trimble v. Com.* 96 Va. 819, 821, 32 S. E. 786; *Robertson v. Preston*, 97 Va. 296, 300-301, 33 S. E. 618; *Berea College v. Kentucky*, 211 U. S. 45, 54-5, 29 S. Ct. 53, 53 U. S. (L. ed.) 81. Nor can we see that the power of the court thus to give effect to one feature of an ordinance when another feature thereof is void can be affected by the mere matter of articulation and phraseology.

In the instant cases, in which, as we have seen, no question as to pre-existing rights arises, we have no doubt as to the validity of the ordinances as applied to the plaintiffs in error, and no doubt, therefore, as to the correctness of the judgments complained of.

[699] We are further of opinion that in so far, and only in so far, as the enactments in question limit or restrict the right of any white or colored person to move into and occupy property of which he was the owner at the time such enactments went into effect, they are beyond the police power of the municipalities and are invalid and inoperative. While it is true, as claimed by counsel for defendants in error, that the ordinances "do not move a single negro or a single white person from the home in which they may be living at the time of" their enactment, it is also true that their provisions are broad enough to prohibit both white and colored persons who own but do not occupy property at the time they take effect from thereafter, at their pleasure, moving into and personally occupying and enjoying the same. It is this latter result which we think the ordinances cannot lawfully bring about, and it is in this respect, and in this only, that we do not concur in the effect of the opinion of the circuit court hereinafter set out in full.

As already indicated, the particular retrospective effect of the enactments under consideration which we have condemned is not specifically involved in the judgments before us. We have dealt with this feature of the ordinances, however, because it is so closely related to the contention that they must be sustained or annulled as a whole, and because all the questions involved are of such general and public concern as that we deemed it proper to express fully our conclusions upon the whole subject.

In a written opinion in case No. 2, the judge of the Circuit Court of Hanover county has fully discussed the principles involved in these cases, except in so far as that opinion may be construed to hold that the provisions of these ordinances may deny to persons who have acquired title to real estate prior to the

enactment of the ordinances [700] the right thereafter personally to enjoy and occupy the same.

In addition to the authorities referred to by the judge of the Circuit Court of Hanover county, we will add at the foot of his opinion a reference to certain other authorities which in our opinion tend to elucidate the important questions involved and to sustain the judgments under review.

The opinion is as follows:

"This case, which is a prosecution against John Coleman for the violation of an ordinance, passed by the town council of Ashland, on the 12th day of September, 1911, entitled an ordinance 'to secure for white and colored people, respectively, the separate location of residences for each race,' involves the validity of said ordinance, and was submitted to the court for decision, by agreement of parties, without the intervention of a jury, and, upon an agreed statement of facts as follows:

"It is agreed by counsel for both parties that the ordinance under which this prosecution is had was ordained on the 12th day of September, 1911, which ordinance is hereby made a part of this agreed statement of facts; that subsequent to said date, the defendant, John Coleman, purchased a certain residence property on Clay street, in the town of Ashland; that on said 12th day of September and ever since there were and are more houses on Clay street occupied as residences by white people than by colored people; that said defendant is a colored man and that, subsequent to his purchase aforesaid he moved into said property and occupied the same as a residence and has continued so to do. It is also agreed, subject to exception as to admissibility, that at the time of the purchase aforesaid, the said property was in the possession of a colored tenant, who has continued to occupy said premises as a residence as a monthly tenant."

[701] "(Section 1) of the ordinance makes it unlawful for any white person to occupy as a residence any house upon any street, or alley, between two adjacent streets on which a greater number of houses are occupied as residences by colored people than are occupied as residences by white people.

"(Section 2) makes it unlawful for any colored person to occupy as a residence any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by white people than by colored people.

"(Section 4) limits the application of the ordinance prospectively only.

"(Section 5) provides for the imposition of a fine for the violation of the ordinance, and, in the discretion of the mayor, a jail sentence, in addition, of not less than thirty nor more than ninety days.

"After the passage of the ordinance, the defendant, John Coleman, a colored man, acquired by purchase, and undertook to occupy as a residence, a certain house upon Clay street, which, at that time, had a greater number of houses occupied by white persons than by colored persons. A warrant was thereupon sworn out against the defendant, who was tried before the mayor of Ashland, convicted of having violated the ordinance, and fined. Coleman, thereupon, took an appeal, and is relying for his defense upon the alleged invalidity of the ordinance in question.

"As I view this case, it is necessary to consider and determine four questions:

"First: Did the town council of Ashland have authority to pass such an ordinance in exercise of the police power?

"Second: If so, did it, in violation of law, delegate such authority to residents upon, or lot owners on, any street or block?

[702] "Third: Is the ordinance a reasonable exercise of the police power?

"Fourth: Is it in violation of the Fourteenth Amendment of the Constitution of the United States?

I.

The Authority of the Council to Pass Such an Ordinance in the Exercise of the Police Power.

"A municipal corporation possesses, and can exercise the following powers and no others: 1st. Those granted in express words; 2d. Those necessarily implied, or necessarily incident to the power expressly granted; 3rd. Those absolutely essential to the declared object and purpose of the corporation, not simply convenient, but indispensable. *Treadway v. Schnauber*, 1 Dak. 227, 46 N. W. 464; *Vincent v. Nantucket*, 12 Cush. (Mass.) 103; *Clark v. Davenport*, 14 Ia. 494; *Clark v. Des Moines*, 19 Ia. 199, 87 Am. Dec. 423; *Minturn v. Larue*, 23 How. (U. S.) 435, 16 U. S. (L. ed.) 574; *Chillicothe Bank v. Chillicothe*, 7 Ohio 31, Pt. 2, 30 Am. Dec. 185; *Collins v. Hatch*, 18 Ohio 523, 51 Am. Dec. 465; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Richmond v. Lynch*, 106 Va. 324, 56 S. E. 139. It is furthermore true that any fair, reasonable doubt, concerning the existence of power, is resolved by the courts against the corporation, and the power is denied. (Same authorities.)

"It is conceded in the argument that the charter of the town of Ashland does not confer upon the town council authority to pass an ordinance providing for segregation of the races, nor does it confer any general police power. It is, however, true that the municipal corporations in Virginia can exercise not only those powers granted by their charters, but they can exercise those powers

granted to them by general statutes, applying to all cities and towns [703] in the State, and it seems to follow that they can, under such a general statute, exercise: 1st. Those powers granted in express words; 2nd. Those necessarily implied, etc., and 3rd. Those absolutely essential to the declared object, etc., of the corporation, etc.

"Section 1038 of the Code of 1904 declares that the cities and towns of the Commonwealth, among other powers enumerated, shall have the right to 'preserve the peace and good order, within their limits, and it was under authority of this general statute that the ordinance in question was passed. The town council is not given authority in express words, either by its charter, or by the general statute above referred to (Sec. 1038), to pass an ordinance providing for the separation of the races so far as residence is concerned. (There is, however, a general statute, passed some six months after the passage of the ordinance, which confers the express authority upon all the cities and towns of the State, and provides for separate residential districts for white and colored people, upon certain conditions. Acts 1912, page 330. But the passage of this subsequent statute does not preclude the existence of the power hitherto, as is often evidenced by statutory enactment of the pre-existing common laws.) Therefore, at the time of the passage of the ordinance, the town council of Ashland had no authority, in express words, to pass such an ordinance. It did have, however, under section 1038 of the Code, express authority to preserve the peace and good order within its limits, and therefore, impliedly, to pass an ordinance necessarily incident to the power expressly granted. Therefore (independently of any objections raised to the ordinance, which will be considered hereafter), if this ordinance tended to promote peace and good order within the town of Ashland, it was within the implied and incidental powers of the town of Ashland to pass the ordinance, under the exercise of the police power conferred upon it by section [704] 1038 of the Code of 1904. For the distinction as to the powers referred to see: *Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L.R.A. 269; 1 *Dillon Mun. Corp. secs. 319, 328*, and authorities cited.

"Police power is defined in 8 Cyc. 863, as 'The name given to that inherent sovereignty which is the right and duty of the government, or its agents, to exercise whatever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a higher complex character requires.'

"Chief Justice Shaw, in *Com. v. Alger*, 7 Cush. (Mass.) 85, declared: 'It is much

easier to preserve and realize the existence and sources of this power than to mark its boundaries, or to prescribe limits to its exercise;' and in *Com. v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450, it is said, 'No exposition has been given of this power more thorough and satisfactory or more often quoted with approval, than that of Chief Justice Shaw.'

"In *Champer v. Greencastle*, 138 Ind. 339, 35 N. E. 14, 24 L.R.A. 768, 46 Am. St. Rep. 390, it is stated 'that police power of the State, so far, has not received a full and complete definition. It may be said, however, to be the right of the State, or State functionary, to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community, which do not encroach on a like power vested in Congress by the Federal Constitution, or which do not violate any of the provisions of the organic law.'

"It is defined in *Rochester v. West*, 29 App. Div. 125, 51 N. Y. S. 482, as 'a power which inheres in the State, and in each political division thereof, to protect by such restraints and regulations as are reasonable and [705] proper, the lives, health, comfort and property of its citizens.'

"As before observed, the ordinance under consideration was passed on the 12th day of September, 1911, and the following March (1912), the legislature of Virginia solemnly declared that the residences of white and colored citizens in close proximity to one another in the cities and towns throughout the State endangered the preservation of public morals, public health, and public order, and they proceeded to empower the cities and towns of the State to pass ordinances providing for separation of the races within their limits. Acts 1912, page 330. It is manifest that, if this condition existed in March, 1912, it existed also in September, 1911, and that if the town of Ashland had authority under its charter, or general law, or impliedly, in September, 1911, to pass ordinances in the exercise of police power, to remedy this evil, it was the duty of the council to do so. The law-making power is the sole judge of when, if at all, it will enact public laws. *Toledo, etc. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Miller v. Fitchburg*, 180 Mass. 32, 61 N. E. 277, and the full measure of discretion is conceded to the legislative body of the municipality as of the State. *Knapp, etc. Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102.

"Consequently, when the legislature declared that a condition existed, in the early part of 1912, which endangered the 'public order,' it would seem to follow that the town of Ashland, in the latter part of 1911, was acting clearly within its powers, when it undertook to preserve good order within its confines by the passage of this ordinance.

"The fact that the town realized the grave danger liable to ensue, and which had resulted, as evidenced by the passage of various acts of the General Assembly, providing for separate coaches on trains, separate waiting rooms at stations, [706] separate schools, etc., from too close association of the races, and took action in advance of that of the legislature along the same lines, is no argument against its power to pass the ordinance.

"I think, therefore, there can be no doubt as to the power of the council of the town of Ashland, under the general grant of power conferred by section 1038 of the Code of 1904, as well as under its incidental powers as a municipal corporation, to pass the ordinance in question, provided it is not objectionable on other grounds.

II.

Did the Town Council of Ashland Delegate Their Authority to Residents and Lot Owners on the Various Streets and Blocks, Etc.

"It is true that, so far as the functions of a municipal corporation are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or any other authority. Cooley's Const. Lim. (7th ed.) 293; McCrowell v. Bristol, 89 Va. 652, 16 S. E. 867, 20 L.R.A. 653. There is, however, no delegation of authority by the town council of Ashland in the ordinance under consideration. In this case the operation of the ordinance does not depend upon the subsequent action, or consent, of any one, but immediately upon its passage it becomes effective prohibiting the establishment of residences, in the future, upon any given street, or block, by white, or colored, people not upon the consent, or by action of a majority of the residents of such block, or street, but by the fact as to whether a majority of residents of such block, or street, are white or colored. [707] What authority have such residents in the premises? Absolutely none.

"A number of cases were cited by the learned counsel for the defendant where the delegation of authority was plain. In the case of Chicago v. The Gunning System, 114 Ill. App. 377, the city council passed an ordinance regarding the erection of billboards along pleasure drives and boulevards, as follows: 'No such sign or billboard shall be erected upon or along any boulevard or pleasure drive or in any street where three-quarters of the buildings in such street are devoted to residence purposes only, *unless the person or persons desiring to erect such sign or billboard shall first have secured the consent, in writing, of three-quarters of the resi-*

dents and property owners on both sides of the street, etc. The ordinance was declared invalid, among other reasons, because the operation of the ordinance was dependent entirely upon the subsequent action or will of the land owners and residents.

"But in Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 35 L.R.A. 84, 53 Am. St. Rep. 325, an ordinance, which provided that 'It shall be unlawful for any person to locate, build, construct, or keep in any block in which two-thirds of the buildings are devoted exclusively to residence purposes, a livery, boarding, or sales stable, etc., within 200 feet of such residence on either side of the street, unless the owners of a majority of the lots in such block, etc., consent in writing, etc.' was declared valid by the same court which decided Chicago v. The Gunning System, supra, the court holding that in the case of Chicago v. Stratton the ordinance was not a delegation of legislative power to property owners, but that it provided for a contingency upon the happening of which the ordinance will be inoperative in certain localities. To the same effect, see also Bull v. Read, 13 Grat. (Va.) 78; The Aurora v. U. S. 7 Cranch. 382, 3 U. S. (L. ed.) [708] 378. It needs no argument to demonstrate that if there was no delegation of authority in these cases there is none in the case at bar, and it is so held.

III.

Is the Ordinance a Reasonable Exercise of the Police Power?

"Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specific and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable, or against sound policy. But where the power to legislate in a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid. 1 Dillon Mun. Corp. secs. 319, 328, and authorities cited.

"It has been shown above that if the town council of Ashland had authority to pass the segregation ordinance under consideration in September, 1911, it derived such authority from section 1038 of the Code, which is a grant of power general in its nature, or it is

an incidental power of the municipality. Therefore, the ordinance must be a reasonable exercise of the power conferred.

"Whether a particular ordinance is unreasonable, and therefore void, is a question for the court, but in determining it the court will have regard to all the circumstances [709] of the city and the objects sought to be attained, and the necessity which exists for the ordinance. 1 Dillon Mun. Corp. sec. 327; Toledo, etc. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Miller v. Fitchburg, 180 Mass. 32, 61 N. E. 277.

"The central idea of the ordinance under consideration seems very manifest. It is to prevent too close association of the races, which association results, or tends to result, in breaches of peace, immorality and danger to the health. The history of legislation on this subject heretofore adverted to, as well as the *phraseology* of the ordinance itself, confirm this view. The attainment of the objects in view is one much to be desired, and if the ordinance is not necessarily oppressive or unreasonable, it is the duty of the court to hold it valid, provided it does not conflict with the limitations placed upon legislative bodies by the Constitution of Virginia, or that of the United States (which proposition will be considered later). An analysis of the ordinance, in the light of the facts agreed upon, should determine this question. The ordinance is prospective in its application. It does not affect rental contracts existing at the time of its passage. It does not divest any person of his property, or rights therein, at the time of the passage of the ordinance. Any white person owning property and occupying it in a street, or block, at the passage of the ordinance, known after the passage of the ordinance as a colored block, is not affected by the ordinance either as to his ownership, or occupancy, but he may, if he wills, continue to own and occupy his property as before its passage. The same thing applies to colored persons, under like circumstances. Under the ordinance, either colored or white persons may, after the passage of the ordinance, purchase and hold property wherever they may desire within the corporate limits. The only right affected by the ordinance is the right to occupy houses [710] in certain streets, or blocks, as residences, and this regulation of the use of property applies without discrimination to all white and colored persons alike within the town of Ashland.

"It would seem that, if a municipal corporation has authority to provide for separation of the races within its limits, no more reasonable, or less oppressive, ordinance could be devised than the one under consideration.

"In Polglaise v. Com. 114 Va. 850, at p. 860, 78 S. E. at p. 900, a case in which the Ann. Cas. 1917D—71.

question of the reasonableness of a resolution of the board of supervisors of the county of Spotsylvania, looking to the protection of the improved roads of the county, passed under the police power of the county, was raised, Cardwell, J., said: 'The General Assembly is a co-ordinate branch of the State government, and so is the law-making power of municipal corporations within their prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. Where, therefore, municipal corporations or their officers are acting within well-recognized powers, or exercising discretionary power, the courts are wholly unwarranted in interfering, unless fraud is shown, or the power or discretion is being manifestly abused, to the oppression of the citizen. Wagner v. Bristol Belt Line Co. 108 Va. 594, 62 S. E. 391, 25 L.R.A. (N.S.) 1278.

"It has been repeatedly decided by this court, and well recognized by text-writers and in the decided cases in other jurisdictions, as settled law, that courts can interfere only to prevent a fraudulent and manifestly abusive or oppressive exercise of the powers conferred upon the council of a city by its charter or the general law, since the discretion of municipal corporations, within the sphere of their powers, is as wide as that possessed by the government of a State. Wagner v. Bristol Belt Line Co. supra: Elsner v. [711] Hawkins, 113 Va. 47, 73 S. E. 479, Ann. Cas. 1913D 1278.

"In the case at bar there is no evidence of any sort whatever appearing in the record to show that the ordinance complained of was unreasonable or unnecessary. On the contrary, the court would take judicial notice of the fact that 'the preservation of public morals, public health and public order in the cities and towns of this State is endangered by the residence of white and colored people in close proximity to one another.' Acts 1912, p. 330.

"Upon the facts in this case, John Coleman, a colored man, in spite of the fact that he knew, or ought to have known, the law, after its passage, purchased the residence, and, in violation of the ordinance, occupied it. If the ordinance is valid in other respects, he is hardly in a position now to take advantage of his own wrong, upon a plea that he is being unreasonably deprived of the use of his property.

"There is no question about the authority of a municipality invested by its charter or by general statute with power to preserve the peace and health, to restrict the use of private property in the interest of the public, provided the restriction is reasonable. 1 Dillon Mun. Corp. sec. 144 and note; Slaughterhouse Cases, 16 Wall. 62, 21 U. S. (L.

ed.) 404; Taunton v. Taylor, 116 Mass. 254; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Brown v. Keener, 74 N. C. 714; Pool v. Trexler, 76 N. C. 297; Com. v. Alger, 7 Cush. (Mass.) 84; Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545, 8 L.R.A. 854, 26 Am. St. Rep. 659. In the last named case an ordinance passed by the town council, in the exercise of police power, prohibited the cultivation for agricultural purposes of more than one-eighth of an acre by any family or household within the corporation limits except for flowers, etc., was held valid and declared to be a reasonable exercise of the police power. Every [712] citizen holds his land subservient to such police regulation as the legislature in its wisdom may enact for the general welfare. Brown v. Keener, *supra*; Pool v. Trexler, 76 N. C. 297.

"Every citizen holds his property subject to the proper exercise of this (police) power either by the State legislature directly, or by municipal corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled "Police Laws or Regulations;" and it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner; if he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever without his consent, nor for any public use without compensation. Still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. Those regulations rest upon the maxim, *salus populi suprema est lex*. This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not a taking of private property for public use,' etc. 1 Dillon Mun. Corp. (3rd ed.) sec. 141.

"In the great leading case upon the subject of Com. v. Alger, 7 Cush. (Mass.) 85, Chief Justice Shaw said: 'Rights [713] of property like all other social and conventional rights are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such rea-

sonable restraints and elections established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use whenever the public exigency requires it—which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the public power—the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties, or without, not repugnant to the Constitution as it shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.'

"As has been heretofore said, police power extends to the protection of the lives, limbs, health, comfort, morals and quiet of all persons, and it has been seen that in promoting these benefits of the public, any reasonable restriction may be placed upon the use of private property, and that such restrictions do not constitute condemnation of private property for public use. It is the declared policy of this State that close association of the races tends to breach of the peace, unsanitary conditions, discomfort, immorality and disquiet. Hence the legislature has seen fit to confer express authority upon the cities and towns of the Commonwealth to enact segregation ordinances. It has provided for separate coaches on the railroads of the State, and separation on the street cars, separate waiting rooms at railroad stations, and separate schools, all because these things promote peace, good order, health and morality.

[714] "In view of all this there appears to be nothing unreasonable in placing the restriction above set out on the use of property to the same end.

IV.

The Fourteenth Amendment.

"We have only to deal with the first section of this amendment, which is as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"It will thus be seen that the amendment itself draws a sharp distinction between a

citizen of the United States and a citizen of a State, and classifies the privileges of citizens into those which they have as 'citizens of the United States' and those which they have as 'citizens of the State wherein they reside.' *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 U. S. (L. ed.) 629; *Gibbons v. Ogden*, 9 Wheat. 203, 6 U. S. (L. ed.) 23; *New York v. Miln*, 11 Pet. 133, 9 U. S. (L. ed.) 648; *Scott v. Sandford*, 19 How. 404, 15 U. S. (L. ed.) 691; *License Tax Cases*, 5 Wall. 471, 18 U. S. (L. ed.) 497; *Paul v. Virginia*, 8 Wall. 180, 19 U. S. (L. ed.) 357; *The Slaughterhouse Cases*, 16 Wall. (U. S.) 36, 21 U. S. (L. ed.) 394; *U. S. v. Reese*, 92 U. S. 214, 23 U. S. (L. ed.) 563; *U. S. v. Cruikshank*, 92 U. S. 542, 23 U. S. (L. ed.) 588.

"The Constitution forbids the abridging of the privileges of a citizen of the United States, but does not forbid the State from abridging the privileges of its own citizens.

"The rights which a person has as a citizen of the United States are those which the Constitution and laws of the [715] United States confer upon a citizen as a citizen of the United States. For instance, a man is a citizen of a State by virtue of his being resident there; but if he moves into another State, he becomes at once a citizen there by operation of the Constitution making him a citizen there, and needs no special naturalization which, but for the Constitution, he would need.

"On the other hand, the rights and privileges, which a citizen of a State has are those which pertain to him as a member of society and which would be his if his State were not a member of the Union. Over these the States have the usual power belonging to government, subject to the proviso that they shall not deny to any person within the jurisdiction (*i. e.*, to their own citizens, the citizens of other States, or aliens) the equal protection of the laws. These powers extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties (privileges), and properties of people, and of the internal order, improvement and prosperity of the State. *Federalist*, No. 45. As was said by Chief Justice Marshall in the *Dartmouth College Case*: 'The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed.' If, in the *Slaughterhouse Cases*, the privilege of butchering animals was of the class belonging to persons as citizens of the State of Louisiana and not belonging to them as citizens of the United States, it is difficult to see why the right here to reside where one chooses is not a right to be exercised by a citizen of the State

of Virginia and not as a citizen of the United States.

"Passing now to the second part of the declarative clause of the amendment, it is equally clear that the defendant has not been deprived of his life, liberty, or property, without [716] due process of law, nor do I understand he is making any such contention.

"The third part of this clause prohibits the State from denying to any person within its jurisdiction the equal protection of the laws, and it is on this point that most, if not all, of the cases have turned, which involve so-called discriminatory legislation as respects the races.

"The theory on which such legislation is based cannot be better illustrated than by the liberal quotation from the case of *West Chester, etc. R. Co. v. Miles*, reported in 55 Pa. St. 209, 93 Am. Dec. 744, involving the legality of a separate law on public conveyances. 'To assert separateness is not to declare inferiority in either race. It is not to declare one a slave and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice or caste, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.'

"In *Munn v. Illinois*, 94 U. S. 113, 24 U. S. (L. ed.) 77, C. J. Waite, in commenting upon the definition of police powers by C. J. Taney in the *License Cases*, to the effect that they are nothing more or less than the powers of government inherent in every sovereignty—that is to say, the power to govern men and things—said: 'Under these powers the government [717] regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good.'

"In the well-considered case of *Barbier v. Connolly*, 113 U. S. 27, on p. 31, 5 S. Ct. 357, on p. 359, 28 U. S. (L. ed.) 923, there was involved the validity of a municipal ordinance prohibiting from washing and ironing in public laundries and wash-houses within defined limits, from ten at night to six in the morning. Justice Field said: 'The Fourteenth Amendment, in declaring that no State

shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights: that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have all access to the courts of the country for the protection of their persons and property, and prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be placed upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education [718] and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing flies, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one another, but they are designed, not to impose unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

"In the execution of admitted powers necessary proceedings are often required which are cumbersome, dilatory and expensive, yet,

if no discrimination against any one be made and no substantial right be impaired by them they are not obnoxious to any constitutional objection. The inconvenience arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied by the State. In the case before us, the provision requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the [719] municipality in the execution of its police powers, and not a violation of any substantial right of the individual."

"In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 U. S. (L. ed.) 205, which was the prosecution of a brewer for violation of a statute prohibiting the manufacture or sale of liquor and passed subsequent to the erection and operation of the brewery, the court quoted liberally from *Barbier v. Connolly*, and then proceeded on p. 664 of 123 U. S. on p. 298 of 8 Sup. Ct. 31 U. S. (L. ed.) 205, to say, in reply to the contention that such legislation could not be enforced against those who, at the time, happen to own property the chief value of which consists in its fitness for such manufacturing purposes unless compensation is first made for the diminution in value of their property: 'This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the State intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.'

"In that case, it will be noted, that alleged discriminatory legislation was enacted after the acquisition by the defendant of this property, which was especially adapted to the use to which it was then being put, while in the case in hand the defendant deliberately acquired his property and undertook to use it in an unlawful manner after the passage of the ordinance.

"In *Camfield v. U. S.* 518, 17 S. Ct. 864, 42 U. S. (L. ed.) 260, the court cited with approval the case of *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390. 2 L.R.A. 81, 12 Am. St. Rep. 560, which had under review a Massachusetts statute, declaring that any fence 'unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property,' should be deemed a private nuisance [720] for which any person injured might have an action of tort. The Massachusetts court held the statute constitutional with reference to fences already erected, basing its decision

on the fact, that 'Police regulation may regulate the use of property in ways which greatly diminish its value.' The United States court, by way of comment, said on p. 524 of 167 U. S., on p. 866 of 17 S. Ct. 42 U. S. (L. ed.) 260: 'The case is authority for the proposition that the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests. Apparently the principal doubt entertained by the court was whether the maintenance of a private fence could be said to be "injurious to the public at large," but it seems to have been of opinion that such a nuisance might give rise to dispute and bickerings prejudicial to the peace and good order of the community.'

"Mr. Justice Holmes goes still further in the case of *Noble State Bank v. Haskell*, 219 U. S. 104, on p. 111, Ann. Cas. 1912A 487, 31 S. Ct. 186, on p. 188, 55 U. S. (L. ed.) 112, 32 L.R.A. (N.S.) 1062, and after citing *Camfield v. U. S.* with approval, declares: 'It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality and strong preponderant opinion to be greatly and immediately necessary to the public welfare.'

"In *Chicago, etc. R. Co. v. McGuire*, 219 U. S. 549, 31 S. Ct. 259, 55 U. S. (L. ed.) 328, involving the validity of an Iowa statute imposing a liability on railway corporations for damages occasioned by negligence and providing that no contract which restricts such liability shall be legal or binding, the Supreme Court of Iowa held the statute constitutional, which decision was affirmed on appeal to the United States court. In discussing the right to make [721] contracts, Justice Hughes said, on p. 588: 'It is subject also, in the field of State action, to the essential authority of government to maintain peace and security and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction.' Then, after citing numerous and various cases in which such right was denied, the distinguished jurist proceeded: 'The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for governmental to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of

policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.'

"It is apparent from these citations that the exercise by a State of its police power is not prohibited by anything contained in the Fourteenth Amendment so long as such exercise is reasonable and not merely arbitrary. As was well said in *Barbier v. Connolly*, as well as in the later decisions: 'Though in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is [722] prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.'

"If the ordinance in question meets this test, it is valid if not it is invalid. Let us then proceed to examine the ordinance and apply the test.

"It will be noted that the ordinance is expressly declared to be prospective only in its application. It deals with conditions as they should thereafter arise, and does not seek to disturb the existing occupancy of any property. If at the time of its passage, there were white and colored persons residing on the same street, they are permitted to continue such residence. By its first section it prohibits any white person from thereafter residing upon a street on which a majority of houses were then occupied by colored persons. Could anything be fairer, or more impartial, in its operation than this? It could make no difference whether an offender against the ordinance were white or colored. In either event the same penalty is prescribed for its violation. It can be truly said to operate alike on all persons and property under the same circumstances and conditions and to affect all persons similarly situated, within the sphere of its operation.

"No case of this precise character has been adjudicated, and yet there are many analogous cases in which the validity of legislation looking to the separation of the races has been vindicated upon this very ground of public policy.

"Thus in *Ex p. Kinney*, 3 Hughes 9, 3 Va. L. J. 370, 14 Fed. Cas. No. 7,825, Judge Hughes denied a writ of *habeas corpus* to a man who had been convicted and sentenced

for violating the Virginia statute against mixed marriages, upon the ground that such statute, operating as it did alike upon both races, neither abridged the privileges of a citizen of [723] the United States nor denied to any person within its jurisdiction the equal protection of the laws.

"In 1890 the State of Louisiana passed a statute providing for separate railway carriages for the white and colored races, which was under review in *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 U. S. (L. ed.) 256. The court held that the enforced separation of the races as applied to the internal commerce of the State, neither abridged the privileges or immunities of the colored man, deprived him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, and continued on p. 550 of 163 U. S. on p. 1143 of 16 S. Ct. 41 U. S. (L. ed.) 256: 'So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, is more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned or the corresponding acts of State legislatures. We consider the fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything [724] found in the act but solely because the colored race chooses to put that construction upon it.'

"This case was affirmed in *Chesapeake, etc. R. Co. v. Kentucky*, 179 U. S. 388, 21 S. Ct. 101, 45 U. S. (L. ed.) 244, and the same doctrine has been announced in numerous State courts, subject only to the qualification that the quality of the accommodations must be equal.

"Subsequent to the decision of the *Plessy* case, the question came before the United States Supreme Court of the validity of the separate school law in the case of *Cumming v. Richmond County Board of Education*, 175 U. S. 528, 20 S. Ct. 197, 44 U. S.

(L. ed.) 862, where Justice Harlan said 'We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by State taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.'

"In conclusion, I would quote the language of the court in *State v. Roby*, 142 Ind. 169, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174: 'There is the very best of reasons why doubts should be resolved in favor of the validity of the act of the legislature. In case of doubt there might be a mistake in declaring the act unconstitutional by the court. To declare an act void for unconstitutionality, through a mistake of a court of last resort, would have the effect, not only of paralyzing one of the co-ordinate departments of the State government, but it would be an usurpation of power by the court—a power withheld from it by the people in the Constitution. The dangerous consequences liable to result from a possible mistake declaring [725] an act of the legislature void for unconstitutionality are sufficient, alone, to inspire the judiciary with the greatest caution in that respect, and furnish ample justification for the ruling that no statute will be declared unconstitutional unless its conflict with the Constitution is beyond reasonable doubt.'

"An ordinance, properly enacted, has all the force of a law within the limits of the municipality. *New Orleans Water-Works Co. v. Louisiana Sugar Refining Co.* 125 U. S. 18, 8 S. Ct. 741, 31 U. S. (L. ed.) 607; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 19 S. Ct. 77, 43 U. S. (L. ed.) 341; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 21 S. Ct. 575, 45 U. S. (L. ed.) 788.

"In conclusion, it is only necessary to say that, in my opinion, the town council of Ashland had full authority, under section 1038 of the Code of 1904, to pass an ordinance providing for separate residences for white and colored people within its limits; that the ordinance passed was a reasonable exercise of this power; and that it does not conflict with the Fourteenth Amendment of the Constitution of the United States.

"The ordinance is, therefore, declared valid, and the conviction of the defendant by the mayor of Ashland is sustained."

Additional authorities for the following propositions:

1. That the councils of the city and town had power to enact the segregation ordinances: 2 *McQuillin Mun. Corp. sec. 724*, p.

1570; 2 Dillon Mun. Corp. sec. 600; 3 McQuillin Mun. Corp. sec. 895, p. 1899; Louisville, etc. R. Co. v. Kentucky, 161 U. S. 677, 16 S. Ct. 714, 40 U. S. (L. ed.) 849; Elsner v. Hawkins, 113 Va. 47, 73 S. E. 479, Ann. Cas. 1913D 1278.

And as to the city of Richmond, see, also, city charter, secs. 19, 19x, 20.

2. As to the reasonableness of the terms of the ordinances: McQuillin Mun. Ordinances, secs. 186, 432; McQuillin [726] Mun. Corp. sec. 732; Chiles v. Chesapeake, etc. R. Co. 218 U. S. 71, 77, 30 S. Ct. 667, 54 U. S. (L. ed.) 936, 20 Ann. Cas. 980; Schmidinger v. Chicago, 226 U. S. 578, 33 S. Ct. 182, 57 U. S. (L. ed.) 364, Ann. Cas. 1914B 284; Adams v. Milwaukee, 228 U. S. 572, 581, 33 S. Ct. 610, 57 U. S. (L. ed.) 971.

3. As to constitutionality and validity: Louisville, etc. R. Co. v. Mississippi, 133 U. S. 587, 10 S. Ct. 348, 33 U. S. (L. ed.) 784; Hall v. DeCuir, 95 U. S. 485, 24 U. S. (L. ed.) 547; Berea College v. Kentucky, 211 U. S. 45, 29 S. Ct. 33, 53 U. S. (L. ed.) 81; McCabe v. Atchison, etc. R. Co. 235 U. S. 151, 35 S. Ct. 60, 59 U. S. (L. ed.) 109.

Segregation ordinances, more or less similar to those involved in the instant cases, have been passed upon by the courts of last resort in Maryland, North Carolina, Georgia and Kentucky in the following cases, not cited in the foregoing opinion or list of authorities, to wit: State v. Gurry, 121 Md. 534, 88 Atl. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1914B 957; State v. Darnell, 166 N. C. 300, 81 S. E. 338, 51 L.R.A.(N.S.) 332; Carey v. Atlanta, 143 Ga. 192, 84 S. E. 456, L.R.A.1915D 684, and Harris v. Louisville, 165 Ky. 559, Ann. Cas. 1917B 149, 177 S. W. 472. In each of the first three of these cases the particular ordinance involved was declared invalid, and in the last one its validity was upheld. The Maryland and Georgia cases, as we conceive, support the conclusion here reached. All four of these cases are reviewed, as are a number of other pertinent authorities, in a recent comprehensive article on "Segregation Ordinances," by the associate editor of the Virginia Law Register, 1 Va. L. Reg. (N. S.) pp. 330-356.

In conclusion, the writer of the above article, in part, aptly observes: "Segregation ordinances which are intended to operate as *bona fide* regulations, are reasonably necessary for that purpose, operate reasonably, and [727] do not unduly interfere with private rights, are constitutional.

"The *bona fides* of these ordinances cannot be made a serious question in law or economy. The different cities have striven to do a public good, and have not been actuated merely by race prejudice. The truth is these ordinances are a natural outgrowth of existing conditions and are in the most instances

intended to preserve such conditions by preserving present separate residences and preventing one race from encroaching upon the other. The ordinances are intended to protect each race from harm from the other."

Keith, P., dissents.

Judgments affirmed.

NOTE.

It is held in the reported case that a segregation ordinance whereby white and colored persons are prohibited from residing in the same block is valid if it is prospective in its operation and does not attempt to disturb existing property rights. The validity of a segregation of the races in different residential districts is discussed in the note to State v. Gurry, Ann. Cas. 1915B 957. And see Carey v. Atlanta, Ann. Cas. 1916E 1151.

MATTER OF DART.

California Supreme Court—February 3, 1916.

172 Cal. 47; 155 Pac. 63.

Municipal Corporations — Police Power — Regulation of Private Charity.

The occupation of soliciting contributions for charitable purposes may be regulated by laws or ordinances providing for reasonable supervision of the persons engaged, and for the application or use of the contributions received to the purposes intended, to prevent unscrupulous persons from obtaining money or other things under the pretense that they are to be applied to charity, to prevent the wrongful diversion of such funds to other uses, and to secure them against waste.

[See note at end of this case.]

Same.

City ordinances creating a Municipal Charities Commission and prohibiting begging in the public streets, while regulating the soliciting of contributions for charitable purposes, the last of which gave the commission arbitrary power to forbid any person from soliciting for charity regardless of his personal worth or fitness, not establishing any standard of character by which the commission should be guided in giving permits, merely requiring that it should find that the "object of said solicitation is worthy and meritorious," are unconstitutional so far as giving such arbitrary power, and in portions imposing a penalty upon any one soliciting contributions for charitable purposes without a permit and prohibiting the sale of any goods donated to charity without the solicitor first having obtained a similar permit.

[See note at end of this case.]

Original application for writ of habeas corpus. William J. Dart, petitioner, and Chief of Police of Los Angeles et al., respondents. The facts are stated in the opinion. APPLICANT DISCHARGED FROM CUSTODY.

Gibson, Dunn & Crutcher, Edward E. Bacon and William A. Barnhill for petitioner.

Warren L. Williams, Samuel Barnes Smith and Andrew J. Copp, Jr. for respondents.

[47] HENSHAW, J.—The authorities of the city of Los Angeles adopted two ordinances. By one was created a Municipal Charities Commission, whose powers and duties were defined. Amongst those powers and duties are:

"(1). To investigate all charities dependent upon public appeal or general solicitation for support and to indorse such of them as meet actual needs of the community, attain a reasonable [48] standard of efficiency and are so conducted as to insure the public of the wise use of the funds."

The second of these ordinances prohibits begging in the public streets or places in the city, and regulates the soliciting of alms and contributions for charitable purposes. It provides as follows:

"Sec. 2. It shall be unlawful for any person, firm, corporation or association to solicit alms, food, clothing, money or contributions within the City of Los Angeles, without first securing a permit so to do from the Municipal Charities Commission of said city. Provided, however, that the provisions of this section shall not apply to properly accredited solicitors of established churches of said city soliciting for purely religious purposes, but it shall apply to the various institutional works carried on by said churches in like manner as other persons, firms, corporations and associations. The permit from the Charities Commission above referred to shall consist of a written certificate issued by the said commission certifying that the object of said solicitation is worthy and meritorious and authorizing the soliciting of gifts and donations therefor; said permits may be revoked by said Commission at any time.

"Sec. 3. It shall be unlawful for any person to solicit or collect for any charitable or philanthropic organization, without first obtaining a written permit so to do from the Municipal Charities Commission; said permit shall be revocable at any time in the discretion of said Commission, which may adopt such regulations regarding the soliciting and collecting of funds as its judgment may dictate, and it shall be obligatory upon the holders of such permits to abide by such rules and regulations.

"Sec. 4. It shall be unlawful for any person, firm, corporation or association to give or promote any entertainment, fair, bazaar or

benefit in the name of charity or philanthropy, without first obtaining a written permit so to do, from the Municipal Charities Commission, said permit to be revocable at any time at the discretion of said Commission.

"Sec. 5. It shall be unlawful for any person, firm, corporation or association to solicit funds within the City of Los Angeles for any ethical, evangelistic, religious, missionary or charitable purposes without having first obtained an indorsement certificate from the Municipal Charities Commission. [49] Provided, however, that the provisions of this section shall not apply to established and recognized churches or other religious organizations in the City of Los Angeles.

"Sec. 6. It shall be unlawful for any person, firm, corporation or association to sell, or offer for sale, any clothing, household goods, or other goods, wares or merchandise which have been solicited or donated for charity or philanthropy without first obtaining a written permit so to do from the Municipal Charities Commission, said permit to be revocable at any time at the discretion of said Commission."

Petitioner was arrested under two criminal complaints charging violations of these ordinances. By the first of these complaints he was accused of soliciting "alms, food, clothing, money and contributions . . . without first securing or having a permit or written certificate so to do from the Municipal Charities Commission." By the second of these complaints, his crime was in "selling and offering for sale clothing, household goods and other goods, wares, and merchandise which had been solicited and donated for charity and philanthropy, without first obtaining or having a written permit so to do from the Municipal Charities Commission."

The following facts appear without controversy: The Salvation Army is a religious organization founded on and believing in the teachings of Christ. It has been established for fifty years. It has its churches and charitable organizations throughout the United States and other countries. Profoundly impressed with the Founder's sympathy for the poor and afflicted, and with His teachings that "Now abideth faith, hope and charity, these three, but the greatest of these is charity," and, "Now, the end of the commandment is charity out of a pure heart," it has made its special field of religious work the relief of the destitute and the rescue of society's outcasts. It has found that it cannot lead the spirit of the weary and heavy burdened without first ministering to his physical necessities. While "man does not live by bread only," he cannot live at all without bread. Therefore, the charitable organizations of the Salvation Army are vital, integral parts of its religious life and work.

For twenty-five years it has prosecuted its religious and charitable work in the city of Los Angeles. It there maintains an "Industrial Home" where men out of employment are given food and lodging without charge, but are required, for [50] their own self-respect, and to the end that mere professional beggary be not fostered, to perform such labor as is within their power, being paid the value thereof. It maintains a "Rescue Home and Maternity Hospital" in which, without charge, food, lodgings, and hospital service are afforded needy married women and unfortunate girls. It maintains a "Young Woman's Boarding House," giving for an extremely low price to homeless girls and women clean, wholesome food and lodging, and helpful moral influences. It maintains four other hotels and lodging-houses where the destitute are housed and housed free of charge, and where but a small charge is exacted from those able to pay. An average of twenty-seven persons per night are given shelter in these hotels free of all charge. It also maintains nine stores where second-hand clothing, furniture, rags, paper, and junk of various kinds, contributed by the charitable, are sold at low prices. In these stores, and in the renovatory work necessary to make many contributed articles salable, employment is given to the needy, who thus become self-sustaining and self-respecting. In the years of its labors the Salvation Army has acquired properties of much value in Los Angeles, all of which are used for one or another of the described purposes. It has alleviated suffering, and given relief and employment in thousands of cases. Its books of financial account are and always have been open to the inspection and examination of its contributors, and no one of those contributors has ever voiced any complaint touching the honesty and efficiency of the Army's administrative work.

After its creation the Charities Commission, claiming the power so to do under the aforesaid ordinances, on or about the sixth day of October, 1913, demanded in writing, of the Salvation Army, that it should, as a condition precedent to obtaining the indorsement or permit of the commission for carrying on or soliciting contributions for any of its above-described charitable work in said city, be governed by a local board of managers, or trustees, all of whom should be residents of the city of Los Angeles, and representative Los Angeles citizens, and that all the property of the Salvation Army in the city should be conveyed to and held by such local board, and that the financial work of the Salvation Army in the city should be conducted by such local board; that no budgets for funds should be prepared and enforced on the Los Angeles [51] workers for any purpose other than Los

Angeles work; and that no funds should be sent out of Los Angeles for the use of the Salvation Army elsewhere, except by the direction of such local board, or of the Municipal Charities Commission; and that Christmas offerings, self-denial, harvest festival, and like accustomed contributions of the Salvation Army should not be used except for local purposes, and that all proceeds derived by the Salvation Army from the conduct of its aforesaid institutions in Los Angeles (whether self-sustaining or not), should be used exclusively for the extension of its work in the city, and not be subject to assessment by territorial (i. e., national) officers of the Salvation Army. Next the Charities Commission exacted that title to all property of the Salvation Army in Los Angeles should be vested in a corporation, and this was done. Thereafter the Salvation Army and its corporation petitioned the Charities Commission for a permit allowing it to continue its charities and its petition was denied. Always desirous of yielding obedience to the law, and of "rendering to Caesar the things that are Caesar's," the Salvation Army endeavored to comply with the exactions of the Charities Commission, but was unable to comply with some of them without impairing its efficiency and integrity as an organized society for religio-charitable work. Failing to secure the permit, the Salvation Army continued this work. The petitioner is one of its officers. In the performance of his duties as such officer, and not otherwise, he has been subjected to these arrests and charged with these crimes.

In setting forth the foregoing facts we are not unmindful of the limitations put on our inquiry under this writ. The validity of these ordinances is to be determined from their provisions, and the question of their validity or invalidity is all that concerns us here. Nevertheless, and assuming for the moment the validity of the ordinances, these facts are highly instructive as illustrating the extent of the power conferred and the manner of its exercise. Here is a great and living charity doing good to thousands of the needy and heavy-laden of Los Angeles, struck dead because it does not make over the management of its affairs to a local board of "representative citizens," and cannot agree that it will dispense the bounty which it receives exclusively for local purposes. Charity is not only to begin at home, but to end at home, saving, [52] as under "permit," it may be suffered to go abroad. The quality of Mercy (and so necessarily of Charity) we are told

—"is not strained;

It droppeth as the gentle rain from Heaven
Upon the place beneath."

But in Los Angeles it is to be strained, and drop as from a sprinkling-pot in the guiding hand of the Charity Commission. But this exemplification of the use of the power is not, of course, an argument against the existence of the power itself. Conceding the existence of the power, if in any instance an illegal exercise of it has been made, that fact will constitute a defense to a prosecution, but will not be effective to destroy the validity of the grant of power itself. The basic question still remains: May a private association, order, or organization be denied the right to fulfill the purposes of its existence saving under a "permit" from the authorities? We here use the term "private charity" as meaning one not supported in whole or in part by state or municipal funds. Over the latter class manifestly the power of regulation and control is great if not plenary.

Certain features of these ordinances at once strike the reader. Money may be freely sent abroad by any "established church" for the uplift of the soul of the Senegambian, and this is very well; but no penny can be sent to Belgium, to Poland, to Serbia, to still the wailing of the children, or allay the anguish of the women, except under a "permit" from the Charity Commission. Nay, more, in the city of Los Angeles itself, its needy childhood goes unfed and unclothed, its dependent womanhood unprotected and uncared for by organized charities except they have a "permit." Surely here if anywhere is

"The organized charity, scrimped and iced
In the name of a cautious statistical Christ."

Respondent argues that charitable institutions soliciting contributions from the general public thus secure public trust funds, and that it is quite within governmental powers for the state or its municipal agencies to regulate the collection and disposition of such trust funds. It is freely conceded, indeed, it is proclaimed, that reasonable regulations may be adopted touching and to a limited extent controlling the operation of charitable institutions dependent in whole or in [53] part on public beneficence. But respondent fails to perceive or at least to discuss the distinction, as broad as the temperate zone, between a law imposing reasonable regulations to effectuate these ends on all such charitable institutions, and a law which makes the right to solicit at all, and thus the right of a given charity to exist dependent on the arbitrary will of a Charity Commission. Again, let us illustrate. Respondent in its brief thus defines the power of the Charity Commission: "The Municipal Charities Commission is delegated power to indorse [which means grant permits to char-

itable institutions under which alone they are entitled to live] such charitable institutions as meet the actual needs of the community, attain a reasonable standard of efficiency, and are so conducted as to insure the public in the wise use of funds." This language taken from the first of the ordinances above quoted, *sounds* reasonable. But as interpreted by the Municipal Charities Commission, What does it mean? In their own language it is this: Such a charity is "one that will execute every trust for charity with the least possible delay, with the greatest possible efficiency and with the least possible deduction for expense." Here is a mark set, and that mark is the absolute perfection of human endeavor. No tolerance, no charity is shown by this Commission of Charities, for any human effort, however self-sacrificing and efficient, that does not attain human perfection. Charities in Los Angeles must reach a pitch of perfection unattained by any other human institution, or in the view of the Municipal Charities Commission they are unfit to live.

But let us eliminate from consideration these constructions put by the Municipal Charities Commission on their own powers, which are but delegated powers, and meet the question of the existence of this power at its source. Can the municipal authorities of a city arbitrarily say what person or what institution may or may not engage in charitable work dependent wholly or in part upon voluntary contributions from the public? Unhesitatingly we answer that this cannot be done, that it constitutes an attempt to use the police power in an arbitrary, unreasonable, and oppressive manner. It necessarily contains an assertion of the power to prohibit and suppress vocations and occupations which, entirely aside from their religious character, are from a wordly point of view in and of themselves not only harmless but positively beneficial to [54] humanity. The power to pass reasonable regulations in such a case bears no relationship to the power to prohibit or suppress. (*Yick Wo v. Hopkins*, 118 U. S. 356, 30 U. S. (L. ed.) 220, 6 S. Ct. 1064; *Los Angeles County v. Hollywood Cemetery Assoc.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 163; *In re Johnston*, 137 Cal. 116, 69 Pac. 973; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674.)

Such charitable work is not to be confounded with beggary which imports personal gain. Most often those who devote themselves to such charities live lives of self-denial and self-abnegation for the sake of others. And the utmost limit of reasonable regulation in the matter is reached by acts protecting the public from charlatans and imposters, insuring knowledge on the part of the donors of the purposes to which their contributions

may be put, coupled with adequate safeguards against malversation as to the funds received. But this falls far short of the law here under review, which permits such charitable work to be carried on only by (again to quote respondent) "trustees satisfactory to the Municipal Charities Commission."

But in further support of the argument that the Charities Commission, or the Municipal Council, may thus forbid a man from devoting his life to this form of self-denial and good works, it is said that neither the constitution of the United States, nor the constitution of this state, guarantees him the right so to do as they guarantee him the free exercise of his religion. They do not. Neither do they guarantee to a man the right to love, to show mercy, to forgive his enemies, or to walk in the path of rectitude. The existence of some human rights is taken for granted in both of these august instruments. We have heard one Chief Executive of this nation declare that he construed the constitution as conferring on his department all powers not expressly withheld. The construction has not as yet met with favor from the juriconsults. As little accord can be given to a construction which denies to the individual any right not expressly reserved and preserved to him. But if driven to authority to support this declaration, we can at least point out that the Declaration of Independence recognizes the right of all mankind to pursue happiness. When that pursuit takes the innocent and admirable form of effort to better the lot of the poor and oppressed, whether happiness be found solely in the consciousness of the doing of kindly [55] deeds, or whether it be found in the conviction that one is thereby following the precepts of a Divine Teacher, in either case it lies not within the ordained powers of our government, national, state, or municipal, to say that such a vocation shall not be followed, such a life shall not be led.

So far we have dealt with the question in what, for lack of a better word, we may term its secular aspect only. From this point of view our remarks and conclusions apply equally to all charities, whether temporal or religious.

But there is another aspect of the question clearly presented, and as clearly demanding consideration. This is the religious aspect. The petition shows that the charities of the Salvation Army are a vital part of its religious life work. One need not write as a theologian in expressing, as we do, the most profound veneration for religion as embodying the highest ethical concepts of a people, and as satisfying their spiritual yearning for a life finer than this earthly one. The two religions exercising the most potent influence in shaping the material and spiritual desti-

nies of the white-skinned races are the Jewish and the Christian. To these as to all others perfect freedom of exercise is constitutionally guaranteed. In both of these religions charity is the central word. It is enjoined, not as a good thing, or a wise thing, or as a kindly thing only, but as a fundamental part of the religion itself. Says the Jewish faith: "On three things the world is stayed; on the Torah (the law) and on worship and on the bestowal of kindness." "Now the end of the commandment is charity out of a pure heart," says Paul to Timothy. "Charity is the scope of all God's commands," preaches Chrysostom. "All perfection of the Christian life is to be attained according to charity," declares Thomas Aquinas. Does it need more, does it need so much, to show that in these religions the bestowal of charity, the devotion of life to charity, are a part of the religion itself? And does it demand discussion to establish so plain a truth as that touching religion there is a doubtful zone which legislation should be most reluctant to enter? The founders of the nation recognized it when they placed the great guaranty of religious liberty in the constitution of a free people, and it is for every court to see that that liberty is not encroached upon and that freedom gnawed and impaired by any experimental legislation however well meant. So when legislation does enter that uncertain domain, the fact [56] that it is there must bring to it condemnation. In accordance with the dictates of the constitution itself the doubt will be resolved in favor of religious liberty. And it will be found better in the long run that the free exercise of religion be preserved in its integrity, better for the nation, better for charity itself which owes so much to religion, even if the efficiency of religious charities be not up to the standard of perfection set by the Municipal Charities Commission. If, under that standard, seventy-five cents of every dollar would go to the objects of charity, while under the less efficient methods in vogue but fifty cents of each dollar actually reaches the beneficiaries, it is not to be forgotten that there will be many millions fewer of these dollars to be distributed in charity if the activities of the religious are hampered, thwarted, and stayed.

Wherefore the prisoner is discharged from custody.

Melvin and Lorigan, JJ., concurred.

SHAW, J. (*concurring*).—The occupation of soliciting contributions to charitable purposes is clearly so far subject to the police power, that it may be regulated by laws or ordinances providing for a reasonable supervision over the persons engaged therein, and for the application and use of the contributions received to the purposes intended, in

order to prevent unscrupulous persons from obtaining money, or other things, under the pretense that they were to be applied to charity, and to prevent the wrongful diversion of such funds to other uses, or to secure them against waste. Measures reasonably tending to secure these ends are unquestionably valid.

If the ordinances in question here were reasonably appropriate for the attainment of these objects, there could be no valid objection to them based on the ground that they deprived persons of liberty, or unduly restricted them in the pursuit of happiness. But they do not merely empower the Municipal Charities Commission to inquire or examine into the character of persons soliciting for charity and withhold permits from all who do not come within fixed standards of character and fitness. They give the commission absolute and arbitrary power to forbid any person from soliciting for charity, regardless of his personal character, worth, or fitness. No standard of character or fitness is set by which the commission is to be [57] guided in giving or withholding permits. The only thing required is that the commission shall find that the "object of said solicitation is worthy and meritorious." Persons of the highest character, desiring to solicit for a worthy cause, might be refused a permit for no reason except the arbitrary will of the commission. Every person has the right, under our constitution, and perhaps without its guarantee, to solicit contributions for a worthy charitable purpose, provided he acts in good faith and honestly applies them to that purpose. The ordinances give the commission power to deprive persons of that right without cause or reason. To the extent that they give this arbitrary power they are contrary to the constitution and void. They come within the principles stated by the supreme court of the United States in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 U. S. (L. ed.) 220, 6 S. Ct. 1064, and by this court in *Ex p. Sing Lee*, 96 Cal. 359, 31 Am. St. Rep. 218, 24 L.R.A. 195, 31 Pac. 245; *Los Angeles County v. Hollywood Cemetery Assoc.* 124 Cal. 349, 71 Am. St. Rep. 75, 57 Pac. 153; *Schaezlein v. Cabaniss*, 135 Cal. 469, 87 Am. St. Rep. 122, 56 L.R.A. 733, 67 Pac. 755; and *Hewitt v. State Board of Medical Examiners*, 148 Cal. 593, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, 3 L.R.A.(N.S.) 896, 84 Pac. 39.

In the *Yick Wo* case, referring to ordinances prohibiting laundries in wooden buildings except by permission from the board of supervisors, the court said: "They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places, but

as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their consent, without reason and without responsibility. (118 U. S. 366, 30 U. S. (L. ed.) 220, 6 S. Ct. 1069.) . . . It does not prescribe a rule and conditions for the regulation of the use [58] of property for laundry purposes, to which all similarly situated may conform" (118 U. S. 368, 30 U. S. (L. ed.) 220, 6 S. Ct. 1069). And in *Los Angeles County v. Hollywood Cemetery Assoc.* supra, the court said: "There is a wide difference between regulation and prohibition—between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself to depend upon the unrestrained will of the municipality. . . . If the business be lawful, and having no injurious tendency, they cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business." The proper method of regulating a lawful business is indicated in *Hewitt v. State Board of Medical Examiners*, supra, as follows: "The right of the physician to be secure in his privilege of practicing his profession is thus made to depend not upon any definition which the law furnishes him as to what shall constitute 'grossly improbable statements' but upon the determination of the board after the statement is made and simply upon its opinion of its improbability. No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business; nor is there any definite rule declared whereby after such advertisement is had the board of medical examiners shall be controlled in determining its probability or improbability. The physician is not advised what statements he may make which will not be deemed 'grossly improbable' by the board. No rule is provided whereby he can tell whether the publication he makes will bring him within the ban of the provision or not. . . . (148 Cal. 595, [113 Am. St. Rep. 315, 7 Ann. Cas. 750, 3 L.R.A.(N.S.) 896, 84 Pac. 41].) If a physician's license is to be revoked for 'grossly improbable statements;' if he is to be thereby

deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made 'grossly improbable statements' in advertising his medical business—it is requisite that the statute authorizing such revocation define what shall constitute such statements so that the physician may know in advance the penalty he incurs in making them." Other methods of regulation may also be allowable; but a law [50] or ordinance by or under which a lawful occupation, in itself, when properly conducted, in nowise injurious to persons, property or the public interest, may be absolutely prohibited at the dictation of any official body without other cause than its own will or desire, is beyond the legislative power and to that extent void.

There is a class of cases upon which the respondent relies as contravening the above-stated principles, such, for example, as *Ex p. Fiske*, 72 Cal. 127, 13 Pac. 310; *In re Flaherty*, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981, and *Barbier v. Connolly*, 113 U. S. 27, 28 U. S. (L. ed.) 923, 5 S. Ct. 357. It will be found, however, that these cases relate to things which in their nature are or may be injurious to public health, safety, comfort or welfare, and that they do not infringe upon the principles above stated with regard to the regulation of occupations which are both lawful and innocuous. In the *Flaherty* case the distinction is stated. After holding that an ordinance forbidding the beating of drums upon the streets without a permit from the president of the board of trustees was valid, the court, referring to other cases which seemed to conflict with the decision, and which are similar to the case at bar, said: "But upon closer examination they will be found to go upon a distinction or principle, whether sound or not, that is not applicable to the case at bar. They are based upon the theory that the lawful inherent rights of men cannot be entirely suppressed or destroyed by statute or ordinance, but can only be *regulated*, and that all regulations of such rights must be uniform" (105 Cal. 565, 27 L.R.A. 529, 38 Pac. 983), and again, "At all events, the cases referred to deal with a right. But the proposition that a man has a natural, ingrained, inviolate, common law or constitutional right to beat a drum on the traveled streets of a city has no foundation in reason or authority. As, therefore, it is not a right that may not be entirely suppressed, it may be regulated as the law making power may determine," and that "as it could be suppressed,

no one could be heard to complain of an ordinance regulating it because thereby special privileges accrued to particular persons" (105 Cal. 566, 27 L.R.A. 529, 38 Pac. 983). The distinction between cases like *Ex p. Fiske*, 72 Cal. 127, 13 Pac. 310, and the present case, is that in this case the right which the commission has power absolutely to take away is a lawful and innocent occupation which the legislature [60] cannot entirely suppress, and as to which its functions are merely to regulate its conduct and prevent abuses. There are other cases relating to ordinances which, after prohibiting certain things, delegate to some officer or board the power to decide whether or not a given person or subject comes within the terms of the prohibition. These are not in conflict with the principles above stated, nor are they applicable to this case. For these reasons I am of the opinion that the portion of the ordinance in question imposing a penalty upon anyone who solicits contributions for charitable purposes without a permit from the commission, is void. The section of the ordinance prohibiting the sale of any goods donated to charity without first obtaining a similar permit is invalid for like reasons.

I concur in the judgment discharging the prisoner.

Angellotti, C. J., and Sloss and Lawlor, JJ., concurred.

NOTE.

Validity of Statute or Ordinance Regulating Solicitation of Funds for Private Charity.

The reported case appears to be the only decision passing on any phase of the power of a state or a municipality to subject to police regulation the solicitation of funds to be disbursed in private charity. It is said in that case to be beyond question that reasonable regulations may be imposed to prevent the commission of fraud under the guise of a subscription for charity. It is however held that an ordinance is unreasonable and invalid which forbids the solicitation of money by a private charity without a permit, the grant or refusal of which rests in the discretion of a charities commission. As an additional ground for its decision, the court holds that as applied to the charitable work of a religious organization such as the Salvation Army, the ordinance in question is an attempt unduly to hamper the free exercise of religion.

CITY OF CLEVELAND

v.

LUTTNER.**CITY OF CLEVELAND**

v.

YOOS.**CITY OF CLEVELAND**

v.

LANGE.**CITY OF CLEVELAND**

v.

COTTRILL.**CITY OF CLEVELAND**

v.

ESPER.

Ohio Supreme Court—May 25, 1915.

*92 Ohio St. 493; 111 N. E. 280.***Public Officers — Nature of Contract with Public.**

A public officer is a public servant, and his candidacy for appointment or election, his commission, his oath in connection with the law under which he serves, and the emoluments of his office constitute the contract between him and the public he serves.

Compensation — Right of De Jure Officer — Salary Paid to De Facto Officer.

Where a policeman is wrongfully dismissed from office, he may recover his salary from the city for the period of the wrongful ouster, less the amount otherwise earned by him in the exercise of due diligence during such period, though another has been employed in his place and been paid the salary thereof.

[See note at end of this case.]

Error to Court of Appeals, Cuyahoga county.

Separate actions by Luttner, Yoos, Lange, Cottrill, and Esper, plaintiffs, respectively, against City of Cleveland, defendant in each action. Judgments for defendant in Court of Common Pleas. Judgments reversed by Court of Appeals. Defendant brings error. The facts are stated in the opinion. MODIFIED.

John N. Stockwell for plaintiff in error.

Frank F. Gentsch, Charles Sarage and M. B. Excell for defendants in error.

[494] BY THE COURT.—The foregoing cases involve the same questions, and therefore were submitted and considered together.

The defendants in error were formerly policemen of the city of Cleveland. They were ousted from office. Action was subsequently brought by them, whereby they were restored to their former positions as police officers. Thereafter demand was made upon the city of Cleveland for their salaries as police officers for the time during which they had been wrongfully ousted from office. The common pleas court found that, owing to the fact that other policemen had been appointed in their stead through the interval and had drawn substantially the same salary, the police officers so wrongfully ousted could not recover.

The case was appealed to the court of appeals which held a contrary doctrine, to wit, that they could recover the full salary for the interval in question, and that such salary was not subject to be reduced by any earnings of said policemen during said interval. To the judgment of the court of appeals error is now prosecuted to this court.

A public officer is a public servant, whether he be a policeman of a municipality or the president of the United States. His candidacy for appointment or election, his commission, his oath, in connection with the law under which he serves, and the emoluments of his office constitute the contract between him and the public he serves.

The constitution of Ohio guarantees to everyone redress for any injury done him in his land, goods, person, reputation, etc., and assures him remedy by [495] due course of law and that justice shall be administered without denial or delay. If the public servant, a policeman in this case, be wrongfully dismissed from public office, he should have the same remedy for such wrong as a private servant for any wrong done him in his employment. The theory in both cases should be to make the wronged party whole; that is, to reimburse him for his loss. The mere fact that the wronging party employs or appoints some one else during the period of wrongful ouster should not excuse him for the full measure of his duty and liability.

The defendants in error in the foregoing cases should, therefore, recover their salaries, less the respective amounts they have otherwise earned, in the exercise of due diligence, during the periods they were wrongfully ousted. Decrees accordingly.

Judgments of the court of appeals modified and affirmed as modified.

Nichols, C. J., Johnson, Wanamaker and Matthias, JJ., concur.

Donahue, J., for affirmance, without modification.

JONES, J., (*dissenting*)—The question involved in this case is whether a discharged employee, who has been afterwards reinstated, can recover his salary from the city when he performed no service for the city during the time of his discharge, and where the city had employed another to take the place of the [496] discharged employee and paid his successor the salary for such services. Stated in another form, can the city be compelled to pay twice for the same services under the circumstances related?

The rule in this behalf is stated by Judge Dillon in his *Municipal Corporations* (5 ed.), volume 1, section 429, as follows:

"For reasons of public policy, and recognizing payment to a *de facto* officer while he is holding the office and discharging its duties as a defense to an action brought by the *de jure* officer to recover the same salary, it is held in many jurisdictions that an officer or employee who has been . . . wrongfully excluded from office, cannot recover against the city for salary during the period when his office was filled and his salary paid to another appointee."

If any criticism could be made of the above text it is in the fact that the rule of law therein stated has in fact been upheld by practically every jurisdiction in the United States. That a *de jure* officer cannot recover against the city when the city has employed and paid a *de facto* employee has been held without reserve in all of the following states: Illinois, Connecticut, Iowa, Kansas, Kentucky, New York, Nebraska, New Hampshire, Missouri, Michigan, Washington, New Jersey, Colorado, Delaware, Oregon, South Dakota, Arizona, Louisiana, Oklahoma and Idaho. *Bullis v. Chicago*, 235 Ill. 472, 85 N. E. 614; *Coughlin v. McElroy*, 74 Conn. 397, 50 Atl. 1025, 92 Am. St. Rep. 224; *Brown v. Tama County*, 122 Ia. 745, 98 N. W. 562, 101 Am. St. Rep. 296; *Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Walters v. Paducah* (Ky.) 123 S. W. 287; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *State v. Milne*, 36 [497] Neb. 301, 54 N. W. 521, 38 Am. St. Rep. 724, 19 L.R.A. 689; *Shannon v. Portsmouth*, 54 N. H. 183; *Westberg v. Kansas*, 64 Mo. 493; *Scott v. Crump*, 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 478; *Samuels v. Harrington*, 43 Wash. 603, 86 Pac. 1071, 117 Am. St. Rep. 1075; *McDonald v. Newark*, 58 N. J. L. 12, 32 Atl. 384; *El Paso County v. Rohde*, 41 Colo. 258, 95 Pac. 551, 124 Am. St. Rep. 134, 16 L.R.A.(N.S.) 794; *Lee v. Wilmington*, 1 Marv. (Del.) 65, 40 Atl. 663; *Selby v. Portland*, 14 Ore. 243, 12 Pac. 377, 58 Am. Rep. 307; *Fuller v. Roberts County*, 9 S. D. 216, 68 N. W. 308; *Michel v. New Orleans*, 32 La. Ann. 1094; *Shaw v. Pima County*, 2 Ariz. 399, 18 Pac. 273; *Goran v. Boise County*, 1

Idaho 655; *Stearns v. Sims*, 24 Okla. 623, 104 Pac. 44, 24 L.R.A.(N.S.) 475. Included in this list may be added our own state, which adhered to that rule in the case of *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417, in the following syllabus:

"A police officer, suspended from office, by the mayor of a city, under the authority granted by the sections 121 and 211 of the municipal code, is not entitled to wages during the period of such suspension, notwithstanding the council afterwards declared the cause of suspension insufficient."

And in support of the opinion in that case the learned judge cited five cases. An examination of those cases supports the emphatic rule announced in the text above, that where the *de facto* employee has performed the services and received the emoluments of office, the discharged *de jure* officer cannot recover from the public for the time that he was out of office. The contrary view has been held in a minority of states only, those states taking the view, as a rule, that public office is in the nature of a private contract and safeguarded as such by the constitution. Of the five states thus holding, California, [498] by a specific statute, nullified the action of its judiciary and passed a law providing in cases of similar character that double compensation should not be paid.

The court of appeals followed the minority rule, lightly dismissing the decisions, the judge delivering the opinion referring to them as "the roll call of states," and reversed the trial court, who had made an exhaustive review of the decisions supporting the rule in the text. The court of appeals cited no authority in its support.

I am not wedded to judicial precedents that have not kept pace with our ever-changing economic life or which are incompatible with our modern system of government. If precedents are based on a weak and false logic, if they cannot be applied to our present system of government, as an equitable and just rule of action in human affairs, then they should be discarded and a new rule adopted. But judicial precedents should not be lightly disregarded, for the represent thoughtful deliberations of just and distinguished jurists whose wisdom has aided in upbuilding the social and governmental systems we now enjoy.

The rule announced in the majority opinion in this case is not only in conflict with the established law of practically every state in the Union, including our own, but is based on a new conception of vested rights in a public officer to the office—that by reason of its occupancy, by appointment or election, there subsists between such occupant and the public a contractual relation which is protected under our constitutional guarantee as an

invasion [499] of private contract. This was the theory upon which the minority of states based their decisions, that the public might be required to pay a second time for services of an official wrongfully dismissed, although the services were performed by another appointed in his stead during such dismissal.

It is difficult to perceive what public policy requires the payment by the public a second time for the same services. The municipal officer whose warrant is required should not be compelled to withhold the compensation from the *de facto* officer for fear that at some time in the future the title to the office should be questioned. The color of authority under which the *de facto* officer acts is all that should be needed. Public policy requires that the duties of the officers and employees should be carried on in the interest of the public. In this instance, in the event of suspension or discharge of an employee, the city, of necessity, together with its officers, must see to it that the police and the fire departments, for instance, should be manned. If the discharged employee, as a *de jure* claimant, should be permitted to sue the city for services which he had not performed, it would place the public service in inevitable embarrassment. Must the state, city or any other subdivision of the state take upon itself the risk of paying double compensation upon the adventitious circumstance that the discharged employee may thereafter hold it liable for a double compensation and for services which he has not performed? Are they bound to anticipate what the decision of the court may be in cases of [500] that character or in that multitudinous class of cases where contests for office arise and are carried through to the courts of last resort? The municipality, in this case, should not be held responsible for an official mistake made by one of its officers in recognizing the wrong claimant. Indeed, if this rule should be followed an employee might invite suspension in order that upon reinstatement thereafter he might recover for the entire time when the services were performed by another, subject only to the limitation for deduction of the reasonable amount that he might have earned meanwhile. It would not be difficult to foresee contingencies where the *de jure* claimant and the *de facto* incumbent would each be willing to permit his suit to lag, if both, on its final termination, could draw compensation from the public funds.

As it happens, in our own court there is at the present time a contest between two candidates for common pleas judge, where the inducted judge has for a long period of time received his salary, partly from the state and partly from the county. Is it possible that we shall place the stamp of approval upon a rule which would require

that in the event of the induction of his rival claimant, after a long period of contest, the claimant should again be paid by the state and county for services performed by the contestee? An effort of that kind was made in a contest case in El Paso County v. Rohde, 41 Colo. 258, 95 Pac. 551, 124 Am. St. Rep. 134, 16 L.R.A. (N.S.) 794.

Under our system of government public policy does not support the theory underlying the majority opinion that an official status, by election or [501] appointment, constitutes, together with the emoluments of his office, "a contract between him and the public he serves," nor that the constitution of Ohio guarantees him redress as in cases of private contract. It has been held in Ohio and elsewhere that the salary attached to the office is but an incident thereto and that no contractual relation exists by reason of an election or apportionment, and that the same is not safeguarded by any provisions of our constitution.

In 1841, in the case of State v. McCollister, 11 Ohio 46, 50, a dictum did creep into the opinion that "When a man becomes an incumbent of an office, he has a vested right in that office; and all such rights are secured by the constitution."

This dictum has been repeatedly repudiated by the courts of this state. In the case of Knoup v. The Piqua Bank, 1 Ohio St. 603, 616, the learned judge, referring to the former dictum, said:

"He [an officer] has no property, or individual right in it. He is but a trustee for the public; and whenever the public interest requires that the office should be abolished, or the duties of the office become unnecessary, the incumbent cannot object to the abolition of the office."

In the case of State v. Hawkins, 44 Ohio St. 98, 109, 5 N. E. 228, which involved the action of the governor in removing the police Judge Minshall said:

"The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract [502] or grant. It is conferred on him as a public trust to be exercised for the benefit of the public."

This policy was approved and followed in the case of Mason v. State, 58 Ohio St. 30, 55, 50 N. E. 6, 41 L.R.A. 291, and by the judge delivering the opinion in the later case of State v. Egry, 79 Ohio St. 391, 413, 16 Ann. Cas. 155, 87 N. E. 269, the judge citing the authority of Taylor v. Beckham, 178 U. S. 548, 20 S. Ct. 890, 1009, 44 U. S. (L. ed.) 1187, in its support. The latter was a case wherein the Taylor and Goebel election contest was involved in the state of Kentucky. Taylor had been given the commission as governor by the state election commissioners.

Upon a contest before the legislature Taylor was ousted and Goebel inducted. In an endeavor to reach the United States court upon the jurisdictional question whether there was a deprivation of property or vested rights in the election to the office of governor, the chief justice, at page 577, said:

"The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. . . . In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."

The case of *Westberg v. Kansas*, 64 Mo. 493, and relied upon as authority in the Ohio case of *Steubenville v. Culp*, supra, is very similar to the case at bar. There a policeman discharged by the mayor attempted to secure his salary *ad interim* by a suit against the city, upon a theory that he had [503] a vested right in his office. The supreme court of Missouri decided against such vested right.

That salary is but an incident to the office, and that neither the same nor his appointment or election thereto is contractual, is generally held by courts of this country.

Again, we must be consistent. If election or appointment constitute a contractual engagement, then the obligations and remedies must be held to be correlative and mutual. If the city could not discharge without violating a contract obligation, neither could the official or employee resign his office or employment without incurring a similar liability. And yet no one will contend that either official or employee may not resign at pleasure, and this he may do, irrespective of an acceptance of such resignation on the part of the municipality. *Reiter v. State*, 51 Ohio St. 74, 81, 36 N. E. 943, 23 L.R.A. 681; *Ratterman v. State*, 44 Ohio St. 644, 10 N. E. 678.

It is a little remarkable that in placing a new rule of decision upon the laws of this state, the case of *Steubenville v. Culp*, supra, was neither overruled nor distinguished. I have been constrained to announce this dissenting opinion because of the fact that as a member of the Fourth Circuit Court of this state we had repeatedly adhered to the rule in *Steubenville v. Culp*, supra, as had other circuits as well, including that of the First Circuit when it announced a similar decision in the case of *State v. Eshelby*, 1 Ohio Cir. Dec. 592, 2 Ohio Cir. Ct. 468.

It may be said that a wrong has been inflicted upon an innocent *de jure* claimant, denying him [504] the redress sought, but the individual interest must submit to the greater interest of the public. That the claimant is not wholly remediless is an-

nounced in the cases cited by the text in 29 Cyc. 1393-4, which permits the injured party to bring an action against his successor if he has not slept meanwhile upon his legal rights.

Newman, J., concurs in the dissenting opinion.

NOTE.

Right of De Jure Officer to Recover from State or Municipality Salary Paid to De Facto Officer During Latter's Incumbency.

Introductory, 1137.

Majority Rule, 1137.

Minority Rule, 1138.

Introductory.

The purpose of this note is to review the recent cases passing on the right of a *de jure* officer to recover from the state or municipality the salary paid to the *de facto* officer during the latter's incumbency. The earlier decisions are collated in the notes to *Nall v. Coulter*, 4 Ann. Cas. 671; *Tanner v. Edwards*, 10 Ann. Cas. 1091; and *Andrews v. Portland*, 10 Am. St. Rep. 280.

Majority Rule.

The rule obtains in most jurisdictions that a state or municipality which has before a judgment of ouster paid to a *de facto* officer the salary of the office occupied by him at the time of payment is not liable to the *de jure* officer for the salary for the same period. *Walden v. Headland*, 156 Ala. 562, 47 So. 79; *Dolan v. Louisville*, 142 Ky. 818, 135 S. W. 272; *Wagner v. Louisville (Ky.)* 117 S. W. 283; *Walters v. Paducah (Ky.)* 123 S. W. 287; *Hallowell v. Buffalo County (Neb.)* 162 N. W. 650; *Stearns v. Sims*, 24 Okla. 623, 104 Pac. 44, 24 L.R.A. (N.S.) 475; *State v. Fassett*, 69 Wash. 555, 125 Pac. 963. Compare *Dorian v. Paducah*, 136 Ky. 373, 124 S. W. 369.

The court in *Walters v. Paducah*, supra, said: "In every case there is necessarily a contest between the *de facto* and *de jure* officers. The duties of the office must be performed. The city, through its officers, must recognize one or the other. That officer who has possession of the office and is in charge of all its records, and who under the ordinances of the general council pays out the money of the city to settle claims against it, and is thus recognized as the acting officer, is as a matter of fact the *de facto* officer although another party may be assuming to perform certain duties of the office, without recognition of his right to do so by the au-

thorities of the municipality. The municipality will not be held responsible for the mistake of its officers in recognizing the wrong claimant. The question does not turn on whether or not a salary was paid to the de facto officer with notice of a contest or claim by another party. In nearly every instance such is the case. The question turns on whether or not payment is made before or after the judgment of ouster. In the case before us, payment was made before judgment of ouster. That being the case, the city of Paducah will not be required to pay the same salary for the same period of time to the de jure officer."

In *Stearns v. Sims*, 24 Okla. 623, 104 Pac. 44, 24 L.R.A. (N.S.) 475, the court, quoting from *Michel v. New Orleans*, 32 La. Ann. 1094, said: "Sound public policy dictates the wisdom and the necessity of paying the salary of the officer in possession of the office and performing the functions required for the protection of society and the maintenance of peace and order; and, after this duty is performed, both law and equity forbid that the city or state be compelled to account for the same salary to any other party who may subsequently be decreed as the proper officer."

In *Hallowell v. Buffalo County* (Neb.) 162 N. W. 650, it appeared that a county judge was removed from office and another person was appointed by the county board to fill the vacancy. He qualified, took possession of the office, and performed its duties. When on appeal the judgment of ouster was declared to be void and the elected official was reinstated in office, it was held that since the appointee of the county board performed the duties of the office with color of title, and was an officer de facto, the county could not be compelled to pay again to the de jure officer the salary that it paid to the officer de facto while in actual possession of the office and before his right to the office had been determined against him.

Where there is conflict between two persons as to who is entitled to an office and the city pays the salary to the de facto officer prior to the adjudication, the de jure officer cannot recover the salary so paid from the city. But the de jure officer may sue the de facto officer to recover as for damages suffered by reason of his usurpation of the office. But if the city pays any portion of the salary after the adjudication, the plaintiff as a de jure officer can recover as against the city, and the city must look to the de facto officer for reimbursement. *New York v. Voorhis*, 129 N. Y. S. 832.

In *State v. Fassett*, 69 Wash. 555, 125 Pac. 963, wherein it appeared that the plaintiff was wrongfully discharged as foreman of the water construction department of Spokane

and another was appointed as his successor and was paid the salary up to the time of the trial of a contest of the office, the city was relieved from paying the plaintiff up to that time.

But where a municipality pays the salary to one who is a mere usurper of the office or to one pretending to hold the office without any color of title thereto, the de jure officer has a right of action against the municipality for the salary. *Ardmore v. Sayre* (Okla.) 154 Pac. 356.

Minority Rule.

Some jurisdictions hold that the salary of a public office is incident to the title of the office and hence a municipality is liable to the de jure officer for his salary during the time he was out of possession of the office although it has been paid to a de facto officer. *Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732; *People v. Bradford*, 267 Ill. 486, 108 N. E. 732; *Terre Haute v. Burns* (Ind.) 116 N. E. 604; *Wynne v. Butte*, 45 Mont. 417, 123 Pac. 531; *Baker v. Nashua*, 77 N. H. 347, 91 Atl. 872; *San Antonio v. Steingruber* (Tex.) 177 S. W. 1023. See also *Black v. San Jose Police Com'rs*, 17 Cal. App. 310, 119 Pac. 674. Compare *Gracey v. St. Louis*, 213 Mo. 384, 111 S. W. 1159.

In *People v. Bradford*, *supra*, the court said: "The law is well settled in this state that the right to the salary is attached to and follows the legal title to the office. This is true irrespective of the question by whom the services were, in fact, actually rendered. (*Mayfield v. Moore*, 53 Ill. 428; *Waterman v. Chicago*, etc. R. Co. 139 Ill. 658; *Kreitz v. Behrensmeyer*, 149 Ill. 406; *Chicago v. Luthardt*, 191 Ill. 516; *Bullis v. Chicago*, 235 Ill. 472.) In *Chicago v. Luthardt*, *supra*, it is said: 'The legal right to the office carries with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited.' While this rule has been most frequently announced and applied in suits between de jure and de facto officers over the salary to an office, it is nevertheless a basic principle of law and one of general application. It has been so applied not only in cases of protracted absence and nonperformance of duties (*Bryan v. Cattell*, 15 Ia. 538) but in cases of actual suspension from office (*Wardlaw v. New York*, 137 N. Y. 194, 33 N. E. 140; *Chicago v. Luthardt*, *supra*). An officeholder may recover the full amount of the salary accruing during the time of his suspension, without any deduction of the amount he may have earned in other employments during that time. (*Bullis v. Chicago*, *supra*; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 7 N.

E. 787.) That the duties of appellee's office were actually performed by some one is disputed. Had they been performed by a mere intruder or interloper, without warrant or authority of law, the right of appellee to recover such salary must be conceded. (*Chicago v. Luthardt*, supra.) That these duties may have been performed by the other commissioners under a claim of right and lawful authority to do so does not alter the situation. This would be true, also, in the case of a de facto officer."

In *Wynne v. Butte*, 45 Mont. 417, 123 Pac. 531, the court, discussing the conflict of decisions, said: "Whether, in the absence of statute, payment to a de facto officer discharges the employing municipality is a question upon which the courts are divided. Those holding the affirmative rest their conclusion upon the ground of public policy; but a review of the decisions is unnecessary, for in this state we have a statute which declares the public policy here. Section 375, Revised Codes, reads as follows: 'When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined.' If, then, after the quo warranto proceeding was instituted, the city disregarded the statute and paid the salary to Quinn, it did so at its peril."

In *Wynne v. Butte*, 45 Mont. 417, 123 Pac. 531, it appeared that the plaintiff was duly appointed as chief of police of a city under the metropolitan police laws. He was wrongfully ousted from office by the mayor and the city council, but was later restored to his office. In an action for his salary during the period of ouster the city attempted to defend on the ground that the salary was paid to the de facto officer appointed by the mayor. It was held that the salary being an incident to the office he could not be deprived of it during the time he was wrongfully prevented from performing his duties; and that his earnings in other employments during the time of his expulsion could not be charged against him.

The reported case though in accord with the minority rule that a de jure officer may recover his salary from the city for the period of wrongful ouster even if some one else has been employed and has been paid the salary for that period, holds that the amount he has earned during that time in the exercise of due diligence must be charged against him.

NEW YORK CENTRAL RAILROAD COMPANY

v.

WINFIELD.

United States Supreme Court—May 21, 1917.

244 U. S. 147; 37 S. Ct. 546.

Workmen's Compensation Acts — Employees within Purview — Employees of Interstate Railroad.

The entire subject of the liability of interstate railway carriers for the death or injury of their employees while employed by them in interstate commerce is so completely covered by the provisions of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Fed. St. Ann. 1909 Supp. p. 584), as to prevent any award under the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41, 316), where an employee was injured or killed without fault on the railway company's part while he was engaged in interstate commerce, although the federal act gives the right of recovery only when the injury results in whole or in part from negligence attributable to the carrier.

[See note at end of this case.]

Error to Appellate Division of Supreme Court, Third Judicial Department, State of New York.

Claim for compensation under workmen's compensation act. James Winfield, claimant, and New York Central Railroad Company, defendant. Claim allowed by Workmen's Compensation Commission. Decision affirmed by Appellate Division of Supreme Court and by Court of Appeals. Defendant brings error. The facts are stated in the opinion. REVERSED.

Frank V. Whiting, Robert E. Whalen, William L. Visscher and H. Leroy Austin for plaintiff in error.

E. Clarence Aiken, Harold J. Hinman and Egbert E. Woodbury for defendant in error.

[147] VAN DEVANTER, J.—While in the service of a railroad company in the State of New York, James Winfield sustained a personal injury [148] whereby he lost the use of an eye. At that time the railroad company was engaged in interstate commerce as a common carrier and Winfield was employed by it in such commerce. The injury was not due to any fault or negligence of the carrier, or of any of its officers, agents or employees, but arose out of one of the

ordinary risks of the work in which Winfield was engaged. He was a section laborer assisting in the repair of the carrier's main track and while tamping cross-ties struck a pebble which chanced to rebound and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Law of the State¹ and an award was made to him by the state commission, one member dissenting. The carrier appealed and the award was affirmed by the Appellate Division of the Supreme Court, two judges dissenting, 168 App. Div. 351, and also by the Court of Appeals, 216 N. Y. 284. Before the commission and in the state courts the carrier insisted that its liability or obligation and the employee's right were governed exclusively by the Employers' Liability Act of Congress, c. 149, 35 Stat. 65; c. 143, 36 Stat. 201 (Fed. St. Ann. 1909 Supp. p. 584), and therefore that no award could be made under the law of the State. That insistence is renewed here. It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority.² Congress acted [149] upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield v. Erie R. Co.* 88 N. J. L. 619, 96 Atl. 394, hold that the act relates only to

injuries resulting from negligence, while the California court in *Smith v. Industrial Acc. Commission*, 26 Cal. App. 560, 147 Pac. 600, and the Illinois court in *Staley v. Illinois Cent. R. Co.* 268 Ill. 356, 109 N. E. 342, L.R.A. 1916A 450, hold that it has broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line. *Baltimore, etc. R. Co. v. Baugh*, 149 U. S. 368, 378-379, 13 S. Ct. 914, 37 U. S. (L. ed.) 772. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. In *re Second Employers' Liability Cases*, 223 U. S. 1, 51, 52 S. Ct. 169, 56 U. S. (L. ed.) 327, 38 L.R.A. (N.S.) 44. It was drafted and passed shortly following [150] a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. Cong. Rec. 60th Cong. 1st sess. 1347. And the reports of the congressional committees having the bill in charge disclosed, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States. House Report No. 1386 and Senate Report No. 460, 60th Cong. 1st sess. Thus, in the House Report it is said: "It [the bill] is intended in its scope to cover all commerce to which the regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. . . . A Federal statute of this character will supplant the numerous State

¹ See *New York Cent. R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, Ann. Cas. 1917D 629.

² In *re Second Employers' Liability Cases*, 223 U. S. 1, 53-55, 32 S. Ct. 169, 56 U. S. (L. ed.) 327, 38 L.R.A. (N.S.) 44; *St. Louis, etc. R. Co. v. Hesterly*, 228 U. S. 702, 33 S. Ct. 703, 57 U. S. (L. ed.) 1031; *St. Louis, etc. R. Co. v. Seale*, 229 U. S. 156, Ann. Cas. 1914C 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129; *Taylor v. Taylor*, 232 U. S. 363, 34 S. Ct. 350, 58 U. S. (L. ed.) 638; *Chicago,*

etc. R. Co. v. Devine, 239 U. S. 52, 36 S. Ct. 27, 60 U. S. (L. ed.) 140; *Texas, R. Co. v. Rigby*, 241 U. S. 33, 41, 36 S. Ct. 482, 60 U. S. (L. ed.) 874; *Northern Pac. R. Co. v. Washington*, 222 U. S. 370, 32 S. Ct. 160, 56 U. S. (L. ed.) 237; *Erie R. Co. v. New York*, 233 U. S. 671, Ann. Cas. 1915D 138, 34 S. Ct. 756, 58 U. S. (L. ed.) 1149, 52 L.R.A. (N.S.) 266; *Southern R. Co. v. Indiana R. Commission*, 236 U. S. 439, 35 S. Ct. 304, 59 U. S. (L. ed.) 661.

statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employers' liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States."

True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the States free to require compensation where the act withholds it. By declaring in § 1 that the carrier shall be liable in damages for an injury to the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, [151] or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track," etc.^{2a} the act plainly shows, as expressly held in *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 501, Ann. Cas. 1915B 475, 34 S. Ct. 685, 58 U. S. (L. ed.) 1062, L.R.A.1915C 1, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents or other employees. The same principle is seen also in § 3, which requires that where the carrier and the employee are both negligent the recovery shall be diminished in proportion to the employee's contribution to the total negligence, and in § 4, which regards injuries arising from risks assumed by the employee as among those for which the carrier should not be made to respond. The committee reports upon the bill show that this principle was adopted deliberately, notwithstanding there were those within and without the committees who looked with greater favor upon a different principle which puts negligence out of view and regards the employee as entitled to compensation whenever the injury is an incident of the service in which he is employed. A few years after the passage of the act a legislative commission drafted and the Committees on the Judiciary in the two houses of Congress favorably reported a bill substituting the latter principle for the other, Senate Report No. 553, 62d Cong. 2d sess. House Report No. 1441, 62d Cong. 3d sess. but that bill did not become a law.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, etc. R. Co. v. Wulf*, 226 U. S. 570, 576, Ann. Cas. 1914B 134, 33 S. Ct. 135, 57 U. S. (L. ed.) 355, and other cases, it is pointed out that the subject which the act covers is "the responsibility of [152] interstate carriers by railroad to their employees injured in such commerce;" in *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67, Ann. Cas. 1914C 176, 33 S. Ct. 192, 57 U. S. (L. ed.) 417, it is said that "we may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury," that by it "Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce," and that it is "paramount and exclusive;" in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 256, Ann. Cas. 1914C 159, 34 S. Ct. 305, 58 U. S. (L. ed.) 591, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce the federal act governs to the exclusion of the state law; in *Seaboard Air Line Ry. v. Horton*, supra, pp. 501, 503, it is said not only that Congress intended "to exclude responsibility of the carrier to its employees" in the absence of negligence, but that it is not conceivable that Congress "intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;" and in *Wabash R. Co. v. Hayes*, 234 U. S. 86, 89, 34 S. Ct. 729, 58 U. S. (L. ed.) 1226, it is said: "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative [citing cases]. On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling."

The act is entitled, "An Act Relating to the liability of common carriers by railroad to their employees in certain cases," and the suggestion is made that the words "in [153] certain cases" require that the act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with

^{2a} The act is printed in full in *In re Second Employers' Liability Cases*, 228 U. S. 1, 6-10,

32 S. Ct. 169, 56 U. S. (L. ed.) 327, 38 L.R.A. (N.S.) 44.

the body of the act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in "commerce between any of the several States," etc. See *Employers' Liability Cases*, 207 U. S. 463, 28 S. Ct. 141, 52 U. S. (L. ed.) 297.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg v. Pennsylvania*, 16 Pet. 539, 617, 10 U. S. (L. ed.) 1060, "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the [154] States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

It follows that in the present case the award under the state law cannot be sustained.

Judgment reversed.

BRANDEIS, J. (*dissenting*).—I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the *Employers' Liability Act* of April 22, 1908 (Fed. St. Ann. 1909, Supp. p. 584) Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees

while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. In other words the majority of the court declares, that Congress by passing the *Employers' Liability Act* prohibited States from including within the protection of their general *Workmen's Compensation Laws* employees who *without fault on the railroad's part* are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress *could* have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The *Workmen's Compensation Law* of New York here in question has been declared by this court to be among those which "bear so close a relation to the protection of the lives and safety of those concerned that they properly [155] may be regarded as coming within the category of police regulations." *New York Cent. R. Co. v. White*, 248 U. S. 188, 207, 37 S. Ct. 247. And this court has definitely formulated the rules which should govern in determination when a federal statute regulating commerce will be held to supersede state legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Sherlock v. Alling*, 93 U. S. 99, 103, 23 U. S. (L. ed.) 819.

2. "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to regulation of Congress within the sphere of its delegated power. . . .

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Savage v. Jones*, 225 U. S. 501, 533, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182.

3. "The question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as

inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

³ The following cases show that Congress, in legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the States of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the federal legislation.

1. In *Sligh v. Kirkwood*, 237 U. S. 52, 62, 35 S. Ct. 540, 59 U. S. (L. ed.) 835, it was held that the Federal Food and Drugs Act (3 Fed. St. Ann. 2d ed. 358), dealing, among other things with shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition, did not prevent a State from penalizing the shipment of citrus fruits "which are immature or otherwise unfit for consumption."

2. In *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 293, 34 S. Ct. 829, 58 U. S. (L. ed.) 1312, it was held that Congress did not, by the passage of the Federal Safety Appliance Acts (6 Fed. St. Ann. 752; 10 Id. 376; 1912 Supp. p. 336), dealing with the equipment of locomotives, as well as of cars, and the Act to Regulate Commerce (4 Fed. St. Ann. 2d ed. 331), preclude the States from legislating concerning locomotive headlights, as to which Congress had not specifically acted.

3. In *Missouri, etc. R. Co. v. Harris*, 234 U. S. 412, 420, 34 S. Ct. 799, 58 U. S. (L. ed.) 1377, L.R.A.1915C 942, it was held that the Carmack Amendment (34 Stat. 584, 595, 4 Fed. St. Ann. 2d ed. 506), regulating the carrier's liability for loss of interstate shipments, did not prevent a State from providing for the allowance of a moderate attorney's fee in a statute applicable both in the case of interstate and intrastate shipments.

4. In *Savage v. Jones*, 225 U. S. 501, 529, 32 S. Ct. 715, 56 U. S. (L. ed.) 1192, it was held that the passage by Congress of the Food and Drugs Act of 1906 (3 Fed. St. Ann. 2d ed. 358), which, among other things, prohibited misbranding, did not prevent the States from regulating the sale and requiring to be affixed a statement of ingredients and minimum percentage of fat and proteins.

5. In *Missouri Pac. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 623, 29 S. Ct. 214, 53 U. S. (L. ed.) 352, it was held that Congress, by granting, in the Act to Regulate Commerce (4 Fed. St. Ann. 2d ed. 331), power to the Interstate Commerce Commission to compel equal switching service on cars destined to interstate commerce, did not, in the absence of the exercise by the Commission of its power, prohibit States from legislating on the subject.

6. In *Asbell v. Kansas*, 209 U. S. 251, 257, 14 Ann. Cas. 1101, 28 S. Ct. 485, 52 U. S. (L. ed.) 778, it was held that Congress in providing (1 Fed. St. Ann. 2d ed. 406) that a certificate of inspection issued by the National Bureau of Animal Industry should en-

Missouri, etc. R. Co. v. Haber, 169 U. S. 613, 623, 18 S. Ct. 488, 42 U. S. (L. ed.) 878.

Guided by these rules and the cases in which they have [156] been applied * we endeavor to determine whether Congress in en-

title cattle to be shipped into any State without further inspection, did not prevent a State from penalizing the importation of cattle which had not been inspected either by the federal bureau or by designated state officials.

7. In *Crossman v. Lurman*, 192 U. S. 189, 199, 24 S. Ct. 234, 48 U. S. (L. ed.) 401, it was held that the Act of Congress of August 30, 1890, 26 Stat. 414 (3 Fed. St. Ann. 2d ed. 715), prohibiting importation into the United States of adulterated and unwholesome food, did not prevent the States from legislating for the prevention of the sale of articles of food so adulterated, as come within valid prohibitions of their statutes.

8. In *Reid v. Colorado*, 187 U. S. 137, 149, 23 S. Ct. 92, 47 U. S. (L. ed.) 108, it was held that Congress, by making it an offence under the Animal Industry Act (1 Fed. St. Ann. 2d ed. 406) for anyone to send from State to State cattle known to be affected with communicable disease, did not prevent the States from penalizing the importation of cattle without inspection by designated state officials.

9. In *Missouri, etc. R. Co. v. Haber*, 169 U. S. 613, 623, 18 S. Ct. 488, 42 U. S. (L. ed.) 878, it was held that the Federal Animal Industry Act (1 Fed. St. Ann. 2d ed. 406), making it a misdemeanor for any person or corporation to transport cattle known to be affected with contagious disease, did not prevent a State from imposing a civil liability for damages sustained by owners of domestic cattle by reason of the importation of such diseased cattle.

10. In *Smith v. Alabama*, 124 U. S. 465, 482, 8 S. Ct. 564, 31 U. S. (L. ed.) 508, it was held that Congress did not, by the passage of the Act to Regulate Commerce (4 Fed. St. Ann. 2d ed. 331), prohibit the States from enacting laws requiring persons to undergo examination before being permitted to act as locomotive engineers.

11. In *Sherlock v. Alling*, 93 U. S. 99, 23 U. S. (L. ed.) 819, it was held that Congress did not, by the passage of many laws regulating navigation, with a view to safety, and providing for liability in certain cases, prohibit the application to an accident in navigable waters of a State of a statute providing for liability for wrongful death.

The following cases, holding that the Federal Employers' Liability Act (Fed. St. Ann. 1909, Supp. p. 584) supersedes the common or statutory laws of the States relating to the liability of railroads for negligent injuries to their employees while engaged in interstate commerce, are, of course, wholly consistent with the cases above referred to, the "field" of both federal and state laws there under consideration being identical: In re Second Employers' Liability Cases, 223 U. S. 1, 55, 32 S. Ct. 169, 56 U. S. (L. ed.) 327, 38 L.R.A.(N.S.) 44; *Missouri, etc. R. Co. v.*

acting the Employers' Liability Act intended [157] to prevent States from entering the specific field of compensation for injuries to employees arising *without fault* [158] on the railroad's part, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any, which in terms express that will. We inquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope and purpose; and, on the other, at the nature, methods and means of state Workmen's Compensation Laws. If the will is not clearly expressed in words we must consider all these in order to determine what Congress intended.

First—As to words used: The act contains no words expressing a will by Congress to recover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of the act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An Act Relating to the liability of common carriers by railroad to their employees in certain cases."⁴

[159] *Second*—As to specific action taken: The power exercised by Congress is not such that, when exercised, it necessarily excludes the state action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever

such injuries or death result from the railroad's negligence, the remedy should be sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the Workmen's Compensation Laws of the States. Between the federal and the state law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third—As to origin, purpose and scope of the Employers' Liability Act and the nature, methods and means of state Workmen's Compensation Laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

(A) *The origin of the Federal Employers' Liability Act:*

By the common law as administered in the several States, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work; subject to the right to be indemnified for any loss inflicted by wrongdoers.

The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of *respondent superior*. This legal liability, which in theory applied between employer and employee as well as between others, came, in course of [160] time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk and of contributory negligence—rose and flourished. When applied to huge organizations and hazardous occupations, as railroading, they practically abolished the liability of

Wulf, 226 U. S. 570, 576; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 66, Ann. Cas. 1914C 176, 33 S. Ct. 192, 57 U. S. (L. ed.) 417; St. Louis, etc. R. Co. v. Hesterly, 228 U. S. 702, 704, 33 S. Ct. 703, 57 U. S. (L. ed.) 1031; St. Louis, etc. R. Co. v. Scale, 229 U. S. 156, Ann. Cas. 1914C 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1120; Taylor v. Taylor, 232 U. S. 363, 368, 34 S. Ct. 350, 58 U. S. (L. ed.) 638; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 501, Ann. Cas. 1915B 475, 34 S. Ct. 635, 58 U. S. (L. ed.) 1062, L.R.A.1915C 1; Wabash R. Co. v. Hayes, 234 U. S. 86, 89, 34 S. Ct. 729, 58 U. S. (L. ed.) 1226; Toledo, etc. R. Co. v. Slavine, 236 U. S. 454, 458, 35 S. Ct. 306, 59 U. S. (L. ed.) 677; St. Louis, etc. R. Co. v. Craft, 237 U. S. 648, 35 S. Ct. 704, 59 U. S. (L. ed.) 1160; Chicago, etc. R. Co. v. Devine, 239 U. S. 52, 54, 36 S. Ct. 27, 60 U. S. (L. ed.) 140;

Chicago, etc. R. Co. v. Wright, 239 U. S. 548, 551, 36 S. Ct. 185, 60 U. S. (L. ed.) 431; Seaboard Air Line Ry. v. Kenney, 240 U. S. 489, 493, 36 S. Ct. 458, 60 U. S. (L. ed.) 762; Osborne v. Gray, 241 U. S. 16, 19, 36 S. Ct. 486, 60 U. S. (L. ed.) 865.

⁴ The title of this act may be profitably compared with that of the bill (not enacted) prepared by the Employers' Liability and Workmen's Compensation Commission pursuant to Joint Resolution No. 41, approved June 25, 1910, 36 Stat. 884, proposing a Federal Workmen's Compensation Law, which reads: "A bill to provide an exclusive remedy and compensation for accidental injuries resulting in disability or death, to employees of common carriers by railroad engaged in interstate or foreign commerce, or in the District of Columbia, and for other purposes." Sen. Doc. 338, p. 107, 62d Cong. 2d sess.

employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread. But the opponents were alert, potent and securely entrenched. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the first Federal Employers' Liability Act (Act of June 11, 1906, 34 Stat. 202), fifty years elapsed. In those fifty years only four more States had wholly abolished the defense of fellow servant's negligence. Furthermore, in only one State had a statute been passed making recovery possible, where the employee had been guilty of

contributory negligence.⁵ Meanwhile, the number [161] of accidents to railroad employees had become appalling. In the year 1905-6 the number killed while on duty was 3,807, and the number injured 55,524.⁶ The promoters of remedial action, unable to overcome the efficient opposition presented in the legislature of the several States, sought and secured the powerful support of the President.⁷ Congress was appealed to and used its power [162] over interstate commerce to afford relief. The promotion of safety was of course referred to in the Committee's report as justifying congressional action; but the moving cause for the Federal Employers' Liability Act was not the desire to promote safety or to secure uniformity, as in standardizing equipment by the Safety Appliance Acts.⁸ There was, in the nature

⁵ At the time the first Federal Employers' Liability Act was passed the so-called common law defenses remained in force, in large part, in most of the States, as to railroad employees.

A. *The Fellow Servant Rule.* (See Compilation of Statutes in "Liability of Employers," Senate Hearings, 1906, pp. 183-288; and in Senate Document No. 207, 60th Congress, 1st sess.)

(1) It had been completely abolished as to railroad employees in only 5 States: Georgia (1856), Kansas (1874), North Carolina (1897), Colorado (1901), North Dakota (1903).

(2) It remained in full force, or substantially so, in 25 States or Territories: Arizona, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Michigan, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming.

(3) In 16 other States it had been modified; abolished either as to certain more dangerous kinds of work, or as to certain classes of employees: Alabama, Arkansas, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin.

(4) The passage of the first federal act immediately stimulated further state legislation. In 1907 the fellow-servant rule was abolished as to railroads in Arkansas, Nevada, Oklahoma, South Dakota; and largely in California, Nebraska, Pennsylvania and Wisconsin.

B. *Contributory Negligence.* (See compilations cited, supra.)

(1) In all but 1 State there had been no statutory change of the rule that contributory negligence constituted a complete defense. Georgia (1895) had substituted the comparative negligence doctrine. In Kansas and Illinois early cases at common law seeming to apply this doctrine had been repudiated. The com-

mon law of Tennessee also contained some traces of the doctrine.

(2) During the year following the passage of the first federal act, which adopted the rule of comparative negligence, with mitigation of damages proportionate to the degree of plaintiff's negligence, several States introduced this modification: Nebraska, Nevada, North Dakota, South Dakota, Wisconsin.

C. *Assumption of Risk.* (See the compilations cited, supra.)

The harshness of this rule had been mitigated by statute or other statutory action taken in only 14 States: Alabama, California, Colorado, Georgia, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia. In 1907 Iowa abolished the rule as to employees giving notice of a known defect.

⁶ See Report of Interstate Commerce Commission for the year 1906. Summary of Casualties, Table A, p. 161.

⁷ President's Messages, December 2, 1902; December 6, 1904; December 5, 1905; January 31, 1908.

⁸ The following facts are significant as showing that employers' liability was not deemed a factor in safety to employees or the public, or a matter in which uniformity was desirable, or as otherwise presenting a railroad problem:

(1) The Annual Reports of the Interstate Commerce Commission to Congress for the eleven years ending December, 1908, deal each year at large with accidents, casualties to employees, and the promotion of safety. These reports contain numerous recommendations for legislation concerning safety appliances, hours of labor, block signals, train control, inspection and accident reporting; but no recommendation or even mention of employers' liability.

(2) The National Convention of Railroad Commissioners, an association comprising the commissioners of the several States, is formed for the purpose of discussing and aiding in the solution of American railroad problems. Likewise, in its

of things, no more reason for providing a federal remedy for negligent injury to employees than there would have been for providing such a remedy for negligent injury to passengers or to other members of the public. The Federal Employers' Liability Act was, in a sense, emergency legislation. The circumstances [163] attending its passage were such as to preclude the belief that thereby Congress intended to deny to the States the power to provide for compensation or relief for injuries not covered by it.

(B) *The scope of the Federal Employers' Liability Act:*

(1.) The act leaves uncovered a large part of the injuries which result from the railroads' negligence. The decision of this court in the first Employers' Liability Cases, 207 U. S. 463, 28 S. Ct. 141, 52 U. S. (L. ed.) 297, had declared that Congress lacked power to legislate in respect to any injuries occurring otherwise than to employees engaged in interstate commerce. Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the federal law. For the act was held to apply only to those directly engaged in interstate commerce. This excludes not only those engaged in intrastate commerce, but also the many who—while engaged on work for interstate commerce, as in repairing engines or cars—are not directly engaged in it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, happen to be injured or killed through the railroads' negligence, while performing some work in intrastate commerce.⁹

(2.) The act leaves uncovered all of the injuries which result otherwise than from the railroad's negligence, though occurring when the employee is engaged directly in interstate commerce.

The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the States [164] the power to provide compensation or relief for injuries not covered by it.

(C) *The purpose of the Employers' Liability Act:*

The facts showing the origin and scope of the act discussed above, indicate also its purpose. It was to end the denial of the right to damages for injuries due to the railroads' negligence—a right denied under judicial decisions through the interposition of the defenses of fellow-servant, assumption of risk and contributory negligence. It was not the purpose of the act to deny to the States the power to grant the wholly new right to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

The Federal Employers' Liability Act was, in no respect, a departure from the individualistic basis of right and of liability. It was, on the contrary, an attempt to enforce truly and impartially the old conception of justice as between individuals. The common-law liability for fault was to be restored by removing the abuses which prevented its full and just operation. The liability of the employer, under the federal act as at common law, is merely a penalty for wrong doing. The remedy assured to the employee is merely a more efficient means of making the wrongdoer indemnify him whom he has wronged. This limited purpose of the Employers' Liability Act precludes the belief that Congress intended thereby to deny to the States the power to provide compensation or relief for injuries not covered by the act.

(D) *The nature of Workmen's Compensation Acts:*

In the effort to remove abuses, a study had been made of facts; and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread, that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing [165] with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet

reports for eleven years ending October, 1908, no reference has been found, either in the annual President's address, or in the report of the Committee on Legislation, or in the discussions, to the subject of employers' liability; or any mention of the passage by Congress of the two Employers' Liability Acts, or of the decision of this court on the first act.

The absence of such reference is particularly noteworthy in the legislative report for the year 1908, pp. 218-233, which is devoted to a consideration of harmonious or uniform legislation. It contains a résumé of the legislation in Congress recommended and supported by the National Convention of Railroad Commissioners during

a period of 19 years and attendances at congressional hearings on safety appliances, block signal, and hours of labor legislation.

⁹ Compare Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, Ann. Cas. 1914C 163, 34 S. Ct. 646, 58 U. S. (L. ed.) 1051; New York Cent. etc. River R. Co. v. Carr, 238 U. S. 260, 35 S. Ct. 780, 59 U. S. (L. ed.) 1298; Delaware etc. R. Co. v. Yurkonis, 238 U. S. 439, 35 S. Ct. 902, 59 U. S. (L. ed.) 1397; Shanks v. Delaware, etc. R. Co. 239 U. S. 556, 36 S. Ct. 188, 60 U. S. (L. ed.) 436, L.R.A. 1916C 797; Chicago, etc. R. Co. v. Harrington, 241 U. S. 177, 36 S. Ct. 517, 60 U. S. (L. ed.) 941; Erie R. Co. v. Welsh, 242 U. S. 303, 37 S. Ct. 116; Raymond v. Chicago, etc. R. Co. 243 U. S. 43, 37 S. Ct. 268.

the situation; even if the law were perfected and its administration made exemplary. For, in probably a majority of cases of injury there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society, which is served thereby, should in some way provide the protection. To attain this end, co-operative methods must be pursued; some form of insurance—that is, some form of taxation. Such was the contention which has generally prevailed. Thus out of the attempt to enforce individual justice, grew the attempt to do social justice. But when Congress passed the Employers' Liability Act of April 22, 1906, these truths had gained little recognition in the United States. Not one of the thirty-seven States or Territories which now have Workmen's Compensation Laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress. It then had under consideration the first Compensation Law for Federal Employees which was enacted [166] in the following month (Act of May 30, 1908, 35 Stat. 556). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of this Employers' Liability Act.

Can it be contended that Congress by simply passing the Employers' Liability Act prohibited the States from providing in any way for the maintenance of such employees (and their dependents) for whose injuries a railroad, innocent of all fault, could not be called upon to make indemnity under that act? It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him; even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency, if provision be not otherwise made. Upon the State falls direct-

ly the far heavier burden of the demoralization of its citizenry, and of the social unrest, which attend destitution and the denial of opportunity. Upon the State also rests under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the States the power to perform either this duty to humanity or their fundamental duty of self-preservation. And if the States are left free to provide compensation, what is there in the Employers' Liability Act to show an intent on the part of Congress to deny to them the power to make the provision by raising the necessary contributions, in the first instance, through employers?

(E) *Methods and means of Workmen's Compensation Laws:*

The principle underlying Workmen's Compensation Laws is the same in all the States. The methods and means by which that principle is carried out vary materially. The principle is that of insurance, the premiums [167] to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insurer; whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several States do and properly may differ radically.

What methods and means the State shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate, rests (subject to constitutional limitations) wholly within the judgment of the State. It might conclude, in view of the hazard involved, that no one should engage in the occupation of railroading without providing against the financial consequences of accidents through contributing an adequate amount to an accident insurance fund. It might conclude that it was wise to make itself the necessary contributions to such a fund, out of monies raised from general taxation. Or it might conclude, as the State of Washington did, that the fairest and wisest form of taxation for the purpose was to impose upon the employer directly the duty of making the required contributions—relying upon the laws of trade to effect, through the medium of transportation charges, an equitable distribution of the burden. The method last suggested is pursued in substance also by the State of New York. In its essence the laws of the States are the same in this respect, as is shown in *Mountain Timber Co. v. Wash-*

ington, 243 U. S. 219, 37 S. Ct. 280 It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. And the right [168] of the employee is as free from any suggestion of wrong done to him as the new right granted by Mothers' Pension Laws.

(F) *Federal and State legislation are not in conflict.*

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a state compensation law—affords, of course, no reason for imputing to Congress the will to deny the States power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate commerce.¹⁰ Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the States (which alone can deal comprehensively with it) the whole subject of indemnity and compensation for injuries to employees whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the States this power. The subject of compensation for [169] accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our States and Territories, so widely extended. In a large majority of instances they reside in the State in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great

diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States, in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is not desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, pre-empted the whole field—has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to state action, was far less clear than under the circumstances here considered. Tested by those decisions and by the rules which this court has framed for its guidance, I am of opinion, as was said in *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 294, 34 S. Ct. 829, 58 U. S. (L. ed.) 1312, that: "The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily [170] hazardous occupation¹¹ and otherwise unprovided for, the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action.

Clarke, J., concurs in this dissent.

NOTE.

The reported case holds that the liability of interstate railroad companies for personal injuries to their employees is so far regulated by the federal employer's liability act (Fed. St. Ann. 1909 Supp. p. 584; Fed. St. Ann. Supp. 1912 p. 335) as to remove the subject-matter from state regulation, and that accordingly employees of an interstate railroad

¹⁰ The number of cases on the October 1915 term of this court was 1069. Of these 93 involved one or more questions arising under the Federal Employers' Liability Act of April 22, 1908. Of these 93 cases, 37 presented the question whether or not the employee was engaged in interstate commerce or intrastate commerce. In 52 of the cases the question was presented whether there was evidence of negligence on the part of defendant. In 24

of the cases the question was also presented whether or not the employee had assumed the risk.

¹¹ The experience of the organization [Brotherhood of Locomotive Firemen and Engineers] shows that more than 60 per cent of all deaths and disabilities are caused by railroad accidents. W. S. Carter, Sen. Doc. 549, p. 137, 64th Cong. 1st sess.

company are not within the purview of a state workmen's compensation act. The applicability of a workmen's compensation act to railroad employees is discussed in the notes to Minneapolis, etc. R. Co. v. Industrial Commission, Ann. Cas. 1914D 655, and Matter of Winfield, Ann. Cas. 1916A 817, the last cited case being reversed by the reported case.

WOODS

v.

ROCK HILL FERTILIZER COMPANY.

South Carolina Supreme Court—November 8, 1915.

102 S. Car. 442; 86 S. E. 817.

Appeal and Error—Appealable Orders—Finality—Nonsuit.

The rulings and orders on motions for nonsuit and for the direction of a verdict are not ordinarily appealable until after final judgment.

Overruling of Demurrer.

An order overruling a demurrer to the complaint on the ground that it failed to state a cause of action is appealable.

Same.

On appeal from the overruling of motions for a nonsuit and for the direction of a verdict, not ordinarily appealable until after final judgment, and from an appealable order overruling a demurrer, the matters involved will be determined, in view of the fact that the reason of the rule against appeals from orders before final judgment is to prevent unnecessary delay in the trial of causes.

Nuisances—Pleading—Unnecessary Averments—Injury to Third Persons.

In an action for damages from defendant's fertilizer mixing plant near plaintiff's residence, the allegation that plaintiff's mother and sister lived with her and suffered from the odors, noises, etc., though not strictly necessary to the statement of plaintiff's cause of action, is not irrelevant thereto, because tending to show the nature and extent of plaintiff's damages.

Public Nuisances—Right of Individual to Enjoin.

To prevent multiplicity of actions, promote justice, and secure the public tranquility, courts refuse to entertain private actions to remedy purely public nuisances, which may and should be remedied through the public process of indictment.

Same.

Where a public nuisance affects some members of the public in a different manner and inflicts upon them injury of a different kind

from that suffered by the general public, it is, as to them, a private nuisance for which they have the private remedy of an action.

Same.

That which is per se or prima facie a public nuisance, is presumed to affect all the public alike, though it may not affect all to the same extent, and one complaining of such a nuisance must allege some injury to himself differing in kind and not merely in degree from that suffered by the general public, and, if he fails to do so, shows no cause of action.

Fertilizer Mixing Plant as Nuisance.

A fertilizer mixing plant is not a "nuisance per se" that is, a nuisance anywhere and under all circumstances, but, if a nuisance at all, is a "nuisance per accidens," that is, by reason of its location and other circumstances, such as the community in which it is located or the manner in which it is constructed or conducted.

[See note at end of this case.]

Same.

In an individual action for damages from a fertilizer mixing plant, prima facie only a private nuisance, it is not necessary to the sufficiency of the complaint that it allege injury to plaintiff differing in kind from that suffered by others who may have been affected.

[See note at end of this case.]

Appeal from Common Pleas Circuit Court, York county: **ERRED**, Judge.

Action by Buena Vista Woods, plaintiff, against Rock Hill Fertilizer Company, defendant. Judgment for plaintiff. Defendant appeals. **AFFIRMED**.

[443] The material allegations of the complaint were as follows:

(1) That the plaintiff is a resident of the city of Rock Hill, county and State aforesaid, is now and has been for a great number of years the owner and in the possession of the following described real estate, on which is located here dwelling.

(3) That the defendant does now, and did at the times hereinafter stated, own and control all that piece, parcel, or lot of land situated, lying, and being in the corporate limits [444] of the city of Rock Hill, S. C., on which it has erected and is operating a fertilizer plant.

(4) That the plaintiff, with her sister and mother, who is now 88 years of age, reside on the lot described in paragraph 1 of this complaint, and have so resided for the last 20 years, and plaintiff has during said time made extensive improvements on said lot and building at cost of not less than \$2,500, and the said property is very valuable.

(5) That the plaintiff acquired the said property and improved the buildings thereon for the purpose of a permanent home for herself, her sister, and her aged mother, and

has continuously used for said purpose for the period above named; for the purpose of a home this said lot was and is particularly and peculiarly desirable, it being situated only about 300 yards from the business portion of the city of Rock Hill, S. C., on the leading and most prominent and important street easily accessible to business offices of said town, her sister being required to accept employment in an office, and, also, her mother now so old and partially blind it is impossible to now move her without serious damage to her health and without destroying the future happiness of her said mother, as her said mother, even though practically blind, is able to visit from room to room without assistance, which would be impossible should she be removed to a different home, and for the further reason that her brother, who lived with her, has just recently died, and her said mother daily visits, without assistance, the room formerly occupied by her son, and to deprive her of this privilege at her age in life would destroy the greater part of her happiness and comfort; and before the erection of the said fertilizer works hereinbefore referred to this home was quiet, and the occupants of the said home enjoyed the pure and unadulterated air, and place was healthy.

(6) That the plaintiff has had opportunities to sell said place, but has always refused same for the principal reasons [445] that adjoining this said property her sister, with her family, reside.

(7) That the defendant is now and has been for the last two and a half years engaged in the business of preparing and mixing fertilizers and keeping said fertilizers and the raw material required to mix same in a warehouse, box cars, and on the platform on its lot described in paragraph 3 herein and within 300 feet of the plaintiff's home; and, in connection, plaintiff erected and has operated said plant wilfully, wantonly, and in utter disregard to the rights of this plaintiff, full well knowing and ought to know that it is completely destroying, and will eventually destroy, said home by rendering it very disagreeable, unhealthy, unpleasant, and maintaining a private nuisance, in the following particulars:

(a) Depriving the plaintiff, her sister, and her mother the use and enjoyment of pure and uncorrupted air they enjoyed before the erection of the said plant.

(b) Compelling this plaintiff, her sister, and said mother to inhale disagreeable and obnoxious odors emanating from the said raw material and fertilizers stored in and around the said plant.

(c) The dust and small particles of the material used and stored are blown by the winds on the garden of plaintiff and collects on the vegetation thereof, thereby ruining and

destroying for eating purposes the vegetables grown therein and making the cultivation of a garden on her said premises useless, and thus depriving plaintiff of the value of the said garden, and thereby requiring her to purchase her vegetables elsewhere, an expense she was not heretofore required to incur.

(d) The noise and boisterous conduct of the employees of the said plant is such that it causes this plaintiff, her mother, and sister to be annoyed, nervous, and anxious at all times for their safety.

(e) The obnoxious odor, flying dust, and grit from said plant is such and causes so much annoyance, discomfort, [446] and fear of impairing the health of the occupants of said home that this plaintiff is now and does close all of the doors and windows in the rear part of said house, next to said plant, and before the erection of said plant this was unnecessary, and the plaintiff, her mother, and sister enjoyed the pure and fresh air, which she and they are entitled to.

(f) That the said flying dust grit frequently falls upon and makes unfit for use food and other articles of diet cooked and in the process of cooking and preparing for the table.

(g) That the said odors, gases, and dust from the said plant interfere with the pleasure and the enjoyment of the said plaintiff, her mother, and sister in having guests and friends visit them, and they are, therefore, deprived of the pleasures of said guests and visitors, which they heretofore did enjoy, and have a right to enjoy unmolested.

(8) That the said defendant created and is maintaining the said fertilizer plant well knowing, or ought to know, that the home and the garden of plaintiff is being ruined and destroyed and its act of creating and maintaining same wilful and wanton and in utter disregard of the plaintiff, and although notified of said odor, etc., has failed and refused to abate same, to the damage of this plaintiff in the sum of \$10,000.

(9) That the future conduct and maintenance of the said fertilizer plant at its present location will completely destroy the desirability, comfort, pleasure, quiet, and healthy condition of plaintiff's home, and the plaintiff, therefore, asked this Court do order the said nuisance abated and discontinued, so that the former condition that it was before the erection of the said plant.

Wherefore, plaintiff demands judgment against the defendant:

First. For damages in the sum of \$10,000 and for the costs of this action.

[447] Second. That the defendant be required to abate the private nuisance by moving its plant and warehouse far enough from the home of the said plaintiff that she and her

family will not be affected there as herein complained.

Third. That a permanent injunction be issued against the operation or the use thereof as a fertilizer plant or warehouse on the said lot.

Fourth. For such other and further relief as to the Court may seem proper.

Wilson & Wilson and John R. Hart for appellant.

J. K. Owens, McDonald & McDonald and Dunlap, Dunlap & Hollis for respondent.

[448] HYDRICK, J.—This is an action for damages alleged to have resulted to plaintiff from a nuisance (a fertilizer mixing plant, near plaintiff's residence) and to enjoin the continuance thereof. Defendant moved to strike out certain allegations of the complaint as irrelevant. The motion was granted as to some of them, and refused as to others. Defendant then interposed a demurrer to the complaint, on the ground that it failed to state a cause of action for a private nuisance, which was overruled. At the close of plaintiff's testimony, defendant moved to strike out all testimony tending to prove damages from odors, noise, dust, and sickness caused by odors or dust, and for a nonsuit, on the ground that, if there was any testimony tending to prove a nuisance, it was a public and not a private nuisance. This motion was refused. At the close of all the testimony, defendant moved for direction of the verdict, on the same grounds that it had moved for nonsuit, and that motion was refused. The jury having failed to agree on a verdict, a mistrial was ordered, and defendant appealed, assigning error in each of these rulings.

[449] Appellee objects to the consideration of the appeal from the refusal of the Court to strike out certain allegations of the complaint and to grant the motions for nonsuit and direction of the verdict, on the ground that the rulings and orders as to those matters are not appealable, until after final judgment. Ordinarily, that is so, and the objection would be well taken, if the appeal were based solely upon such matters. The reason of the rule is to prevent unnecessary delay in the trial of causes by appeals from interlocutory orders which may have no prejudicial effect upon the final judgment. But, as the order overruling the demurrer is appealable, the reason for the rule does not apply, and it will be better for both parties in the further progress of the case to have these questions decided.

The allegation that plaintiff's mother and sister live with her and suffer as alleged, though not strictly necessary to the statement of plaintiff's cause of action, was not irrelevant thereto, because it tends to show

the nature and extent of plaintiff's damages, since she has the right to have them live with her and enjoy the comforts of her home. In a like case, a plaintiff might allege injuries to his wife and children, or the keeper of a hotel or boarding house, to his guests, not to enable him to recover damages for what they suffered, but to show the nature and extent of his own damages.

As the case must go back for trial on the merits, and as any statement or discussion of the testimony by the Court might result prejudicially to one side or the other, it is sufficient to say, with regard to the motions for nonsuit and direction of the verdict, that plaintiff's testimony tended to prove the allegations of her complaint, and defendant's testimony tended to disprove them. Therefore, if the complaint stated a cause of action for a private nuisance, no doubt the learned counsel for defendant will concede that the Court was bound to let the jury decide the issues of fact.

[450] The question of paramount importance, then, is: Did the complaint (the material allegations of which will be reported) state a cause of action for a private nuisance? Defendant's contention is, not that the facts alleged are not sufficient to constitute a nuisance, but that, if they constitute a nuisance at all, it is a public nuisance, and, therefore, the complaint is insufficient, because there is no allegation that plaintiff suffered any special or particular injury, differing in kind from that suffered by the public.

To prevent multiplicity of actions, promote justice, and securing the public tranquility, Courts refused to entertain private actions to remedy purely public nuisances. These may and should be remedied through the public process of indictment. But the Courts recognize the fact that a public nuisance may affect some members of the public in a different manner and inflict upon them injury of a different kind from that suffered by the general public; and, when this is so, it is, as to them, a private nuisance, for which they may have the private remedy of an action. But that which is *per se* or *prima facie*, a public nuisance, is presumed to affect all the public alike, that is, in the same manner, though it may not affect all to the same extent. Therefore, the rule is that when a plaintiff complains of that which is *per se*, or *prima facie*, a public nuisance, he must allege some injury to himself differing in kind, and not merely in degree, from that suffered by the general public; and, if he fails to state such injury, he states no cause of action, and this for the reason above stated that the Courts will not allow him to have a private remedy for that which affects all the public alike. The cases cited by appellant were cases in which the things com-

plained of were *per se*, or *prima facie*, public nuisances, and, therefore, the rule above stated was held to apply. But the rule does not apply, and there is no reason for its application, when a plaintiff states, as his cause of action, that which is *prima facie* only a private nuisance, even though it may appear [451] from his complaint that a determinate number of other persons are or may be similarly affected by it, for a nuisance may affect a considerable number of persons in the same manner and yet not be a public nuisance, and, in that event, if the individuals so affected were denied the private remedy of an action, they would be without any remedy at all, because, if it is not a public nuisance, it is not subject to indictment.

Now, clearly, a fertilizer mixing plant is not a "nuisance *per se*," that is, a thing which is a nuisance anywhere and under all circumstances. If it is a nuisance at all, it is what is called a "nuisance *per accidens*," that is, by reason of its location and other circumstances, such as the community in which it is located, or the manner in which it is constructed or conducted. It follows that plaintiff's cause of action is based upon that which is *prima facie* only a private nuisance, and, therefore, it was not necessary to the sufficiency of her complaint that she should have alleged injury to herself differing in kind from that suffered by others who may have been affected. The complaint will be searched in vain for any allegations of fact which show that the things complained of amount to a public nuisance. The demurrer was, therefore, properly overruled.

Judgment affirmed.

NOTE.

Place for Storing or Mixing Fertilizer as Nuisance.

Generally.

Whether a place used for storing or manufacturing fertilizer constitutes a nuisance depends largely on the situation and environment and the manner in which it is conducted: the determination of its character as a nuisance being governed by the degree of inconvenience caused by its operation. Thus it may be stated as a general rule that where the fumes, gases, odors, etc., arising from the storage or manufacture of fertilizer are of such an offensive and objectionable character as to affect seriously the comfort of those subjected to it, or to work an appreciable injury to their property, it will be declared to constitute a nuisance, and as such will be abated. *Northwestern Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 24 U. S. (L. ed.)

1036; *U. S. v. Luce*, 141 Fed. 885; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 29 Atl. 900, 25 Am. St. Rep. 595, 9 L.R.A. 737; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; *Laird v. Atlantic Coast Sanitary Co.* 73 N. J. Eq. 49, 67 Atl. 887; *Ruckman v. Green*, 9 Hun (N. Y.) 225; *Duffy v. E. H. & J. A. Meadows*, 131 N. C. 31, 42 S. E. 460; *Barkau v. Knecht*, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. St. 206, 28 Atl. 702; *Frost v. Berkeley Phosphate Co.* 42 S. C. 402, 20 S. E. 280, 46 Am. St. Rep. 738, 26 L.R.A. 698. And see the reported case. See also *Manhattan Mfg. etc. Co. v. Van Keuren*, 23 N. J. Eq. 251.

The rule was stated in *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 29 Atl. 900, 25 Am. St. Rep. 595, as follows: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie. And this, too, without regard to the locality where such business is carried on, and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business. . . . We fully agree that in actions of this kind, the law does not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; that in determining the question of nuisance in such cases, the locality and all the surrounding circumstances should be taken into consideration; and that where expensive works have been erected and carried on, which are useful and needful to the public, persons must not stand on extreme rights, and bring actions in respect of every trifling annoyance, otherwise, business could not be carried on in such places. But still, if the result of the trade or business thus carried on is such as to interfere with the physical comfort, by another, of his property, or such as to occasion substantial injury to the property itself, there is wrong to the neighboring owner for which an action will lie." In that case it appeared from the evidence that noxious gases escaping from a fertilizer factory were so offensive and objectionable as to affect the health of residents of the neighborhood, and at times obliged them to leave the table, and even to abandon the house, and further that the gases materially injured property, discolored and injured clothing hung out to dry, stained the glass in the windows, and corroded the tin spouting on the houses.

In *Laird v. Atlantic Coast Sanitary Co.* 73 N. J. Eq. 49, 67 Atl. 387, wherein it was sought to enjoin the operation of a crematory and fertilizer plant on the ground that the smoke and odors emanating from it were so disagreeable that at times persons living from two thousand to twenty-five hundred yards from it were compelled to close their doors and windows, it was said: "With regard to the character for offensiveness and the intensity of the odor. The complainants and their families are not oversensitive people, but plain, everyday folk, and their evidence must be considered accordingly. Their evidence was that in the conditions of the atmosphere and the direction of the wind which I have mentioned, and especially and mainly in warm weather, the odor was very unpleasant, so much so that they felt constrained to close their windows and keep them closed. They were rendered uncomfortable, both at their meals and when sitting in their houses and on their piazzas in the summer time. This situation of things is serious. They have the right to have the air come to them in a state of ordinary purity, so that they can comfortably enjoy, during the hot months, the ordinary currents of air. In all these cases it is a question of degree. In this case the evidence satisfies me that the degree of intensity was such that ordinary, plain people would be rendered uncomfortable by it."

In *U. S. v. Luce*, 141 Fed. 385, which was an action brought by the United States to abate the nuisance caused to its quarantine station by the operation of two fish fertilizer factories situated from three-eighths to three-quarters of a mile distant, the court holding the foul odors and the great number of flies caused by the operation of the factories to constitute a nuisance said: "The United States is represented at the quarantine station in the persons of its officers, agents and servants having charge and occupancy thereof. Immigrants and other persons there detained in quarantine or confined in the marine hospital are so detained or confined by authority of the United States in the maintenance of a system intended and calculated to serve at once as an aid to commerce and a protection against the invasion of the country by contagious and infectious diseases. The United States, owning and holding the property for the accomplishment of these benign purposes, has a right to insist that neither the efficiency of the management of the station nor its usefulness in other respects shall be sacrificed or impaired by nuisances wrongfully created or continued, and it is entitled to secure relief from such nuisances, when materially and injuriously affecting the health or comfort of those in charge of or employed at the station, or of those detained or confined there. To both classes of persons the government owes protection against such wrongs and the courts should not hesitate to accord it. The evidence in the case is not confined to the subjects of foul or noisome smells passing directly from the fish factories to the quarantine station, and discomfort and annoyance to the inmates of the station from the multiplication of flies resulting from the operation of the factories. It covers several other points on which the counsel for the government laid much stress; among them being the impregnation of the beach with the large amount of liquid refuse daily run from the factories into the bay and consequent contamination of the air with offensive odors, and the increased danger of the spread of contagious and infectious diseases beyond the limits of the quarantine station owing to the great number of flies frequently wafted from the factories to the station. The evidence on the two points just mentioned is voluminous and is not lightly to be disregarded. There is also evidence touching noises for several hours in the night directly or indirectly caused by the unloading of the fish from the vessels at the factories. But, wholly aside from the three grounds of contention last alluded to, the evidence is full, clear and convincing that the inmates of the quarantine station are materially annoyed and discomforted by offensive, noisome and nauseating odors originating at or in the immediate vicinity of the fish factories and caused by their operation, and that such annoyance and discomfort, while not uninterrupted, occur so frequently as to interfere to an unreasonable and unjustifiable degree with the common enjoyment of life and to constitute a nuisance which should be restrained by injunction."

In *Northwestern Fertilizer Co. v. Hyde Park*, 97 U. S. 659, 24 U. S. (L. ed.) 1036, wherein it appeared that the odors from a fertilizer factory were so offensive as to produce nausea and discomfort, and to depreciate the value of property, it was held to constitute a nuisance.

In *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. St. 209, 28 Atl. 702, it appeared that the fumes and gases emanating from a fertilizer factory were of such a character as to render the homes of the residents of the neighborhood unfit for habitation, and to cause nausea, vomiting and loss of appetite. It was held that the operation of the factory might be enjoined as a nuisance.

Nor is it essential to the existence of an actionable nuisance that health should be broken down or injured. *U. S. v. Luce*, 141 Fed. 385, wherein it was said: "It is not essential to the existence of a nuisance that it be injurious to health. The sound condition of those employed in the factories and habituated to the smells necessarily generated in their operation cannot be determinative of the proper decision of this case. It is well

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known that persons can be accustomed to foul and noisome odors and retain their health." And in *Perrin v. Crescent City Stockyard, etc. Co.* 119 La. 83, 12 Ann. Cas. 903, 43 So. 938, it was said: "We find, from the evidence so taken, that the odors complained of are the legitimate and natural cause of the nuisance charged, though we do not find that they are injurious to health. It is an exaggeration to say that they are unbearable; but that they are a source of great discomfort to defendant and his family and to the residents of the neighborhood cannot be denied. A use of property which materially interferes with the physical comfort of those who live in the neighborhood, or which impairs the physical enjoyment of their home, may be a nuisance, even though it does not injure their health, or result in driving them from their home."

In the fact that the employees of a fertilizer factory or those accustomed to the conditions and odors caused thereby do not suffer any inconvenience does not alter the rule. *U. S. v. Luce*, 141 Fed. 385, wherein it was said: "It by no means follows from the fact that the odors from the fish factories may not be nauseating or discomforting and annoying to those employed there, or to others inured to noisome smells, that they do not constitute a nuisance to the inmates of the quarantine station and marine hospital. It is important in this connection to bear in mind that the accomplishment of the purposes for which the station and hospital were established involves not only the presence there of the officers and employees in charge, but the detention and confinement of many who have never been subjected to such a tainted atmosphere."

A license from a board of health to maintain and operate a fertilizer factory cannot be set up as a defense if the factory is so conducted as to constitute a nuisance. *Garrett v. State*, 49 N. J. L. 94, 693, 60 Am. Rep. 592, 7 Atl. 29.

However, the mere fact that odors from a fertilizer factory are smelled at a great distance and are unpleasant and objectionable will not alone constitute the factory such a nuisance as to justify equity in enjoining its operation. *Webb v. Virginia-Carolina, Chemical Co. (W. Va.)* 87 S. E. 633. In *Duffy v. E. H. & J. A. Meadows*, 131 N. C. 31, 42 N. E. 460, it was said: "The fact that odors are 'unpleasant and objectionable' is no ground for invoking the aid of the court in interfering with a business or other establishment from which such odors arise. That they are unpleasant will not be sufficient; they must work some substantial annoyance, some material physical discomfort, to those who live in the neighborhood, or injury to their health or property."

Even though the disagreeable odors, etc., arising from the operation of one fertilizer factory may not be sufficient in itself to be a nuisance, if when combined with those of other similar factories in the same neighborhood the resultant inconvenience is so great as to be unreasonable, either one or all of such factories may be declared to be a nuisance. See *United States v. Luce*, 141 Fed. 385, wherein the rule was stated and applied as follows: "The factory of the defendants and that erected by S. S. Brown & Company, . . . are so situated with respect to each other that when the wind is in such direction as to carry the odors from one of them to the quarantine station it will carry the odors from the other there, and the odors from one cannot be distinguished from the odors from the other. There is no evidence of co-operation, privity or business relationship of any kind between the defendants and S. S. Brown & Company in the erection and operation of their respective factories, or between the defendants and the succeeding owners or managers, if such there be, of the factory erected by S. S. Brown & Company; nor is there any evidence to the point that the odors from either of the factories alone would or would not so contaminate the air at the quarantine station as to create a nuisance there within the definition of the authorities. But the combined odors from both factories unquestionably have that effect, and in producing it the two establishments in fact co-operate in and contribute to the creation of the nuisance. Under these circumstances, in the absence of a plain, adequate and complete remedy at law, the owners or managers of both or either of the factories can be enjoined from maintaining or contributing to the maintenance of the nuisance." So in *Perrin v. Crescent City Stockyard, etc. Co.* 119 La. 83, 12 Ann. Cas. 903, 43 So. 938, it was said: "The mere fact that there exists in the locality other nuisances which produce similar results is no defense, if the nuisance complained of exists to such an extent to be measurably traceable thereto; that it is not necessary that all the injury should be the result of the nuisance sought to be charged; that, if it is of such a character and produces such results that, standing alone, it would be a nuisance to plaintiff, the fact that it is the principal, though not the sole, agent producing the injury, is sufficient."

As Nuisance per Se.

In some of the older cases it was said that a plant for manufacturing commercial fertilizer is a nuisance per se. *State v. Luce*, 9 Houst. (Del.) 396, 32 Atl. 1076; *Czarniecki v. Bollman (Pa.)* 10 Cent. Rep. 96.

In the latter case it was held that a bone boiling factory located in a thickly settled district was a nuisance per se, the court saying: "Everyone knows that carrion cannot be gathered together in any populous neighborhood without being offensive."

But the modern and better doctrine is that whether such a factory is a nuisance depends entirely on the conditions surrounding its operation. *Webb v. Virginia-Carolina Chemical Co.* (W. Va.) 87 S. E. 633. And see the reported case. In *Duffy v. E. H. & J. A. Meadows*, 131 N. C. 31, 42 S. E. 460, the court, holding the denial of a motion for judgment on the complaint and answer to be correct, stated the doctrine as follows: "The first motion could have been sustained only upon the ground that the material used in manufacturing the guano constituted either a nuisance per se, or that the answer admitted the allegations of the complaint to such an extent as to show that the manner in which the business was conducted and the material used caused a nuisance. This court would be slow to declare any lawful business a nuisance per se. A slaughterhouse located in a thickly populated town or city, or a manufactory of guano similarly situated, in which the chief material used was decayed fish, not having gone through a process of deodorization, would be nuisance per se, and there may be others. But if a slaughterhouse was situated in a place remote from residences and public highways, it would not be a nuisance, unless it was shown that the business was conducted in an improper manner, as by allowing or permitting the escape of gases, stenches or vapors, thereby producing serious and substantial discomfort and annoyance to those residing in the neighborhood, from a want of proper care in the removal or burning of the offal from the premises. Such a guano manufactory as we have mentioned, so remotely situated from residences and highways as not to affect the health or comfort of the community by means of odors, would not be a nuisance."

LEWIS

v.

REED'S EXECUTOR ET AL.

Kentucky Court of Appeals—February 17, 1916.

168 Ky. 559; 182 S. W. 638.

Wills — Power of Equity to Reform.

Strictly speaking, courts of equity have no power to reform a will, as that term is used

with respect to other instruments, and it is only where the mistake in a will is apparent on its face, and the court is able to ascertain the means of correcting a mistake, that a court of equity will correct a mistake in a will.

[See note at end of this case.]

Construction of Wills — Disinheritance Not Favored.

An heir will not be excluded or disinherited, except by express words or necessary implication; and if the will is doubtful, that construction favorable to the heir will be adopted.

Testator's Intent to Be Effectuated.

In construing a will, the court should aim to give effect to the testator's intent, upholding, if possible, each item of the instrument.

All Provisions to Be Harmonized.

The courts will, if possible, harmonize provisions of a will, and only if inconsistent will the latter prevail over former provisions.

Persons Taking under Bequest — Enumeration Following General Words.

The sixth clause of a will recited that the residue of the testator's estate should be held by his executors in trust for the benefit of all his nieces and nephews hereinafter named, paying to each, who should survive the testator for fifteen years, equal instalments of the income, and that at the end of such period the property should be sold and divided among the nieces and nephews and their children. The clause further recited that it was the testator's intention that all his nieces and nephews and their children should take an equal portion of the estate. The enumeration of the nieces and nephews omitted the name of plaintiff's mother, a niece who died before the testator. It is held that, notwithstanding the use of the expression "all," the enumeration of the nieces and nephews showed the intent on the part of the testator that only those enumerated should take; consequently plaintiff was not entitled to take on the theory that the name of her mother was omitted through mistake, the testator intending to put his nieces and nephews and their descendants on equal footing, such a conclusion being strengthened by the declaration, in a subsequent clause of the will, that no advancements should be charged against the interests of any of the beneficiaries.

Appeal from Circuit Court, Fayette county.

Action by Lizzie G. Lewis, plaintiff, against Henry S. Reed's executor et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. **AFFIRMED.**

Robert B. Franklin and Robert C. Talbott for appellants.

Falconer & Falconer for appellees.

[559] CLAY, J.—Henry S. Reed, a resident of Fayette county, died in the year 1911, leaving a will which was dated January 4, 1910, and duly probated by the Fayette county

court. After authorizing his executor and trustee to sell and convey all of his property, and making certain specific bequests, which are not material to this controversy, the will is as follows:

[560] "6th. All of the residue of my estate, real and personal, I desire my executor to hold in trust for the benefit of my nieces and nephews hereinafter named, paying to each of them that survive me for fifteen years after my death their equal portion of the income therefrom in semi-annual instalments. At the end of said fifteen years all of my real and personal estate shall be sold by my executor and trustee and divided equally among my nephews and nieces and their children. My intention is that all my nephews and nieces and their children shall take an equal portion of my estate. The nephews and nieces who take under this will are: Mrs. Mattie Simpson Dunlap, Houston, Texas; Mrs. Lilla H. Goggin, El Paso, Texas; Mary Simpson, Eagle Pass, Texas; Mrs. Catherine Bowman Banks, Columbus, Georgia; Joseph J. Reed, Knoxville, Tennessee; S. P. Simpson, Eagle Pass, Texas; William R. Bowman, Fayette County, Kentucky; Bush Bowman, Guthrie, Oklahoma; Andrew Bowman, Fayette County, Kentucky; John B. Bowman, McIntosh, New Mexico; Robt. Lee Bowman, Bellaire, Ohio; and Ellen Douglas Payne, Lexington, Kentucky.

"7th. No charge shall be made by my executor to any of the above named devisees for gifts or advancements made during my life.

"8th. I hereby appoint the Security Trust Company, of Lexington, Kentucky, my executor and trust of this will."

Plaintiff, Lizzie G. Lewis, is the only daughter of Elizabeth Reed Lewis, who was a niece of testator and who was dead when the will was written. The executor and trustee declined to recognize her as one of the devisees under the will. Claiming that the will shows on its face that the testator clearly intended that all of his nephews and nieces and their children should share equally under clause 6 of the will, and that, by mistake, she was not named as one of the devisees, plaintiff brought this action to have the will reformed and construed so as to give her an interest in the devised estate. From a judgment denying her the relief prayed for, she prosecutes this appeal.

Strictly speaking, courts of equity have no power to reform a will, as that term is used with respect to other instruments. It is only where the mistake in the will is apparent on its face and the court is able, by a due construction of its terms, to ascertain the means of correcting [561] the mistake, that a court of equity will correct such mistake when called upon to construe the will or to deter-

mine the rights of the parties claiming under its provisions. *Eckford v. Eckford*, 91 Ia. 54, 58 N. W. 1094, 26 L.R.A. 370; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L.R.A. 321; 1 Story's Eq. Jur. 179; 2 Pomeroy's Eq. Jur. sec. 871; 1 Redf. on Wills, 3rd ed. 500; *Kerr on Fraud and Mistake*, Am. ed., by Bump, 448; *Wilson v. Morley*, 5 Ch. D. (Eng.) 776; *Mellish v. Mellish*, 4 Ves. Jr. (Eng.) 45; *Jackson v. Payne*, 2 Metc. (Ky.) 567; *Nutt v. Nutt*, Freem. Ch. (Miss.) 128; *Hunt v. White*, 24 Tex. 643. It is conceded that this is the correct doctrine, but insisted that it is peculiarly applicable to the will in question. In brief, the argument is as follows: The testator left no heirs except his nieces and nephews. Plaintiff's mother being dead, plaintiff was an heir. An heir will not be excluded or disinherited except by express words or necessary implication. In *re Reed*, 7 Penn. (Del.) 30, 76 Atl. 617; *Howard v. American Peace Soc.* 49 Me. 288. Where the construction of a will is doubtful, a construction favorable to the heir will be adopted. In *re Long*, 228 Pa. St. 594, 77 Atl. 924; *Baker v. Baker*, 152 Ill. App. 620. In construing wills the court should aim to ascertain the testator's intention and should, if possible, adopt a construction that will uphold each item or clause thereof. *Patrick v. Patrick*, 135 Ky. 307, 122 S. W. 159. When, from the language of a will, there is no doubt as to the testator's intention, the provisions thereof may be broadened and supplied by the chancellor, in order to carry out such intention. *Peynado v. Peynado*, 82 Ky. 5. The will in question distinctly provides that, at the end of fifteen years, all of the real and personal estate of the testator shall be sold by the executor and trustee, "and divided equally among my nephews and nieces and their children." Not only so, but the will further provides: "My intention is that all my nephews and nieces and their children shall take an equal portion of my estate." By using this language it is claimed the testator did not leave his intention to mere construction, but expressly declared his intention that all of his nephews and nieces and their children should share equally in the devised property. Having thus declared his intention and then having proceeded to name the devisees, the will clearly shows on its face that in naming the devisees plaintiff was overlooked and her name omitted from the will by mistake.

[562] While the argument is forcibly presented, it overlooks other provisions of the will with which the provisions relied on by plaintiff, when properly construed, are not inconsistent, and which show a clear intention on the part of the testator to limit the devise to those nieces and nephews specifically named. If the testator had desired that all

of his nephews and nieces should take under the sixth clause of his will, there would have been no necessity whatever for naming them. Instead of so providing, he expressly limits the devise of the income for fifteen years to his nephews and nieces "hereinafter named." When he comes to dispose of the corpus of the estate he simply provides that it shall be divided equally "among my nephews and nieces and their children." While, in the next clause, he does say "my intention is that all my nephews and nieces and their children shall take an equal portion of my estate," he does not stop there. He goes further and says: "The nephews and nieces who take under this will are: (here follow their names)." His intention is further shown by the seventh clause of the will, which distinctly declares that "no charge shall be made by my executor to any of the above named devisees for gifts or advancements made during my life." The word "all" being used in connection with language showing a clear purpose on the part of the testator to devise the rest of his estate only to certain named devisees, we conclude that the testator meant only all of those who were named and not all of his nieces and nephews, regardless of whether they were mentioned in the clause in question. We do not regard as controlling the fact that plaintiff's mother was dead when the will was written, and that the testator did not attempt to mention the children of any of his deceased nephews and nieces. His purpose was to have his estate kept intact for a period of fifteen years and the income therefrom paid to the designated beneficiaries during that period. He did not intend that the corpus of his estate should be distributed until the expiration of that period. It was not improbable that during that time one or more of his nephews and nieces might die. Having in view this contingency, he made provision for their children. Construed in the light of this circumstance, the will does not show an intention to make any distinction between the beneficiaries of the corpus of the estate and the beneficiaries of the income. [563] In speaking of children he meant only the children of the devisees mentioned. Courts will always construe a will so as to harmonize its different provisions and give effect to each if possible. To this end they will not disturb the first provision further than is absolutely necessary to give effect to the second. It is only where the provisions are absolutely irreconcilable that the latter will be preferred and will prevail over the former. *Jacob v. Jacob*, 4 Bush (Ky.) 115; *Hunt v. Johnson*, 10 B. Mon. (Ky.) 342; *Howard v. Howard*, 4 Bush (Ky.) 497. The construction we have adopted does no violence to the will itself. It simply harmonizes the word "all" with the other provisions of the will, which clearly

show that he intended to include as devisees only the nephews and nieces specifically named. Nor does this construction violate the rule that heirs should not be excluded except by express words or necessary implication. By devising all the rest and residue of his estate to the nephews and nieces named in the will, the testator, by necessary implication, excluded all others. We, therefore, conclude that the will does not show on its face such a clear mistake on the part of the testator as would justify us in correcting the will so as to include plaintiff as one of the devisees.

Judgment affirmed.

NOTE.

Jurisdiction of Equity to Reform Will.

The earlier cases passing on the jurisdiction of equity to reform a will are discussed in the notes to *Polsey v. Newton*, 16 Ann. Cas. 139, and *Williams v. Hamilton*, 65 Am. St. Rep. 475.

In addition to the reported case, there are apparently but few recent cases which pass on that point. In *Jackson v. Wolfe* (Ark.) 191 S. W. 938, it appeared that the father of the plaintiff devised certain specified real estate to her mother and the heirs of her body. The suit was instituted in a chancery court, the complaint alleging that there was an erroneous description in the will, in that the land was described as the south half of the northwest quarter of a section, whereas it was intended to devise the north half of the northwest quarter. The prayer of the complaint was that the will should be reformed so as correctly to describe the tract of land according to the intention of the testator, and that the plaintiff should recover her undivided half interest in this tract. Subsequently an amended complaint was filed, alleging an agreement between the father of the plaintiff and her mother, by the terms of which he was to devise to her the homestead property and certain other real estate, provided she would agree to join with him in the conveyance of other lands to a nephew. The court said: "In the present case we find no circumstances whatever which would justify this court in declaring that the testator meant by the description used to convey a tract other than the one which was specifically described. This tract was the homestead of the testator, and his wife had a life estate in it by operation of law, and that may have been the reason why the testator omitted it from the devise to her. To hold with the plaintiff in this case would be purely a reformation of the instrument, which in all the cases on that point this court has held could not be done."

In *Holmes v. Campbell College*, 87 Kan. 597, Ann. Cas. 1914A 475, 125 Pac. 25, 41 L.R.A.(N.S.) 1126, the complaint sought to set aside a will on the grounds of undue influence and want of capacity of the testatrix to make a valid will. The facts disclosed that three-fourths of the estate of the testatrix was bequeathed to the defendant. The lower court found that the testatrix believed at the time of the execution of the will that she had disposed of practically her entire estate and that her mind, at the time the will was signed, "was impaired by old age, by worry over her property and the fancied conduct of some of her relatives, and by disease, so that, while she was able to transact the business of renting her land and looking after collecting the rents, and having her pension looked after and her will made, she was not able to fully comprehend the nature and effect of the disposition of her property made by this will." The court said: "The provision cannot be stricken from the will, however, merely because it was the result of a mistake of fact on her part. This would be in effect to reform the will, and the court possesses no such power."

See also *Hertford v. Harned* (Ind.) 113 N. E. 727, wherein the court said by way of dictum: "While courts of equity are invested with the power of reforming written contracts for mutual mistake and make them conform with the intent of the contracting parties, they are not clothed with like authority over wills, nor have they the rightful power to admit extrinsic evidence to add to, eliminate, or vary the terms of a will as written."

VOLKER LUMBER COMPANY.

v.

UTAH AND OREGON LUMBER COMPANY ET AL.

Utah Supreme Court—April 8, 1915.

45 Utah 603; 143 Pac. 365.

Chattel Mortgages — Failure to File — Creditors Entitled to Attack.

Under Comp. Laws 1907, § 150, providing that, unless the possession of personal property be given to, and retained by, the mortgagee, no mortgage thereof shall be valid as against the rights and interests of third persons, unless the mortgage or a copy thereof be filed in the office of the recorder of the county where the mortgagor resides, etc., and under section 2473, providing that reten-

tion of possession of goods by their vendor shall be conclusive evidence of fraud as against creditors, including all persons who shall be creditors of the vendor at any time while such goods shall remain under his control, a chattel mortgage is invalid as against all persons who without notice or knowledge of its existence give credit to the mortgagor at any time subsequent to execution and previous to filing.

[See note at end of this case.]

Same.

Where a chattel mortgage is filed as provided, it becomes effective as against all persons extending credit to the mortgagor after such filing, unless such persons can invalidate it on the ground of fraud or other legal basis of attack.

[See note at end of this case.]

Same.

A chattel mortgage which is not filed as required is valid against all persons having claims against the mortgagor which accrued previous to the execution and delivery of the mortgage, unless such persons acquire a lien by attachment or otherwise against the property before the mortgage is filed as provided; since a debtor may prefer his creditors.

[See note at end of this case.]

Same.

Under Comp. Laws 1907, §§ 150, 2473, postponing the rights of a chattel mortgagee to those of a creditor of the mortgagor who extended credit subsequently to the execution, but previous to the filing of the mortgage, where plaintiff, after filing, secured the assignment of a claim against the mortgagor which had accrued previous to the filing, plaintiff acquired all rights of such mortgagor therein, including the right to invalidate the mortgage.

[See note at end of this case.]

Appeal from District Court, Weber county: HOWELL, Judge.

Action by Volker Lumber Company, plaintiff, against Utah and Oregon Lumber Company et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

T. D. Johnson and Wade M. Johnson for appellants.

R. S. Farnsworth for respondent.

[604] FRICK, J.—The plaintiff, hereinafter called respondent, as a creditor and assignee of other creditors of the defendant Flewelling Building Company, hereinafter styled company, commenced this action in equity against the defendant Utah & Oregon Lumber Company, hereinafter called appellant, and also against the company to have declared invalid a chattel mortgage which was executed and delivered by said company to the appellant, and incidentally to have determined the priority and extent of respondent's alleged lien up-

on the property included in said chattel mortgage.

The material facts, in substance, are: In July, 1910, said company was engaged in what in the trade is known as millwork, that is, in the business of manufacturing doors, sash, blinds, molding, etc., in Ogden, Utah. On the 16th day of July, 1910, said company was indebted to the appellant in the sum of \$800 and on that day executed its note for said sum, and, to secure the payment thereof, also executed and delivered to appellant a chattel mortgage on its woodworking machinery used in the business aforesaid. Said mortgage was not filed for record until June 1, 1911. When said mortgage was given said company was indebted to the Ogden Oil & Glass Company, one of the assignors of the appellant, in the sum of \$318.98, and when the mortgage was recorded the indebtedness amounted to \$416.03. The indebtedness had [605] thus increased \$97.40, while the mortgage remained unrecorded. After the mortgage was recorded the indebtedness was further increased in the sum of \$57.38. The aggregate amount of the indebtedness thus was \$473.41. There was, however, paid after the mortgage was recorded the sum of \$181.54, which reduced the whole amount of the debt to \$291.87, and, if said \$57.38 should also be deducted for the reasons hereinafter stated, then the amount was further reduced to the sum of \$234.49. Said company was also indebted to George A. Lowe Company when said mortgage was given in the sum of \$685.01, and when said mortgage was recorded said indebtedness had been increased in the sum of \$630.76, making the whole indebtedness \$1,315.77. There was paid after the mortgage was recorded the sum of \$1,060.64, leaving a balance of \$255.13. But there were also goods sold after the mortgage was recorded in the sum of \$323.11, which left a debt of \$578.24, if said \$323.11 is added, or, if not, then said sum of \$255.13. The \$578.24 was also assigned to the appellant. Said company was also indebted to the respondent as follows: When said mortgage was given nothing was owing, but after the mortgage was executed and delivered, and up to the time it was filed, said company became indebted to respondent in the sum of \$574.96. After the mortgage was recorded the debt was increased in the sum of \$927.82 which, when added to the prior amount, swelled the debt to the sum of \$1,502.78. There was, however, paid after the mortgage was given the sum of \$732.62, which left a balance of \$730.16, all of which was, however, incurred after the mortgage was filed. No fraud is involved in this case.

Upon substantially the foregoing facts respecting the indebtedness the court adjudged the mortgage invalid as against all of said claims, and entered a decree restraining its

enforcement. Appellant insists that the court erred in its conclusions of law and in entering the decree aforesaid.

It was made to appear at the trial that when the mortgage was filed none of the foregoing claims had been reduced to judgment, and no execution or other lien had been established either in favor of the assignors or the respondent as assignee, or otherwise. Appellant's counsel therefore contend that the [606] mortgage in question is prior in right as against all those who were merely general creditors of the company, and hence was prior to all of the claims that we have set forth above. Upon the other land, respondent's contends that the mortgage is invalid as against all of said claims. The precise question presented on this appeal is *res integra* in this jurisdiction.

We think the solution of the question very largely depends upon the effect to be given to our statute relating to chattel mortgages, and against the creation of secret liens. Comp. Laws 1907, section 150, so far as material to this controversy, reads as follows:

"Unless the possession of personal property be delivered to and retained by the mortgagee, no mortgage thereof shall be valid as against the rights and interests of any persons other than the parties thereto, unless:

"(3) The mortgage, or a copy thereof, be filed in the office of the recorder of the county where the mortgagor resides, or, in case he is a nonresident of this state, in the office of the recorder of the county or counties where the property may be at the time of the execution of the mortgage."

The only other section which we deem material is section 2473 of the same compilation, which reads as follows:

"Every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or assignor, or subsequent purchasers in good faith. The word 'creditors,' as used in this section, shall be construed to include all persons who shall be creditors of the vendor, or assignor, at any time while such goods and chattels shall remain in his possession or under his control."

It is perhaps true that the weight of authority, under statutes somewhat different from ours, is to the effect that only those creditors who have established, and therefore assert, liens against the mortgaged property can assail the validity [607] of an unrecorded mortgage upon that ground. We shall

refer to only a few of the many cases that could be cited in support of the foregoing proposition, namely, *Forrester v. Kearney Nat. Bank*, 49 Neb. 655, 68 N. W. 1059; *Cameron v. Marvin*, 26 Kan. 612; *McVay v. English*, 30 Kan. 368, 1 Pac. 795; *Morse v. Morrison*, 16 Colo. App. 449, 86 Pac. 169; *Wilson v. Leslie*, 20 Ohio 161. Should the reader desire to pursue the subject, he will find a large number of cases referred to in the foregoing citations. It must not be overlooked, however, that our chattel mortgage statute specifically provides that "no mortgage shall be valid as against the rights and interests of *any person other than the parties thereto*," unless such mortgage is filed, etc., as provided in the statute. (Italics ours.) It might be that, if this section stood alone, in view of the decisions, it could be contended, with much force that "the rights and interest of any person" mentioned in the statute refers to some specific rights and interests in or to the property mortgaged. If we construe and apply the foregoing language, however, in connection with what is said in section 2473, supra, relative to what is meant by the term "creditors," then whatever doubt remains vanishes. The term "creditors," as used in our statute, therefore, includes all persons who may have claims against the mortgagor at any time while the mortgaged goods and chattels remain in his possession. Now, it is universally held by the courts, and such clearly is the purpose of the statute, that, under a statute like ours, filing, if it is required, or recording, where that is necessary, in law is the equivalent of taking possession by the mortgagee, and hence the statute is construed to mean that the mortgage is invalid as against the class of persons aforesaid only so long as it is not filed or recorded, unless it is withheld from record so long that fraud may be inferred from the delay. When it is filed or recorded, however, it is the same, in legal effect, as though possession were taken, and the mortgage is valid as against all who become creditors of the mortgagor after such filing or recording, unless it can be declared invalid upon the ground of fraud or for some reason other than that it was not filed or recorded. Our statute fixes no time, as some statutes do, within which a mortgage must be [608] filed or recorded. The question, so far as it affects the claims in this case which were incurred after the mortgage was executed and delivered, and before it was filed as required by our statute, namely, all those that arose after the 16th day of July, 1910, and before the 1st day of June, 1911, has been considered and determined by the Supreme Court of California in the case of *Ruggles v. Cannedy*, 127 Cal. 290-306, 53 Pac. 911, 59 Pac. 827, 46 L.R.A. 371. The decision, so far as ma-

terial here, is fairly reflected in the headnotes as given in 53 Pac. 911, which read as follows:

"(1) Civ. Code, section 2957, provides that a mortgage of personal property is void as against creditors unless recorded in like manner as grants of real property. Held that, since recordation has been made by the Code the equivalent of an immediate delivery and continued change of possession, a chattel mortgage not immediately recorded is void as to creditors whose claims arose between its execution and recordation.

"(2) Under Civ. Code, section 2957, providing that a mortgage of personal property is void as against creditors unless recorded, a creditor may sue to set aside as fraudulent a mortgage not seasonably recorded, though he has not acquired a lien by judgment or attachment before the recordation of such mortgage.

"(3) A chattel mortgage not seasonably recorded is valid as between the parties, and as against creditors whose claims arise after recordation."

The question of what constitutes a creditor under the California statute, which, in legal effect, is like ours, is fully and ably discussed by Mr. Justice Henshaw. It is there held that the term "creditors" applies to all persons who, without notice of the mortgage, have extended credit to the mortgagor after the mortgage was given and before it was filed or recorded as required by the statute. It is further held that such is the effect entirely apart from any question of fraud. The rule is based upon the local statute, and not upon the decisions of the courts, which are based upon somewhat different statutory provisions. It would seem that the decision of the California Supreme Court in following the statute is clearly right. When a statute defines what is meant or included within the term "creditors" there is no room for judicial construction. To depart from the statute [609] would become judicial legislation, rather than judicial construction. The case of *Ruggles v. Cannedy*, supra, is approved by the Supreme Court of California in the later case of *Hopper v. Keys*, 152 Cal. 488-493, 92 Pac. 1017. It is also cited by the California Appellate Court in the case of *Runge v. Wilson*, 7 Cal. App. 579, 95 Pac. 178. It is only fair to state, however, that in neither of the foregoing cases was the precise question now before us involved. The case was also approved and followed in *In re Hickerson*, 162 Fed. 352. The same doctrine is laid down by the New Jersey Court of Errors and Appeals in *Roe v. Meding*, 53 N. J. Eq. 350, 30 Atl. 587, 33 Atl. 394, and in *Dunham v. Cramer*, 63 N. J. Eq. 151, 51 Atl. 1011. There is a dissenting opinion in the California case by Mr. Justice Garrouette

which is concurred in by Justices Van Dyke and Harrison. The dissenting justices argue that the term "creditors" should be limited to those who "assert their claims by attachment or otherwise before recordation is had." They insist that the California statute should be construed to conform to the Nebraska and other decisions, some of which we have cited, although those decisions are based upon different statutory provisions. In view of the wording of the California statute—and if there is any difference ours is still stronger in favor of the creditor—we are not impressed with the views contained in the dissenting opinion in the California case. We are of the opinion, therefore, and so hold, that under our statute a chattel mortgage is, as a matter of law, invalid as against all persons who, without notice or knowledge of the mortgage, extend credit to the mortgagor at any time after the mortgage is executed and delivered and before it is filed as required by the statute. We further hold that, when a mortgage is filed as provided by the statute, it becomes effective as against all persons who extend credit to the mortgagor after that event, unless they can invalidate it upon the ground of actual fraud or for some other legal reason. Again, a mortgage, although not filed, is also valid against all persons who have claims against the mortgagor which accrued before the mortgage was executed and delivered, unless such persons acquire a lien by [610] attachment or otherwise against the property mortgaged before the same is filed as provided by the statute. That such is the intention of our statute seems clear, since it suspends the effect of the mortgage as to those persons only who extend credit while the mortgage subsists, but before possession of the mortgaged property is taken, or before the mortgage is filed, provided they have no notice of the existence of the mortgage. This again is in accordance with reason and justice. In this state a debtor, although in failing financial circumstances, may, nevertheless, prefer his creditor. He may thus secure any one or more of his creditors, just as he chooses, if done in good faith and for a *bona fide* claim. A mortgage can, therefore, not be assailed by one creditor merely because another was preferred. The mortgage is, therefore, good as against all claims which exist when the mortgage is given unless it can be assailed upon other grounds than that it was not filed. It is therefore valid as against the claims that existed when the mortgage was given and which remained unpaid at the time it was filed. This precise question was not involved in the case of *Ruggles v. Cannedy*, supra, and for that reason the California court expressed no opinion upon it. In that case only creditors who became such after the mortgage was given

and before it was filed were before the court. From what follows it will appear, however, that while the question just discussed in one sense is involved here, yet it may be academic merely. The record discloses that when the mortgage in question was executed and delivered to the appellant the company (the mortgagor) was indebted to the respondent and its assignors in the sum of \$1,003.99, and that thereafter goods were sold to the company by the respondent and its assignors amounting to \$7,467.13, and there was paid by the company the sum of \$6,936.98. There was, therefore, \$530.15 more goods bought than were paid for, and when that sum is added to the amount due when the mortgage was given it swells the debt due to respondent and its assignors to the sum of \$1,534.14. It, however, also appears that the whole of the indebtedness existing when the mortgage was given was wiped out. The question, therefore, of whether the mortgage was valid as against said debt of \$1,003.99, [611] which existed when the mortgage was given, is immaterial in this case, unless it should be further made to appear that the payments that were made were intended to be, and should have been, applied on goods bought after the mortgage was given and before it was filed. If such were the case, then said \$1,003.99 would have to be postponed to the claim of the mortgagee so far as the mortgaged property is concerned. If, however, such is not the case, then the whole of said \$1,003.99 has been paid, and only the amount that was purchased by the company from respondent and its assignors after the mortgage was filed would be subject to the mortgage. The goods purchased after the mortgage was filed amounted to the sum of \$1,308.31. The District Court, however, held the mortgage invalid as against that amount as well as against the other claims. That holding is directly contrary to the holding of the California Supreme Court in *Ruggles v. Cannedy*, supra, which case is directly based upon a statute which is not distinguishable from ours, and which case we feel constrained to follow.

The contention that respondent cannot prevail as to those claims that were assigned to it after the mortgage was filed because it then had knowledge of the mortgage is not tenable. Respondent succeeded to all the rights of its assignors, and, as we have seen, the mortgage, as to them, was invalid to the extent herein pointed out.

We desire to add in conclusion that there are some matters contained in both the findings of the court and the arguments of counsel which we have not considered, for the reason that we do not deem them material under the conceded or undisputed facts and circumstances in this case, although we concede that such matters might be material in

similar cases where the facts and circumstances are different or where they are disputed. We also wish it understood that it may be that the figures relating to the indebtedness and payments as we have given them may not, in every particular, be correct. They are taken from the record as we read it. They were not inserted in the opinion for the purpose of binding either the court or the parties, but are given to better illustrate the scope of the decision, and to show in what respects, [612] rather than to what extent, the judgment or decree should be modified.

The case is therefore remanded to the District Court of Weber County, with directions to vacate the judgment or decree, and to enter one in accordance with the views herein expressed; appellant to recover costs.

Straup, C. J., and McCarty, J., concur.

NOTE.

It is held in the reported case that under the broad terms of the Utah statute an unfiled chattel mortgage is invalid as to a creditor of the mortgagor whose claim accrues after the execution of the mortgage provided he has no notice thereof. As to claims accruing prior to the execution of the mortgage, however, the court holds that the creditor must acquire a lien on the property by attachment or otherwise before the mortgage is filed in order to be entitled to attack it. The question who is a creditor entitled to attach the validity of a chattel mortgage because of a failure to file or renew it, is discussed in the note to *Aultman Engine, etc. Co. v. Young*, Ann. Cas. 1912B 1101.

STATE EX REL. MUNDING

v.

INDUSTRIAL COMMISSION OF OHIO.

Ohio Supreme Court—July 2, 1915.

92 Ohio St. 434; 111 N. E. 299.

Workmen's Compensation Acts — Rights of Beneficiary — Vesting of Award.

An award of compensation from the state insurance fund, under section 35 of the workmen's compensation act (103 O. L. 72), to a wholly dependent person vests in the dependent when the award is made; so that, in case of the death of such dependent, his

or her personal representative is entitled to the balance, if any, remaining unpaid.

[See note at end of this case.]

Commutation of Award.

The word "commute," as employed in workmen's compensation act (103 O. L. 88), § 40, providing that the board of awards, under special circumstances, may commute periodical payments to one or more lump payments, means that the board may pay the defendant something less than he otherwise would receive.

Original action for mandamus. Munding, relator, and Industrial Commission of Ohio, respondent. The facts are stated in the opinion. WRIT AWARDED.

McGhee, Davis & Doulger and *Walter L. Connors* for relator.

Edward C. Turner, Freeman T. Eagleson and *John G. Price* for respondent.

[434] NICHOLS, C. J.—The petition in this case and demurrer thereto present the question whether an award of compensation from the state insurance fund, under Section 35 of the workmen's compensation act (103 O. L. 72), to a wholly dependent person vests in the dependent when the award is made, so that, in case of the death of such dependent, his or her personal representative is entitled to the balance, if any, remaining unpaid.

[435] The original Ohio workmen's compensation act was passed May 31, 1911 (102 O. L. 524). Its purpose, well expressed in its title, was: "To create a state insurance fund for the benefit of injured, and the dependents of killed employees, and to provide for the administration of such fund by a state liability board of awards."

This act was optional or elective in principle. On February 6, 1912, its constitutionality was upheld by this court in the case of *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A. (N.S.) 694. On September 3, 1912, a constitutional amendment was adopted by the people of Ohio (Section 35, Article II) authorizing the passage of laws providing for a state fund to be created by compulsory contribution thereto by employers and administered by the state.

Pursuant to this authority the legislature passed the present act (103 O. L. 72). This act is in effect an amendment to the act of 1911, the principal changes being that it is compulsory as to all employers employing five or more workmen, and optional as to those employing less.

Section 35 of the act, so far as the question before the court in this case is concerned, may be said to be identical with Section 28 of the old law.

The present act was the result of much thought and careful consideration of the oper-

ation of workmen's compensation laws of other states and foreign countries and of the administration of the plan in Ohio under the original law. It made the compensation plan more workable and efficient and provided fully for the administration of the act in all its features by the state liability board of [436] awards, and may be said to be a model of legislative expression in clarity and comprehension.

For convenience the board in charge of the administration of the fund will be referred to in this opinion as the board of awards rather than as the industrial commission of Ohio, for the commission, in matters pertaining to its administration of the workmen's compensation fund, acts as the state liability board of awards.

Section 14 of the act defines the terms "employee," "workman" and "operative" as used in the act.

Section 21 provides in part: "Every employee mentioned in subdivision one of section fourteen hereof, who is injured, and the dependents of such as are killed in the course of employment, . . . provided the same was not purposely self-inflicted, . . . shall be entitled to receive . . . from the state insurance fund, such compensation for loss sustained on account of such injury or death, . . . as is provided by sections thirty-two to forty inclusive."

Section 35 provides for compensation in case of death, and is as follows:

"In case the injury causes death within the period of two years, the benefits shall be in the amounts and to the persons following:

"1. If there be no dependents, the disbursements from the state insurance fund shall be limited to the expenses provided for in section forty-two hereof.

"2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly [437] wages, and to continue for the remainder of the period between the date of the death, and six years after the date of the injury, and not to amount to more than a maximum of thirty-seven hundred and fifty dollars, nor less than a minimum of one thousand five hundred dollars.

"3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two thirds per cent of the average weekly wages, and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-seven hundred and fifty dollars.

"4. The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

"(A) A wife upon a husband with whom she lives at the time of his death.

"(B) A child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the death of such parent.

"In all other cases, question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as dependent unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, lineal descendant, ancestor or brother or sister. The word 'child' as used in this [438] act, shall include a posthumous child, and a child legally adopted prior to the injury."

Under this section, in case of an injury resulting in death, the essential facts to be determined by the board of awards are: (1) That the employee was injured in the course of his employment; (2) that the injury was not self-inflicted; (3) that it resulted in death within the period of two years; and (4) the question of dependency at the time of death.

The last question is determined by the statute in the case of a wife living with her husband at the time of his death, and children under the age of sixteen living with the parent at the time of death of such parent. Such persons must be presumed to be wholly dependent for support on the deceased employee. All other questions of dependency must be determined by the board of awards. If it be found that there were dependents at the time of death, then the board must determine the average weekly wage of the deceased. If it is found that there were wholly dependent persons at the time of death (as in the instant case, the award having been made to relatrix's intestate as sole dependent), then the board can make no determination or finding as to the amount of the compensation which must be awarded; that is fixed by law in a sum certain. See Section 35, paragraph 2. The payment shall be two-thirds of the average weekly wage, and to continue for a period of six years, and not to exceed \$3,750, nor is it to be less than \$1,500. There are no qualifying words whatever. The board's duty, after finding the existence of dependents, [439] is but to make a calculation. It is entirely without discretion in the premises.

The statute, in fact, orders that in the case of wholly dependent persons the payment, subject to the fixed maximum and minimum, must be a certain definite sum (two-thirds of the average weekly wage) multiplied by a certain definite figure (six times fifty-two weeks).

Thus, in the case now before the court the board awarded the defendant \$1,872, to be paid in bi-weekly instalments of \$6 a week,

and to continue for a period of six years from the date of the death of the employee.

This paragraph of Section 35 is practically conclusive of the case, as it has every element necessary to confer a vested right. A fixed amount is awarded to a definite person as a matter of right, with no language suggesting in anyway an abatement of the award on the death of the person to whom it is made prior to the payment of the same in full, and we must hold that it speaks for itself, unless some other section or sections of the act condition or limit the right to this compensation.

Section 36 is not applicable to the instant case. It only has application where there are plural dependents, and while it provides for the determination by the board as to the manner in which the benefits or compensation may be apportioned among the several dependents and to which one the payments shall be made for the benefit of all, it gives no discretion whatever to alter the amount of the award so fixed nor to abate any part of the same.

[440] Sections 39, 40 and 41 of the act provide as follows:

"Section 39. The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion may be justified.

"Section 40. The board, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments.

"Section 41. Compensation before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employees or their dependents."

It is urged by the attorney general that Section 39 must be construed as giving the board continuing power and jurisdiction over the compensation when awarded, so that in case of the death of dependent it can abate the balance due under the award, if any, and revert the same to the state insurance fund.

That such was the intention of the legislature is not apparent from the section. We do not think findings and orders which may be changed mean findings and orders which are definitely fixed by law and as to which the board of awards has no discretion.

If the deceased employee left a widow who was living with him at the time of his death, the board must find that she was wholly dependent upon her deceased husband and must make a certain award [441] of compensation to her. The questions of dependency and amount of award in such case are both determined absolutely by the statute. The board can only act formally and must so act.

If Section 39 gave power to modify, alter or amend the finding as to the amount of the compensation or its payment, it would do so likewise as to the question of dependency. There are many findings and orders of the board to which Section 39 is plainly applicable and for which it was no doubt intended—thus, in Section 32, in cases of temporary disability; Section 33, in cases of partial disability; Section 34, in cases of permanent total disability; Section 35, in the matter of commuting periodical payments to one or more lump-sum payments; Section 36, in the matter of the apportionment of compensation, etc.

Section 34, providing for compensation in case of permanent total disability, presents a very strong, if not conclusive, indication that the amount awarded under paragraph 2 of Section 35 vests in the dependent, and that Section 39 is without application. Section 34 provides in part that in cases of permanent total disability the award shall be two-thirds of the average weekly wage, and shall continue *until the death* of such person so totally disabled.

In paragraph 2 of Section 35 the words "until the death of such person" (dependent) are omitted, and substituted therefor, after the words "to continue," appears the phrase, "for the remainder of the period between the date of the death, and six years after the date of the injury."

[442] As both of these sections were enacted by the same legislature, at the same time, as part of the same act and upon the same subject, it must be conceded that the legislature had before it the question of the abatement of an award upon the death of a dependent, and as it provided for such abatement in one instance and failed to do so in another, its action must be deemed intentional and that Section 39 cannot be construed to be equivalent to the words "until the death of such person," or similar words, omitted after the phrase "to continue" in paragraph 2 of Section 35, or to vest in the board of awards the power to read in such words.

If Section 39 could be construed as giving the board power to abate an award made under paragraph 2 of Section 35, in case of the death of dependent prior to completion of payments, it necessarily follows that it could be construed also as giving the board power and jurisdiction to determine dependency at any time during the period covered by the payments, instead of having its determination expressly limited by the statute, as it is, to dependency at time of death, and, although the statute is inflexible as to amount of award, abate the award at any time the person to whom the compensation was granted ceased to be a dependent. This construc-

tion would be directly contrary to the statutory requirements.

If the construction were possible, the board, having power to abate compensation, must necessarily keep a strict watch over each case, numbering many thousands, so as to discontinue payments as soon as dependency ceases to exist. Such construction [443] would render Section 40 of very doubtful, if any, value, for in each case there would be the possibility of the death of the dependent during the period and the consequent reversal to the insurance fund of all unpaid instalments, and the board would certainly hesitate to commute periodical payments to a lump sum and thus lose the increment to the fund in case of death of dependent. This would be a distinct backward step toward the old system which resulted in passage of the act. In fact, it is difficult to conceive the theory on which periodical payments can be commuted if the right to the entire award does not vest when made in the dependent. The word "commute" in this section must mean that the board by commuting the payments pays the dependent something less than he otherwise would receive. So, if the construction contended for by the state were adopted, it would mean that the board, when it made a lump-sum award, not only gave dependent something to which he was not entitled and might never be entitled, but also, instead of commuting the award, actually increased it. Section 41 exempts "compensation before payment" from attachment and execution. If compensation were not vested, then there could be neither attachment nor execution, and this section would be without meaning, unless we should add after the word "compensation" the words "and each installment thereof after it has become due and payable."

Since Section 35 is entirely clear and unambiguous and is consistent with Sections 39, 40 and 41, the court is not authorized to legislate under the [444] guise of statutory construction and upon the theory that the legislature intended, that the compensation awarded under paragraph 2 of Section 35 should abate at the death of dependent, thus changing the plain wording of the statute.

The language of this part of the section, as we have pointed out, is that the payment shall be two-thirds of the weekly wage and to *continue* for the remainder of the period between date of death and six years after the injury. As stated by Donahue, J., in *Sipe v. State*, 86 Ohio St. 80, 87, 99 N. E. 208, "That intent [of the legislature] must be ascertained first, if possible, from the language used and where that language is clear and unambiguous courts have no authority to change it." Citing *King v. Greenwood Cemetery Assoc.* 67 Ohio St. 244, 65

N. E. 862; *Hough v. Dayton Mfg. Co.* 66 Ohio St. 427, 64 N. E. 521; *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574.

In the last-cited case, Spear, J., uses language applicable here, when he says: "To endeavor to make this plainer would be like an effort to reason upon a sum in simple addition. . . . The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. . . . The words asked to be incorporated would be the words of the expounders and not of the lawmakers."

The only construction that can justifiably be given paragraph 2 of Section 35, in the case of a sole dependent, is the plain meaning of the words used. There is no authority under any rule of [445] statutory construction to add to, omit or change the words used. Compensation is awarded in a definite sum, with no conditions attached except that the payments are to be periodical.

There seems to be no decision of an American court upon this question arising under workmen's compensation statutes, but long ago this court decided a question which in principal is quite similar. The case of *Dorah v. Dorah*, 4 Ohio St. 292, presented the question whether the allowance made by the appraisers to a widow for her year's support conferred a vested right of property in such widow, so that, in case of her death before the expiration of the year and before the entire allowance had been paid, her personal representative could recover the balance. The court held that the entire amount vested when the allowance was made, and the balance remaining unpaid, though, on account of the death of the widow, impossible of application for which it was intended, could be recovered. Ranney, J., in his opinion used language and reason applicable to the case we are considering. He says, after pointing out that if the amount allowed did not vest then, if it had been paid, part could be recovered back by the estate upon the death of the widow prior to the expiration of the year, or a proportionate amount in case of the death of a child when the allowance had been made to a widow and minor children:

"We can see no reason to suppose, that it was ever intended to allow a recovery back of any part of the amount, upon the happening of such a contingency [death of a child]; . . . To allow [446] such a deduction, either by giving an action to the administrator to recover it back where it has been paid, or by permitting him to withhold it where it has not, is to introduce the most perplexing uncertainty as to the rights of the widow and the duties of the administra-

tor, . . . With the construction we adopt, the rights and duties of all concerned are clear, definite, and fixed. It gives to the widow and children a paramount claim upon enough of the estate to support them for one year, over creditors and distributees; and where it has been fixed or set apart by the appraisers, or by the court on review, effectually withdraws it from the balance of the estate, and has all the force and effect of an adjudication in their favor. It confers a vested right of property, conclusively disposes of so much of the estate, and leaves no discretion to the administrator as to complying with it."

The right of the dependent to whom an award has been made under paragraph 2 of Section 35 is clearer than that of a widow to whom an allowance has been made on her year's support. The compensation is awarded to the dependent in a fixed sum out of an insurance fund provided wholly for the purpose of paying such compensation. This award effectually withdraws the amount awarded from the fund and makes it exempt from execution and attachment. Any other holding would introduce into the administration of the workmen's compensation act most perplexing uncertainty both as to the rights of dependents and the duties of the board of awards.

[447] The precise question involved in this case has been before the courts of England, and it is the holding there, not only that an award of compensation to a dependent vests on allowance, but that the right to claim an award vests in the dependent at the time of death of the employee, and if dependent dies before presenting such claim the personal representative of a dependent may make the claim and recover upon it. While the English acts are different from ours in many respects, an examination of the cases to which we now refer and to the statutes will show that the same question was before the English courts as is presented by the instant case, and that practically the same reasons were advanced in opposition to the theory which the court adopted as are now advanced by counsel for the state.

In the case of *United Collieries v. Simpson A. C.* [1909] 383, the House of Lords held that where a workman has been killed by an accident arising out of and in the course of his employment, and his dependent dies without making a claim, the dependent's legal personal representative is entitled to compensation under the workmen's compensation act of 1906.

At page 389, Lord Loreburn says: "The eighth paragraph also contemplates payment to a dependent. And though the ninth [similar to Section 39 of the Ohio act as to apportionment of benefits] reserves a power

to vary the apportionment, neither it nor any other paragraph proceeds upon any other view than that there is a definite right on the part of dependents as a class to the money, subject to a [448] parental power of the court in dividing and applying it for their advantage." The dissenting opinion of Lord Dunedin is interesting because it shows that the court had before it the objection that payments to a personal representative were not authorized because the law provides only for payment to dependents. This case expressly approves the case of *Darlington v. Roscoe*, 1 K. B. [1907] 219, where it was held that if a notice of claim under the workmen's compensation act of 1897 has been given by a sole dependent, who dies before a request for arbitration is made or other proceedings are taken, the right to claim survives to such dependent's legal personal representatives and the maxim *actio personalis moritur cum persona* does not apply.

The only case we have been able to find advancing a contrary view is that of *O'Donovan v. Cameron*, 2 Ir. R. [1901] 633, where it was held: "The sole total dependent of a workman, who was killed by an accident arising out of his employment, died before she had filed or served a claim for compensation under the Workmen's Compensation Act, 1897. Had she had lived, and taken the necessary steps to recover it, she would have been entitled to £150 compensation. The personal representative of the deceased workman subsequently took proceedings . . . to recover compensation, to be applied for the benefit of the dependent, and in payment of her debts: *Held*, that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount."

[449] This case was distinctly disapproved by the House of Lords in *United Collieries v. Simpson*, *supra*.

Thus in England the authority is all in favor of the view that the right to compensation vests in the dependent at the time of the death of the employee and is transmitted to his personal representative even though the dependent has died without having made a claim for compensation. And this is a much more doubtful question than that before us, where the claim has been filed, compensation awarded and part payment made before death of dependent.

The English cases emphasize the fact that a fixed sum is provided by the act and no provision made for a refund of any part of the award, and that in the case of a dependent dying before the compensation is exhausted the absence of such a provision shows that when once the compensation is fixed there is to be *no refund*.

The question here, by the application of the most elementary rule of statutory construction, is settled by the statute. It speaks for itself, and there is no ambiguity. It is also settled by all the adjudicated cases on the subject.

But were it necessary to go outside of the statute to sources which we may consider, the result is even more conclusive.

Let us start at the beginning of workmen's compensation in Ohio. On May 10, 1910, the general assembly passed an act (101 O. L., 231) authorizing the governor to appoint a commission of five persons, representative of both employers and employees, to investigate the subject of a direct-compensation [450] law and to report to the next session of the general assembly the result of their investigation, together with a bill or bills providing for the speedy remedy for employees for injuries received in the course of their employment. This commission, of which Mr. J. Harrington Boyd was chairman, filed its report with the legislature in January, 1911.

This report is a remarkable document, probably the most valuable report ever submitted by an investigating committee or commission to the general assembly. It goes into the subject of workmen's compensation from every conceivable angle, gives the result of investigations with the greatest detail, together with a complete statement of the causes which have brought about workmen's compensation, and a full explanation of the laws of other states and countries, and produces an array of facts in regard to industrial accidents which is appalling.

The conclusions of this commission were admirably summed up by Johnson, J., in his opinion in *State v. Creamer*, supra, at page 389. And the theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs [451] to compensate the person injured, or his dependents, for his or their loss.

The commission recommended that a compensation plan of this kind be adopted not as "in any sense charity but only simple justice."

The commission filed with its report for the consideration of the general assembly, two tentative acts, one suggested by a majority of the commission and the other by a

minority member. Section 8 of the majority bill provides for compensation in case of death, and is in substance the same as Section 35 of the present act. Section 13, paragraph b, provided: "The compensation awarded shall never be vested except subject to such changes as the provision of this code allow."

Section 20 (the section on which present Section 39 is based) provided:

"The said state board of compensation awards shall have entire jurisdiction of the disbursement of the insurance fund provided for in this code, and of determining the validity of all applications for compensation out of said fund, and of fixing the amount of the award in each instance; but so long as the award or any part of it remains unpaid their jurisdiction as to the amount of such award and as to the person in any particular class of beneficiaries to which the same shall be payable shall be continuing so that they may have power to make such changes therein as the circumstances may warrant, and as right and justice may require."

This proposed section reads, it is to be presumed, about as the state would have us now read Section 39.

[452] In the bill submitted by the minority, the following sections appeared: Section 28, providing compensation in case of death, is practically similar to present Section 35; Section 33, providing that "The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified."

Both bills were before the legislature, and at the same session at which the report was submitted the original compensation act was passed, Sections 28 and 33 of which (except for the maximum and minimum amounts) are identical with Sections 35 and 39 of the present act.

It is thus apparent that the legislature, having before it the proposition of limiting payments to the lifetime of dependents and of granting power to the board to change awards so long as any part of it remained unpaid, by rejecting Section 20 of the act proposed by the majority and by accepting Section 33 of the minority measure, clearly indicated its intention as to this matter, and in rejecting Section 13 (paragraph b of the majority measure) it refused to provide that "compensation awarded shall never be vested."

The only fair inference to be drawn is that the legislature intended that compensation, under paragraph 2 of Section 35, should be vested in the dependent when

awarded. Again, this law was passed not in a spirit of "charity" but only simple justice. The fund it provides is called, and is in fact, an "insurance" fund, from which payments [453] are to be made, and is in no sense a pension fund, and never, so far as we are aware, has it been contended that injured employees and their dependents were not entitled to compensation as a matter of right.

The right to be compensated for an injury has no element of bounty or charity about it. No part of the fund (except such part as it pays for the protection of its own employees) is contributed by the state.

As we have before stated, the theory is that when an employee is injured or killed in course of his employment, a sum fixed by law is set off from the fund to compensate him for his injuries, or his dependents for his death, to compensate for taking away the man's right to earn a livelihood, which, but for the accident, he would have earned. A fixed sum goes out from the fund to compensate for the loss which has occurred.

In case of death with no dependents, there is no loss to anyone except the employee other than the expenses provided for by the statute, which would otherwise fall on society. In case of dependents, the sum is likewise fixed by law and ordered paid to the dependent. There is nothing to indicate that this loss is to be compensated in part by the death of dependents and the part thus compensated to be returned to the state. On the contrary, the only situation considered is that existing at the date of death. At that time the amount is fixed, not by the board but by the statute; it is set apart from the general fund, may be paid in lump sums and there is no provision whatever for rebate.

[454] Thus, the payments being fixed in amount, ordered paid from a certain fund and awarded to a definite person, every element of a vested right is present and no element or suggestion of a pension that is to cease at the death of the pensioner.

The report of the investigating commission, as well as all of our compensation laws and reports, shows that the provision for periodical payments is solely for the benefit of the injured employee or dependents, for the reason that experience teaches that in a very great many cases a lump sum, if allowed, is dissipated, while small payments, on the other hand, are carefully husbanded.

It may also be noted that the words "insurance fund," "compensation," "award" and "commutation," all negative the idea of a pension or rebate of any kind.

The intent apparent and expressed throughout the act that compensation is to be paid only to dependents, was not for the purpose

of securing an abatement of unpaid compensation upon the death of a dependent. The purpose is to insure that compensation shall go intact to the injured employee or his dependents without any shrinkage by passing through or into the hands of assigns, agents, attorneys, friends or relatives, it being common knowledge that if a sum of money on its journey from the one from whom to the one to whom it is due passes through the hands of others it is inevitable that it suffers diminution, sometimes almost to the vanishing point.

We hold that when the award is once made to a sole dependent the right to the compensation vests, [455] and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent.

As to the argument that unless a rebate or refund is allowed in case of death of dependent a great wrong is done the injured and dependents of killed employees, it is perhaps sufficient to say that the assumption upon this argument is based is utterly opposed to the theory on which the fund is established, maintained and administered. It is so plain as to be beyond all argument that the fund is provided to compensate in the manner and amount fixed by law for all losses which it covers; that it was never intended that the fund should be enhanced by lapses; that there is no conception of profit in the plan, and no one entitled to an award can have his right affected at all, either as to amount or in any other manner, by the allowance or denial of the claim of any other person to compensation. A study of the act will show that it is the duty of the board to provide an adequate fund to pay all the compensation provided by the act. What amount will be necessary is calculated by the board, the theory being that all losses will be and must be paid in full; the methods of establishing the fund and the sources from which the money is to come are specified, and nowhere, even by inference, is the board authorized to speculate that a greater or less sum will be needed on account of unpaid or partly unpaid awards.

Both the letter and spirit of the law show that the right to compensation vests when the same is [456] awarded under paragraph 2 of Section 30, and the demurrer to the petition is therefore overruled.

As the board in this case awarded the dependent the sum of \$1,872 and ordered the same paid in bi-weekly installments at the rate of \$6 per week, to continue for six years from the date of the death of the employee, it has, in making the award, fully complied with the law, and the court is without power to require it to commute

the balance remaining due to one lump sum. That is a matter, under Sections 39 and 40, wholly within the discretion of the board, but the petition shows that the board has refused to pay to relator any part of the award since the death of the dependent or to continue the bi-weekly payments. The writ therefore must order the board to pay to relator the sum of the bi-weekly payments which have accrued since dependent's death and to continue such payments until the full amount originally awarded is fully paid unless commutation is ordered by the board.

Demurrer overruled and writ awarded.

Johnson, Wanamaker and Newman, JJ., concur.

NOTE.

Award or Right to Compensation under Workmen's Compensation Act as Vesting in Beneficiary.

The few cases which have passed on the question are not in accord as to whether the right of a dependent of a workman dying from an injury received in the course of his employment to the allowance prescribed by a workmen's compensation act is vested in the beneficiary or whether it is personal and lapses on his or her death. The reported case holds that the right to compensation vests in the beneficiary and passes to his or her heirs or legatees. A like view obtains in England. See *United Collieries v. Simpson* [1909] A. C. 383, wherein Lord Loreburn said: "The eighth paragraph also contemplates payment to a dependent. And though the ninth reserves a power to vary the apportionment, neither it nor any other paragraph proceeds upon any other view than that there is a definite right on the part of dependents as a class to the money, subject to a parental power of the court in dividing and applying it for their advantage. If there is this right, when does it arise or become vested? The statute evidently treats it as arising because of the workman's death. It seems to follow that it arises on the workman's death, unless some other event is fixed. . . . It seems to me, therefore, that, as the person represented by the respondent was the only dependent, her representative may properly claim all that she was entitled to, the right being transmissible as property. If there had been several dependents, the law would not be different, but the discretion of the county court judge or sheriff in apportioning might very likely render the proceedings unprofitable. No doubt this act was intended to save dependents from the loss they might sustain by being deprived of the support they previously had from the deceased workman, and if the dependents themselves die they require

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it no longer. And it seems anomalous to enforce payment when no dependent is still living to require support. The act, however, provides a fixed sum, and this must be taken as the statutory provision, whether in the event it is needed or not. Perhaps if this result had been foreseen it might have been guarded against; but that cannot affect the judgment of a court of law."

So in the earlier case of *Darlington v. Roscoe* [1907] 1 K. B. (Eng.) 219, Cozens-Hardy, L. J., said: "The right is not to damages, the amount of which is left at large, but to a definite sum to be ascertained in accordance with the act. This compensation is given 'to dependents wholly dependent upon his earnings at the time of his death.' That is the critical period. It is not confined to such dependents as may exist at the date of the commencement of the proceedings, in the county court, still less at the date of the award. In short, there was a statutory obligation on the part of the employers in this case to pay in the event which happened a definite sum to the widow, as being the sole dependent of the deceased workman. She commenced proceedings by making a claim, but died before any award was made. Why had she not a vested right to compensation, which passed to her legal personal representative?"

In *O'Donovan v. Cameron* [1901] 2 Ir. R. 633, a contrary conclusion was reached but that case was expressly disapproved by the House of Lords in *United Collieries v. Simpson*, supra.

However, in *Ivey v. Ivey* [1912] 2 K. B. (Eng.) 118, it was held that the death of one of several dependents was ground for cutting down the award. The court said: "It is said that the widow was absolutely entitled to this money, but could she have assigned it away from her children or paid it to a creditor? We should be frittering away entirely this beneficial provision for the dependents if we allowed any doubt to exist on this point. Mr. Shakespeare, who has argued this case with his usual fairness and ability, admitted that the language of the rule was wide enough to include the death of a dependent, but he says an award can only be varied whilst the dependents are alive and there is no provision for changes on death. Rule 58 says 'an application for the variation of an order of the court under paragraph 9 of the First Schedule to the act may be made by any person interested.' The contention of Mr. Shakespeare for the legal personal representative of the widow is that her next of kin are the persons interested within that rule; but some of them had no interest under the award. Then has there been any variation of the circumstances of the various dependents? Clearly there has; the thirty

shillings a fortnight was to be paid to her for the maintenance of herself and her younger children. Now she is dead and the provision for maintenance is completely changed. I cannot imagine clearer circumstances for justifying a variation of the award."

In two American jurisdictions it has been held that the right of a dependent to the allowance provided by a workmen's compensation act does not vest. In *Murphy's Case*, 224 Mass. 592, 113 N. E. 283, the reasons for that view were stated, and the cases holding to the contrary were reviewed, the court saying: "To hold that the dependent's right to compensation is a vested right, which passes to a legatee by will, and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of, and so as an incident to, the business in which he was employed. The opposite result has been reached in England and in Ohio. But both those decisions were founded on provisions of the acts there in question which were not like the provisions of our workmen's compensation act. The decision in *United Collieries v. Simpson* [1909] A. C. 383, was based upon the provision of the English act, that in case the employee was killed a lump sum should be paid to those dependent upon him. St. 6 Edw. VII, c. 58, § 1, cl. 1, and schd. 1, § 1, and (a) (i). The decision in Ohio (*State v. Industrial Commission*, 92 Ohio St. 434, 436, 437) was founded on a provision of the act that in the case of persons wholly dependent 'the payment shall be sixty-six and two-thirds per cent of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of injury.' This provision, construed in the light of the report of the commissioners, was held by the court to mean what by a literal interpretation of its words it provided. For these reasons we are of opinion, that although there is no express provision to that effect in the act, the weekly payment to be made to the dependent comes to an end when the dependent dies."

In the case of *In re Bartoni*, 225 Mass. 349, 114 N. E. 663, the case last cited was followed without further discussion.

In *Matecny v. Vierling Steel Works*, 187 Ill. App. 448, there was dictum to the same effect. In discussing the propriety of making an allowance in a lump sum to a dependent, the court said: "The appellee contends that, even if it be held that the mother was the sole beneficiary, still her right to the entire compensation became vested upon the death of Joseph Matecny, and the appointment of an administrator for his estate, and that this right would survive her death and inure to the benefit of her estate. After a careful consideration of this question, we have arrived at the conclusion that the contention of the appellant is correct, and that the obligation of the appellant to pay compensation to the administrator would be extinguished on the death of the mother. We do not believe that the act contemplates that the employer shall pay any money to non-dependent heirs."

An analogous question was passed on in *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. S. 675, wherein it was held that the right to compensation does not vest in an injured workman, so as to permit its recovery after his death by his personal representative. The court said: "That the award made to the claimant in this proceeding could not have been vested absolutely in the claimant is evident from the provisions of section 22 of the law, which provides that the commission, on its own motion or upon application by any interested party, may, on the ground of a change in conditions, 'review any reward, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of facts and rulings of law,' etc. He had a right during his lifetime, and while the award remained unchanged, to receive the compensation fixed for the period limited by the statute; but with his death from natural causes he ceased to have any right to compensation, just as his contract of employment for a definite period would have been terminated by the same event if no accident had befallen him. The right to compensation was personal to himself, as much under the statute as it was under his contract of employment; the former grew out of the latter."

ESTATE OF CUTTING.

CUTTING

v.

CUTTING ET AL.

California Supreme Court—February 28,
1916.

172 Cal. 191; 155 Pac. 1002.

Wills — Revocation by Marriage of Testator.

Under Civ. Code, § 1299, providing that if, after making a will, the testator marries and the wife survives him, the will is revoked, unless provision has been made for her by marriage contract or by the will, or she is mentioned in such way therein as to show an intention not to make such provision, an antenuptial will standing alone containing no provision for, nor mention of, testator's wife, is revoked by his marriage and death leaving her surviving him.

[See Ann. Cas. 1917A 203.]

Revival of Will — By Codicil.

Under Civ. Code, § 1287, providing that the execution of a codicil referring to a previous will republishes the will as modified by the codicil, an antenuptial will may be republished by the execution of a codicil, notwithstanding section 1299, providing that an antenuptial will making no mention of testator's wife is revoked by his marriage and death leaving her surviving, and that no other evidence to rebut the presumption of revocation must be received.

[See note at end of this case.]

Same.

An instrument "hereby affirming my will," except as herein modified, and declaring the following to be a codicil to testator's last will, followed by the provisions modifying the will, republishes the will, though it was an antenuptial will making no provision for testator's wife, and he died leaving his wife surviving.

[See note at end of this case.]

Same.

An antenuptial will, as modified by a post-nuptial codicil, stands as if it were but one testamentary intention expressed in a single will made after marriage as of the date of the codicil.

[See note at end of this case.]

Same.

Under Civ. Code, § 1321, providing that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole, an instrument executed by a testator affirming his will, except as therein modified, and declaring the following to be a codicil, followed by the provisions modifying the will, but not again referring to the will, is sufficient as a republication of the antenuptial will, notwithstanding the designation in the instrument of the latter part thereof as a codicil.

[See note at end of this case.]

Same.

A provision in a codicil directing the executors to provide for testator's wife from the remainder of his estate an annual income of \$3,000, payable monthly, in accordance with an antenuptial contract whereby he promised to cause her to be paid \$250 per month if they married and she survived him, is a testamentary disposition of property, and not merely a direction to pay a debt under an antenuptial agreement, and accordingly the codicil is sufficient to republish a will previously revoked by the testator's marriage.

[See note at end of this case.]

Husband and Wife — Antenuptial Agreement — Effect of Testamentary Provision — Consistency.

An antenuptial agreement to cause to be paid to a woman \$250 per month if the parties married and she survived, is not abridged by a codicil providing the annuity out of the remainder of the estate after the provisions of three paragraphs of the will.

Appeal from Superior Court, Alameda county: WELLS, Judge.

Petition by Alice M. Cutting, plaintiff, against Frederick P. Cutting et al., defendants. Judgment for defendants. Petitioner appeals. The facts are stated in the opinion. **AFFIRMED.**

A. J. Treat, L. Horwitz and Henry Conklin for appellant.

Warren Gregory, Allen L. Chickering and William H. Gorrell for respondents.

[192] **LAWLOR, J.**—The petitioner, as the widow of the decedent, appeals from a judgment entered upon an order sustaining the two demurrers of the respondents to the petition, in which she asserts that within the meaning of section 1299 of the Civil Code, the will of the decedent, dated October 22, 1912, was revoked, and that, therefore, he died intestate. The respondents are the below mentioned executors and the Pacific Unitarian School for the Ministry at Berkeley, California, a legatee under the said will.

Stated in chronological order, the record on appeal discloses that on October 22, 1912, the decedent, Francis Cutting, executed a holographic will wherein he named his son, Frederick Page Cutting, William H. Chickering, and Alfred D. Cutler, as his executors; that on April 19, 1913, the testator and petitioner executed an "antenuptial agreement;" that on May 10, 1913, they were married; that on July 18, 1913, the testator executed a holographic codicil to his said will; that on October 1, 1913 the testator died, without making any further testamentary disposition of his property; and that there was no issue of said marriage. The will of October 22, 1912, was the only antenuptial will left by the testator and the petitioner was not men-

tioned nor referred to therein. At the date of the execution of the said will the testator was a widower and the father of two adult children—the said son, Frederick Page Cutting, and a daughter, Isabella S. Cutting, both of whom survived him.

[193] The will and codicil were admitted to probate on October 20, 1913, and letters testamentary were issued to the said executors. On June 24, 1914, petitioner filed her petition for revocation of the probate of the will and codicil. The petition prays that the court decree that the testator died intestate; that the letters testamentary issued to the said executors be revoked and set aside; and that letters of administration be issued to petitioner, as the widow of the testator. The said demurrers to the petition followed and on September 16, 1914, were sustained without leave to amend. Judgment was entered in favor of the respondents on September 28, 1914.

The codicil of July 18, 1913, and the antenuptial agreement of April 19, 1913, heretofore referred to, are here set out in full:

"Oakland, California.

July 18, 1913.

"I, Francis Cutting, hereby affirming my will bearing date Oct. 22nd, 1912, except as herein modified, do hereby declare the following as and to be a codicil to my said will being my last will and testament. After paragraphs numbered 2, 3, 4, having reference to devises benefitting my daughter, also Miss Paterson, also my son Frederic P. Cutting, I direct that my executors provide from the remainder of my estate an income for my wife Alice M. Cutting and pay the same to her monthly of two hundred and fifty (\$250) dollars per month as long as she lives, in accordance with an antenuptial agreement with my said wife and myself of April —, 1913.

"(Signed) FRANCIS CUTTING."

"Ante Nuptial Agreement between Francis Cutting and Alice M. Duren."

"The undersigned, in contemplation of marriage hereby agree that in consideration thereof Francis Cutting will give Alice M. Duren proper support during their married life and should said Francis Cutting die before said Alice M. Duren after their marriage he will cause her to be paid two hundred and fifty (\$250) dollars per month during her life which said Alice M. Duren agrees shall be in lieu of any and all claims against the property or estate of said Francis Cutting whether community or any other property or interest [194] of said Francis Cutting and will marry said Cutting at any convenient time requested by said Cutting who also agrees to pay said Alice M. Duren

one hundred dollars per month during the time that may elapse prior to marriage and continue during her life should he die before their marriage.

"In witness whereof we have set our hands this nineteenth day of April, 1913.

"(Signed)" ALICE M. DUREN.

"FRANCIS CUTTING."

1. As already stated, the appellant contends that the will of October 22, 1912, was revoked on the death of the testator, by virtue of section 1299 of the Civil Code, which reads: "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received."

We do not find it necessary to construe the clause in section 1299 relating to a marriage contract. Excluding that clause, the section contemplates these conditions: (1) An antenuptial will; (2) A subsequent marriage; (3) The death of the testator; (4) The survival of the wife; and (5) Either provision for the wife in the antenuptial will, or a mention of her therein in such way as to show an intention not to make such provision. We have here an antenuptial will which neither provided for the petitioner nor mentioned her in such way as to show an intention not to provide for her; a subsequent marriage between the testator and the petitioner; his death and her survival. It is plain from its terms that section 1299 has application only to an antenuptial will, and does not contemplate wills made after marriage. Therefore, if the antenuptial will of October 22, 1912, stood alone, it would have been revoked upon the death of the husband according to the provisions of the section. *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741; *Corker v. Corker*, 87 Cal. 643, 25 Pac. 922; *In re Larsen*, 18 S. D. 335, 5 Ann. Cas. 794, 100 N. W. 738.

2. But the antenuptial will was republished by the codicil of July 18, 1913, in accordance with section 1287 of the Civil Code, and hence the will was taken out of the operation of [195] section 1299. Section 1287 declares: "The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil." The appellant contends, however, that the said will was not republished for these reasons—first, that under section 1299, an antenuptial will cannot be republished at all, but that an entirely new will must be made after marriage, and, second, that even if it can be republished by a postnuptial codicil, the instrument of July 18, 1913, was not a codicil.

Was it necessary to the replication of the will of October 22, 1913, that the testator should have made an entirely new will following the marriage? Upon this question the position of petitioner is that on the death of the testator the antenuptial will was *ipso facto* revoked. It is not claimed by petitioner that the antenuptial will, in and of itself, was invalid, or that it was revoked by the marriage alone. "On the contrary," it is admitted, "if the wife did not survive the testator, the will not only was not revoked, but it was of full force and effect." But it is further contended that from the date of the marriage the will was liable to revocation, that when death came to the testator the will was thereby revoked, and having ceased to be a will it could not be revived or republished even by an otherwise valid postnuptial codicil. Discussing the meaning of section 1299, it is urged by petitioner that "if a testator desires to dispose of his property by will after marriage, he must make an entirely new will, which cannot embody by reference, or otherwise, a will made before marriage." In other words, if the antenuptial will is invalid under section 1299, then it is invalid for every purpose so far as the testamentary claims of the widow are concerned.

This contention cannot be supported. If the antenuptial will does not conform to section 1299, then as to that section such will is without force. But the husband may nevertheless make a postnuptial will providing for the wife, either by a will made originally after marriage, or, as here, by the republication of an antenuptial will as modified by a codicil. It does not follow that because an antenuptial will, standing alone, is rendered invalid by virtue of section 1299, it may not have testamentary force in the making of a postnuptial will. The postnuptial will—the antenuptial will as modified by the codicil—stands as if it were but one testamentary intention [196] expressed in a single will made after marriage as of the date of the codicil. "The codicil refers to the will, and operates as its republication, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil." *Payne v. Payne*, 18 Cal. 292; see also *Ladd's Estate*, 94 Cal. 670, 30 Pac. 99; *In re McCauley*, 138 Cal. 432, 71 Pac. 512; *In re Hayne*, 165 Cal. 568, Ann. Cas. 1915A 928, 133 Pac. 277.

It is clear, therefore, that if the testator had not continued the antenuptial will in force by the postnuptial codicil, it would have stood revoked on the death of the testator. But by virtue of the post nuptial codicil the antenuptial will was republished and became a postnuptial will from the date of the codicil. There is nothing in section 1299 which precludes the republication of an

antenuptial will in accordance with section 1287 of the Civil Code, nor is it to be held that under the latter section an antenuptial will may not, in contemplation of section 1299, be republished and become a part of a postnuptial will.

By reference, the testator republished the former will. Language more expressive of the purpose could hardly have been chosen. The testator said, "I . . . hereby affirming by will bearing date Oct. 22nd, 1912, except as herein modified, do hereby declare the following as and to be a codicil to my said will being my last will and testament." The terms of the codicil plainly indicate that the requirements of section 1287 have been studiously followed by the testator in order to make testamentary provision for petitioner in accordance with the antenuptial promise. And by affirming the will except "as herein modified" and declaring "the following as and to be a codicil to my said will" the antenuptial will does not come within the purview of section 1299.

3. The objections to the codicil are two-fold—first, that it lacks in testamentary form, and second, that apart from the question of its form, the instrument is, in substance, not a codicil.

The first point that the codicil is lacking in form is thus expressed in the brief for the petitioner: "It will be observed that the decedent has himself declared what portion of it is to be regarded as a codicil, for he does not declare it in its entirety to be a codicil, but limits his testamentary intention to that part beginning 'after paragraphs,' etc. The testator. [197] declares 'the following as and to be a codicil.' . . . The two distinct parts of the attempted codicil must be kept in view. The testator first uses the word 'affirming,' and then declares the 'following to be a codicil to my said will, being my last will and testament.' The second part of the attempted codicil is that which he declares shall be his codicil, nothing more." It is further declared that section 1287 of the Civil Code "calls for more than a codicil to republish the will. The codicil must refer to the previous will. That part of the writing declared by the testator to be the codicil does not refer to the previous will at all." It is sufficient to say on this point that the entire instrument must be read and construed together and, thus considered, the declaration that the instrument is a codicil refers to its entirety and affirms the will as modified by the provision for the petitioner. "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; . . ." (Civ. Code, sec. 1321). The point made by the petitioner is therefore without merit. See *Payne v. Payne*, 18 Cal. 292; *In re McCauley*, 138 Cal.

432, 71 Pac. 512; Ladd's Estate, 94 Cal. 670, 30 Pac. 99.

4. We will now consider the objections to the substance of the codicil. It is asserted in this behalf that the codicil is neither a will nor a codicil to a will in that it is not dispositive.

It will be conceded that a codicil to be effective as such must be either dispositive or appointive. (Page on Wills, p. 39, sec. 45.) The codicil, in this case, is not appointive, but it is dispositive. The testator directs the executors to provide for his wife "from the remainder" of his estate an annual income of three thousand dollars, payable monthly as long as she lives, in accordance with the antenuptial agreement. This is clearly the testamentary disposition of property.

But it is urged that the codicil does not dispose of property; that it was merely 'a direction to pay what he owed under the contract, which contract would have to be carried out whether or not he made a will.' In other words, it is argued by petitioner that the codicil only provided for the payment of a "debt" under the antenuptial agreement.

The testator made three distinct and related promises in the antenuptial agreement—first, to give proper support to petitioner [198] during coverture; second, to "cause her to be paid" \$250 per month during the remainder of her life if they married and she survived him, and, third, to pay petitioner "one hundred dollars per month during the time that may elapse prior to marriage and continue during her life should he die before their marriage." The contingency touching their failure to marry was thus fully covered by the express promise to pay one hundred dollars per month as long as she lived. This promise would have been enforceable. But the first and third promises need not be further considered here.

It is to the second promise that the codicil refers. What was that promise? It was not a promise that the testator would pay petitioner anything. The promise was that he would "cause her to be paid" \$250 per month if they married and she survived him. But the executory agreement did not provide in what manner the testator was to cause her to be paid the sum of \$250 per month. The mode selected by him, after their marriage, was the making of testamentary provision for her.

The codicil did something more than provide for the payment of a "debt"—it gave property to the petitioner by directing his executors to provide from the remainder of his estate an income for her after his death if she survived him. This is the meaning and purpose of the codicil. It seems clear that

when the testator made the promise to cause her to be paid he intended to do precisely what he did do through the medium of the codicil. The codicil furnishes informing evidence that it was executed on account of the marriage and in order to perform the promise contained in the antenuptial agreement that he would cause her to be paid the annuity of three thousand dollars after his death. The codicil, and the promise in the antenuptial agreement to cause her to be paid, must be considered together as representing a common purpose to provide for her as his widow as long as she lived. Thus by the codicil the promise in the executory agreement was executed. In other words, the codicil had for its sole object the execution of the promise contained in the executory agreement. It is plainly apparent that with respect to the petitioner the intention of the testator from the date of the antenuptial agreement was to provide one hundred dollars per month during her lifetime, if they did not marry, and \$250 per month as long as she lived if they did marry and [199] she became his widow. It is made clear, both by the executory agreement and the codicil, that the testator intended that after his death, if his wife survived him, she should receive \$250 per month, and no more, and this purpose is accomplished by the codicil when read in connection with the clause in the antenuptial agreement that such sum "shall be in lieu of any and all claims against the property or estate of said Francis Cutting whether community or any other property or interest of said Francis Cutting."

5. It is further contended that by the codicil the testator attempts to abridge the rights of the petitioner under the antenuptial agreement by subordinating the annuity to paragraphs 2, 3, and 4 of the will, and that "this could not have been a lawful intention if its object, either express or implied, was to deny, or contravene, or obstruct some other person's clear legal right." But the promise to provide for the petitioner was executory, and the testator was not restricted in the antenuptial agreement to any particular mode in causing her to be paid the annuity of three thousand dollars.

In view of the conclusions herein, it is not necessary to pass on the question whether the antenuptial agreement is a "marriage contract" (Civ. Code, sec. 1299), or a "marriage settlement contract" (Civ. Code, secs. 178-181), or whether the said terms are identical in their meaning.

No other points require notice. The judgment is affirmed.

Shaw and Sloss, JJ., concurred.

Hearing in Bank denied.

NOTE.**Revival of Will Revoked by Marriage.***Generally.*

When a will has been revoked by the marriage of the testator, it is not revived by the subsequent termination of the marital relation. *Long v. Aldred*, 3 Add. Ecc. (Eng.) 48; *Brady v. Cubitt*, 1 Dougl. (Eng.) 31; *Brown v. Clark*, 77 N. Y. 369. And see *Matter of Wollaston*, 9 Jur. N. S. (Eng.) 727.

While a parol republication of a will revoked by the marriage of the testator was apparently valid before the statute of wills, at least with respect to wills disposing of personalty (*Brady v. Cubitt*, 1 Dougl. (Eng.) 31; *Long v. Aldred*, 3 Add. Ecc. (Eng.) 48), under that act and the statutes now in force in the various American jurisdictions a will so revoked cannot be revived by any republication short of the formalities required for the original execution of a will. *Carey v. Baughn*, 36 Ia. 540, 14 Am. Rep. 534. Thus in *Sawyer v. Sawyer*, 52 N. C. 134, the court said: "Assuming that the will was revoked by the marriage, it was not republished or revived by the declarations of the testator and his intention that it should operate. Indeed, if these declarations did not have the effect of preventing the revocation (as we have seen above), it would be strange if they were allowed to revive the will after it was revoked. Can that bring to life, which could not prevent the death? And such a conclusion would let in, under a different aspect, all the mischiefs of fraud and forgery against which the statutes were intended to guard."

In *Means v. Ury*, 141 N. C. 248, 53 S. E. 850, the facts and conclusions of the court thereon were stated as follows: "Carmeline Means, while the wife of Ephraim Means, made her will, and some time thereafter, being a widow, married Jason Carr, and, during such coverture verbally declared said paper writing to be her last will and testament without any further execution thereof, in accordance with the statute. The court below adjudged the paper writing not to be the last will and testament of Carmeline Means, upon the ground that it was revoked by her subsequent marriage, and that her verbal declarations could not constitute a re-execution and republication of it. We think the ruling sound."

In the case of *In re Fransen's Will*, 26 Pa. St. 202, it appeared that a woman after making her will married. Thereafter in the presence of three witnesses called together for that purpose she declared verbally that it was her desire that the will should stand and that her property should be disposed of as therein directed. After holding that the declaration did not of itself constitute a will the

court said: "And this brings us in the last place to the question whether the facts proved before the register were a republication of the will. We agree in saying they were not, even if since the Act of 1833 parol republication of a written will be possible."

In *Stewart v. Mulholland*, 88 Ky. 38, 10 S. W. 125, 21 Am. St. Rep. 320, the same rule was laid down under an express statute. The court said: "The ninth section of chapter 113, General Statutes, title 'Wills,' provides: 'Every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin.' Section 11, of the same chapter, also provides, that 'No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived, otherwise than by re-execution thereof, or by a codicil executed in the same manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown thereby.' It is manifest, under these two sections of the statute, that a will once revoked can only be revived by a re-execution of the instrument in the manner pointed out by the statute. It is in fact the making of another will, and must be executed in the same manner in which the original will was required to be executed. The will offered for probate is all in the handwriting of the testatrix, who, at the time of its execution, was the widow of Jacob, and it being holographic, it is contended that its preservation by Mrs. Stewart for so many years, and her frequent recognition of the paper as her will, so often made during a long period of time, amounts not only to a republication of the paper as her will, but such an execution of the instrument as makes it a complete will. There can be no doubt, from the testimony of those intimately acquainted with the testatrix, that she always, from the date of the execution of the paper until her death, regarded it as her last will, and as having given her property to those whose claim upon her affections made them the objects of her bounty. This manifest intention, however plain on the part of Mrs. Stewart, will not be permitted to override the plain letter of a statute that was enacted for the purpose of preventing a litigation over the question of intent, and admitting to probate a paper already revoked, that has no stronger proof of its validity than the mere intention of the maker to impart a new life to the instrument."

Revival by Codicil.

Where a will has been revoked by the marriage of the testator, a codicil executed in due

testamentary form referring to the will and evidencing an intention to continue it in force except as it is modified by the codicil operates to revive the will. *Kurtz v. Saylor*, 20 Pa. St. 205. And see *Matter of Emmons*, 110 App. Div. 701, 96 N. Y. S. 506. See also the reported case.

In *James v. Shrimpton*, 1 P. D. (Eng.) 431, 45 L. J. P. 85, it appeared that a will was made in 1871. In 1872 the testator married and after the ceremony he executed a codicil in which he made provision for his wife. The codicil was destroyed but the court being satisfied that the testator did not intend thereby to revoke the will allowed probate.

In the case of *In re Bangham*, 1 P. D. (Eng.) 429, 45 L. J. P. 80, it appeared that a testator executed a will and thereafter married. He subsequently executed a second will referring to the first. The court allowed the first will to be included in the probate of the second.

In *Brown v. Clark*, 77 N. Y. 369, it appeared that the testator after her marriage executed a codicil referring specifically to the former will and containing the following clause: "Which [codicil] in connection with and amendment of my will I now publish and declare together as constituting my last will and testament." Holding that the will was revived, the court said: "The codicil was executed with the formalities required by the statute. It was signed by the testatrix in the presence of two witnesses and was attested by them in her presence at her request, and she, at that same time, declared the instrument to be 'a codicil to her last will and testament and a reaffirmation of the latter.' The original will was present when the codicil was executed and the attention of the witnesses was called to it, and one of them examined and identified it. The evidence leaves no room for doubt that the main purpose of the testatrix in making the codicil, was to re-establish the will which had been revoked by her marriage. The codicil made some provision for a brother of the testatrix not contained in the will, but the paramount intention of the testatrix in executing the codicil, was, as appears by the codicil and the extrinsic circumstances, to reaffirm the disposition of her property made by the will so that the bulk of her estate should go according to its provisions. The contestants claim that the intention of the testatrix to reaffirm the will cannot take effect for the reason that there was no republication of that instrument after her marriage, and that what occurred at the time of the execution of the codicil was a publication of that instrument only and did not operate to revive the will or incorporate its provisions with those of the codicil. The general doctrine is well settled that

a codicil executed with the formalities required by statute for the execution of wills operates as a republication of a will so far as it is not changed by the codicil."

It is not necessary to a revival that the codicil shall show that the testator knew that his will was revoked by his marriage or that it shall contain express words of revivor. *Francis v. Marsh*, 54 W. Va. 545, 1 Ann. Cas. 665, 46 S. E. 573, wherein the court said: "The codicil in this case not only refers to the will by its date, and describes it as 'my will' but revokes the appointment of one of the executors and names another in his stead. It leaves no room for question or doubt as to the identity of the will to which it refers, and appoints an executor for the will referred to, not an executor merely. It says, 'I do nominate and appoint J. B. Watson as one of the executors of my will and do hereby revoke the appointment of W. R. Jewell to said will.' The will referred to had named two executors, and the codicil said Watson should be one of the executors of his will. All this could mean nothing short of an intent that the will referred to should be carried into effect. This sufficiently evidences an intent to revive."

KLINE ET AL.

v.

HARRIS ET AL.

North Dakota Supreme Court—May 25, 1915.

30 N. Dak. 421; 152 N. W. 687.

Pleading—Striking Out as Sham—General Denial.

Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court as to the good faith of the defendants in pleading it, nor can it be stricken out as sham on an application of the plaintiffs. The defendant has the right, by a general denial, to put the plaintiff to the proof of his demand.

[See note at end of this case.]

Same.

An answer, by way of a general denial, is the equivalent of and substitute for the general issue under the common-law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common-law system the gen-

eral issue could not be stricken out as sham, although shown by affidavit to be false.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Pierce county: BURR, Judge.

Action by H. S. Kline et al., plaintiffs, against Hattie Harris et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. REVERSED.

Palda, Aaker & Greene for appellants.

Paul Campbell for respondents.

[423] KNEESHAW, J.—This action was brought to recover on a bond given to release an attachment issued in a former action and levied on property of defendants Hattie and A. C. Harris, and on which bond defendants Ebbert and Mantz were sureties. The action in which the bond was given resulted in a judgment against Hattie and A. C. Harris, and which judgment, it is alleged, was assigned to the plaintiffs in this action.

To the complaint the defendants answered by a general denial duly verified by attorney.

The plaintiffs' attorney gave notice of a motion to strike out the answer as frivolous and sham. The trial court made an order granting said motion and allowing defendants five days in which to answer over on payment of \$10 costs.

The defendants appealed from said order on February 10, 1914, and on the same day an order for judgment was signed, and judgment was entered in favor of the plaintiffs thereon for \$1,000.50 damages and costs.

Said order of judgment being based on the former order striking out the answer as sham, and on the failure of the defendants to answer over as provided in said order.

This appeal was taken by the defendants both from the order striking out the answer and from the judgment.

The only question involved and to be considered is the right of the district court to strike out the defendants' answer as sham, frivolous, or for want of proper verification.

The answer consisted merely of a general denial of the allegations of the complaint, and it was duly verified by the defendants' attorneys in form as provided by law, which fact is conceded.

[424] Therefore, that disposes of the question of the proper verification of the answer, as our statute authorizes a verification by attorney. The only other question is, Can an answer by way of a general denial, duly verified by either the party or his attorney, be stricken out on motion as sham?

The court in the case of *Wayland v. Tysen*, 45 N. Y. 281, says:

"This answer [by way of a general denial] is the equivalent of and substitute for the general issue, under the common-law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common-law system the general issue could not be struck out as sham, although shown by affidavits to be false."

And the court in the case of *Fay v. Cobb*, 51 Cal. 313, which we cite with approval, says: "Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court, as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on an application of the plaintiff." *Ibid*.

"The defendant has the right by a general denial to put the plaintiff to the proof of his demand."

To the same effect, see also *Samuel Cupples Wooden Ware Co. v. Jensen*, 4 Dak. 149, 27 N. W. 206; 28 N. W. 193; *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872; *King v. Waite*, 10 S. D. 1, 70 N. W. 1056, and many other cases cited.

We therefore are of the opinion that the court erred in striking out the answer as sham, or on any of the grounds stated; and the order of the District Court of Pierce County in striking out the answer, and the judgment of the said court entered in said case in favor of the plaintiffs and against the defendants for \$1,000.50 damages and costs, is hereby reversed, and the cause is remanded for further proceedings, with directions that the cause stand for trial on the issues made by the pleadings.

Christianson, J., being disqualified, did not participate, Honorable W. J. Kneeshaw, Judge of the District Court of the Seventh Judicial District, sitting in his stead, by request.

NOTE.

Striking Out General Denial as Sham or Frivolous

Majority Rule:

Rule Stated, 1177.

Qualification of Rule, 1180.

Minority Rule, 1180.

Majority Rule.

RULE STATED.

At common law, those pleas only were regarded as sham or frivolous which were on

their face false or insufficient, and accordingly a motion to strike did not ordinarily lie against a plea of the general issue. See *Greenbaum v. Turrill*, 57 Cal. 285; *Robertson v. Moir*, 88 Ill. App. 355; *Mier v. Cartledge*, 8 Barb. (N. Y.) 75; *Farmers', etc. Bank v. Smith*, 15 How. Pr. (N. Y.) 329; *Pierson v. Evans*, 1 Wend. (N. Y.) 30; *Broome County Bank v. Lewis*, 18 Wend. (N. Y.) 565; *Wayland v. Tysen*, 45 N. Y. 281.

Statutes in most if not all of the American jurisdictions have substituted for the common-law general issue a general denial of all or a part of the cause of action alleged, and authorize in general terms for the striking out of sham or frivolous pleadings. In the majority of jurisdictions that authorization is deemed to be merely a preservation of the common-law rule and a general denial is held not to be subject to be stricken out as sham or frivolous.

United States.—*Adams v. Western Maryland R. Co.* 161 Fed. 777; *Neubauer v. American Seating Co.* 171 Fed. 273. Compare *Oregonian R. Co. v. Oregon Ry. etc. Co.* 22 Fed. 245, 10 Sawy. 464.

California.—*Brooks v. Chilton*, 6 Cal. 640; *Fay v. Cobb*, 51 Cal. 313; *Greenbaum v. Turrill*, 57 Cal. 285; *Lybecker v. Murray*, 58 Cal. 186; *Shasta Bank v. Boyd*, 99 Cal. 604, 34 Pac. 337. See also *Arata v. Tellwium Gold, etc. Min. Co.* 65 Cal. 340, 4 Pac. 195, 344. Compare *Gay v. Winter*, 34 Cal. 153.

Florida.—See *Jackson Sharp Co. v. Holland*, 14 Fla. 384.

Kansas.—In *re Bartholomew*, 41 Kan. 273, 21 Pac. 275.

Nebraska.—*Upton v. Kennedy*, 36 Neb. 66, 53 N. W. 1042.

New York.—*Mussina v. Stillman*, 13 Abb. Pr. 93; *Caswell v. Bushnell*, 14 Barb. 393; *Claffin v. Jaroslauski*, 64 Barb. 463; *Davis v. Potter*, 4 How. Pr. 155; *Seward v. Miller*, 6 How. Pr. 312; *Livingston v. Finkle*, 8 How. Pr. 485; *Winne v. Sickles*, 9 How. Pr. 217; *Benedict v. Tanner*, 10 How. Pr. 455; *Grant v. Power*, 12 How. Pr. 500; *Farmers', etc. Bank v. Smith*, 15 How. Pr. 329, 331; *Fellows v. Muller*, 48 How. Pr. 82; *Grocer's Bank v. O'Rourke*, 6 Hun 18; *Martin v. Erie Preserving Co.* 48 Hun 81; *Robert Gere Bank v. Inman*, 51 Hun 97, 5 N. Y. S. 457, affirmed 115 N. Y. 650, 21 N. E. 1118; *Wilson v. Eastman, etc. Co.* 56 Hun 194, 18 Civ. Pro. 267, 9 N. Y. S. 189; *Reynolds v. Craus*, 62 Hun 620 mem. 16 N. Y. S. 792; *Wood v. Sutton*, 12 Wend. 235; *Wayland v. Tysen*, 45 N. Y. 281; *Thompson v. Erie R. Co.* 45 N. Y. 468; *Newman v. Livingston County*, 45 N. Y. 676; *Farmers' Nat. Bank v. Leland*, 50 N. Y. 673; *Zivi v. Einstein*, 2 Misc. 177, 23 Civ. Pro. 56, 21 N. Y. S. 583; *Meurer v. Brinkman*, 25 Misc. 12, 53 N. Y. S. 770; *Belsena Coal Min. Co. v. Liberty Dredging*

Co. 26 Misc. 846, 55 N. Y. S. 747; *Fromme v. Schwoerer*, 30 Misc. 825, 61 N. Y. S. 1108; *Schmidt v. McCaffrey*, 34 Misc. 693, 70 N. Y. S. 1011; *Mudgett v. Grand Trunk Ry.* 65 Misc. 304, 119 N. Y. S. 843; *Barrie v. Yorstons*, 35 App. Div. 404, 28 Civ. Pro. 253, 54 N. Y. S. 841; *Howe v. Elwell*, 57 App. Div. 357, 67 N. Y. S. 1108; *Schlesinger v. McDonald*, 106 App. Div. 570, 94 N. Y. S. 721; *Duke v. Grant*, 126 App. Div. 383, 110 N. Y. S. 563; *Rockowitz v. Siegel*, 151 App. Div. 636, 136 N. Y. S. 192; *Gibbs v. Title Guaranty Co.* 79 Misc. 247, 139 N. Y. S. 945; *Henderson v. Manning*, 5 Civ. Pro. 221. See also *Roby v. Hallock*, 55 How. Pr. 412; *Albany County Bank v. Rider*, 74 Hun 349, 26 N. Y. S. 490; *Rochester Central Park v. Thein*, 76 Hun 571, 28 N. Y. S. 232; *Saratoga Springs First Nat. Bank v. Slattery*, 4 App. Div. 421, 38 N. Y. S. 859. Compare *Broome County Bank v. Lewis*, 18 Wend. 565.

North Dakota.—*Sifton v. Sifton*, 5 N. D. 187, 65 N. W. 670; *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 672. See also *Sigmund v. Minot Bank*, 4 N. D. 164, 59 N. W. 966. And see the reported case.

South Carolina.—*Ransom v. Anderson*, 9 S. C. 438; *American Button-Hole, etc. Co. v. Hill*, 27 S. C. 164, 3 S. E. 82.

South Dakota.—*Green v. Hughitt School Tp.* 5 S. D. 452, 59 N. W. 224; *Loranger v. Big Missouri Min. Co.* 6 S. D. 478, 61 N. W. 686.

Washington.—*Larson v. Winder*, 14 Wash. 647, 45 Pac. 315.

Canada.—*Woods v. Tees*, 5 Manitoba 256.

Before the decision in *Wayland v. Tysen*, 45 N. Y. 281, the rule in New York was for a period of time otherwise, the courts following the decision of *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515, 15 How. Pr. 186, which held that an answer denying a material allegation in the complaint might be stricken out as sham although duly verified. See *Elizabethport Mfg. Co. v. Campbell*, 13 Abb. Pr. (N. Y.) 86; *Corbett v. Eno*, 13 Abb. Pr. (N. Y.) 65, 22 How. Pr. 8; *Conklin v. Vandervoort*, 7 How. Pr. (N. Y.) 483; *Butterfield v. Macomber*, 22 How. Pr. (N. Y.) 150. But in *Livingston v. Finkle*, 8 How. Pr. (N. Y.) 485, the reason for the rule now obtaining was well stated as follows: "The rules applicable to such defenses, before the adoption of the Code, are equally applicable now. One of these rules was, that the plea of the general issue would never be stricken out as false. The reason which has sometimes been assigned is, that the defendant has the right to put the plaintiff to the proof of his allegations. *Mier v. Cartledge*, 8 Barb. 75. But I am not prepared to admit that this is the true foundation of the rule. It is rather because the plea of the general issue asserted nothing, and could not, there-

fore, with any proper regard to the meaning of terms, be adjudged to be false. It was but a denial of what the plaintiff had asserted. It charged merely that the pleading, to which it was an answer, was false. Although, strictly speaking, there is no such thing as the general issue, under the present system of pleading, yet the general denial of the allegations of the complaint, as authorized by the present code, is, in most respects, like it. Such general denial, like the general issue, puts the plaintiff to the proof of his entire cause of action, as he has alleged it in his complaint. Under the general issue, the defendant, after the plaintiff had made a *prima facie* case against him, might proceed to prove almost anything tending to show that, when the action was brought, the plaintiff had no subsisting cause of action. This he probably would not be allowed to do upon a general denial under the code. In such a case the only thing at issue would be the truth of the matters alleged in the complaint. In respect to the question now under consideration, the two kinds of defense are not distinguishable. Neither can be stricken out as false, because neither asserts anything."

In *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315, the court said: "If it be held that the courts have the right to strike, as sham and frivolous, denials in the answer of material allegations of the complaint, the result will be that they must often be called upon to decide whether such denials are warranted by the facts, preliminary to the trial of the cause by the court or jury, and this question of fact will generally have to be determined upon proof pro and con by way of affidavits and not by examination of witnesses before the court. The result of this inquiry, if it have any result at all, will be for the court to determine upon this unsatisfactory proof the truth or falsity of the denials, which is the very question which must be determined by the court or jury upon the trial of the cause; and since, under all of the authorities, the court will never strike such allegations unless upon the clearest proof of their falsity, it will follow that in very few instances will any good purpose be subserved by this preliminary inquiry as to the good faith of the denials in the answer. It would therefore seem to accord with the better practice to hold that a denial in an answer, if sufficient in form, entitles the defendant interposing it to a determination, as to its truth or falsity by the jury or the court, after a regular trial of the issue thus made, and such we believe to be the established right of the defendant as recognized by the great weight of authority. In all of the cases it is conceded that under the common-law system of pleading the plea of the

general issue could not be stricken as sham or frivolous, and it would seem that a general denial of an allegation under the code performs substantially the same function as the plea of the general issue under the common-law system of pleading. It would be of no use to array the authorities pro and con upon this question as to whether or not the denials in an answer may be stricken as sham and frivolous. It is sufficient to say that by far the greater number have held that they cannot be stricken and that nearly all of the recent cases are to that effect."

In *Winne v. Sickles*, 9 How. Pr. (N. Y.) 217, it was said: "The power of the court to strike out a sham or false answer or defense is retained by the 152d section of the code. The principles by which the court is to be governed in the exercise of this power have not been changed. Under the former practice the plea of the general issue was never stricken out as false. The obvious reason for making this exception is found in the nature of the plea itself. It merely refers the plaintiff to the proof of his cause of action, as he has alleged it to exist. It affirms nothing to be true, and, therefore, can scarcely be said to be a sham or false plea. So, under the code, the defendant may deny, generally, the allegations of the complaint. When he does this, his answer amounts to the general issue; or, admitting some of the allegations, he may put others in issue by denying them. In neither case can the answer be said to be a sham answer. In either case the defendant has a right to have the issue he has made tried in the usual manner."

The rule was also laid down in the leading case of *Wayland v. Tysen*, 45 N. Y. 281, as follows: "Under the common law system the general issue could not be struck out as sham, although shown by affidavits to be false. (*Broome County Bank v. Lewis*, 18 Wend. 565.) This was not upon the ground that a false plea was not sham. That was always so regarded, but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common law evidence, and that *ex parte* affidavits were not such evidence. The court, under that system, exercised the power of striking out pleas setting up affirmative defenses as sham when shown by affidavits to be false, but not where the party verified such plea by affidavit. (*Steward v. Hotchkiss*, 2 Cow. (N. Y.) 634.) . . . It may be said that the power claimed will only be exercised in clear cases, where it is manifest that the desire of the defendant is only for delay, and that he is practicing a fraud for this purpose by putting a falsehood upon the record. . . . The judgment of the court must be exercised upon the affidavits,

and if satisfied of the falsity of the pleading, although sustained by opposing affidavits, it becomes a duty so to decide by granting the motion. It is in the power of the plaintiff, in every case, as was done in this, to preclude the defendant from interposing either a general denial or a denial of specific facts by verifying his complaint. Thus he can prevent such answer, unless from the affidavit of the defendant it shall appear that it was interposed in good faith."

QUALIFICATION OF RULE.

It has been held that a general denial of allegations in a pleading which are matters of record, or of written instruments to which the defendant is a party, or of knowledge of matters of which the defendant might have informed himself by reasonable diligence will be stricken out on a motion as sham or frivolous. *Oregonian R. Co. v. Oregon Ry. etc. Co.* 22 Fed. 245, 10 Sawy. 464; *Sloane v. Southern California R. Co.* 111 Cal. 688, 44 Pac. 320, 32 L.R.A. 193; *Barrie v. Yorston*, 35 App. Div. 404, 54 N. Y. S. 841; *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. S. 224, 1151; *Sharp v. Sharp*, 145 N. Y. S. 386.

In an action to recover an unpaid tax on personal property, a denial by the defendant of any knowledge or information sufficient to form a belief as to the truth of the allegations which relate to matters of public record, open by law to public inspection, and with knowledge of which the defendant is chargeable by law, has been held to be a frivolous plea. *New York v. Matthews*, 180 N. Y. 41, 72 N. E. 629.

Where an action was brought on a judgment and the defendant by an answer denied knowledge or information regarding the judgment sufficient to form a belief, and by another paragraph merely denied indebtedness, it was held that the answer was sham and should be stricken out. *Buller v. Sidell*, 43 Fed. 116.

It has been held that an answer containing denials on information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party, is properly stricken out as sham and frivolous. *Moscow First Nat. Bank v. Martin*, 6 Idaho 240, 55 Pac. 302.

It has been held that where the answer in the form of a general denial is manifestly false, and the falsehood is conceded by the defendant who makes no pretense that the answer is true, the courts will, on motion, strike it out. *Steward v. Hotchkiss*, 2 Cow. (N. Y.) 634.

In *Mier v. Cartledge*, 8 Barb. (N. Y.) 75, 2 Code Rep. 125, it was held that an unverified answer might be stricken out as false on motion, on affidavits showing its falsity

although the answer amounted to a general denial, but that if the answer or other pleading was verified a motion to strike it out could not be entertained.

Minority Rule.

In some jurisdictions no distinction is made between general denials and defenses consisting of new matter, and the rule obtains that an answer to a pleading by a general denial of any material allegation in the pleading may be stricken out on motion as sham or frivolous if it is clearly shown to be false. *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 388; *Wheaton v. Briggs*, 35 Minn. 470, 29 N. W. 170; *Stevens v. McMillin*, 37 Minn. 509, 35 N. W. 372; *Dobson v. Hallowell*, 53 Minn. 98, 54 N. W. 939; *Bardwell-Robinson Co. v. Brown*, 57 Minn. 140, 58 N. W. 872; *State v. Weber*, 96 Minn. 422, 150 N. W. 490, 113 Am. St. Rep. 630; *Brown-Forman Co. v. Peterson*, 101 Minn. 53, 111 N. W. 733; *Beckwith v. Golden Rule Co.* 108 Minn. 89, 121 N. W. 427; *Towne v. Dunn*, 118 Minn. 143, 136 N. W. 562; *Sheets v. Ramer*, 125 Minn. 98, 145 N. W. 787; *Walter v. Walter*, 35 N. J. L. 262; *Coykendall v. Robinson*, 39 N. J. L. 98; *Flack v. Dawson*, 69 N. C. 42; *Schehan v. Malone*, 71 N. C. 440; *Werk v. Christie*, 6 Ohio Cir. Dec. 255, 9 Ohio Cir. Ct. 439; *Wertheimer v. Morse*, 10 Ohio Dec. (Reprint) 814, 23 Cinc. L. Bul. 455; *Wentzel v. Zim*, 10 Ohio Dec. 97, 7 Ohio N. P. 512. See also *Remington v. Scholes* [1897] 2 Ch. (Eng.) 1, 66 L. J. Ch. 526, 76 L. T. N. S. 667, 45 W. R. 580; *Hayward v. Grant*, 13 Minn. 165, 97 Am. Dec. 228. Compare *Morton v. Jackson*, 2 Minn. 219; *McDermott v. Deither*, 40 Minn. 86, 41 N. W. 544.

The court in *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 388, said: "An answer containing only denials may be just as false, just as readily interposed in bad faith, and for the mere purpose of delay and obstructing the administration of justice, and therefore just as mischievous and reprehensible in every respect, as one setting up new matter."

So in *Werk v. Christie*, 6 Ohio Cir. Dec. 255, 9 Ohio Cir. Ct. 439, it was said: "Where a direct and explicit denial is made of each and every allegation of a petition, we have had very grave doubts whether the court had such power, or ought on a motion filed to strike it out as false, proceed to adjudicate the question as to its falsity. There would seem to be good ground for believing that this is an invasion of the rights of a party to have a question of this kind settled by a jury, if it be a case in which the party is entitled to a trial by jury on the merits, or in a case where he is not so entitled thereto, a full hearing by the

court, not raised by a motion, but upon the issues raised by the pleadings. And yet, so far as we can see, the exercise of such right has generally been maintained by the courts as necessary to their protection and their right to interfere in this summary manner, when satisfied that such pleading has been used to prevent the proper administration of the law, in many cases has been upheld."

In *Coykendall v. Robinson*, 39 N. J. L. 98, the court pointed out that even at common law no distinction was made between the general issue and other pleas, saying: "This rule was applied to the general issue, as well as to other pleas, where it appeared to be a sham plea. *Phillips v. Bruce*, 6 M. & S. (Eng.) 134; *Shadwell v. Berthoud*, 5 B. & Ald. (Eng.) 750, note; *Vincent v. Groome*, 1 Chit. (Eng.) 182. No reason can be assigned why a defendant should be permitted to shelter himself from the power of the court to strike out a false plea, by taking refuge under the general issue. It is clear that the right, which a defendant had at common law, to have the issue of fact tried by a jury, was subject and subordinate to the power of the court to strike out a false plea." A reference to the English authorities cited by the court, however, does not disclose that the pleas in those cases were the general issue.

It has been held that where the court is satisfied that an answer containing a general denial is made for the purpose of preventing the administration of justice, the court has the power of its own protection to order the denial stricken out on motion as sham. *Werk v. Christie*, 6 Ohio Cir. Dec. 255, 9 Ohio Cir. Ct. 439.

Where under the code the defendant is required to deny generally or specifically each material allegation of the complaint, a general denial of each and every allegation is held to be a sham plea and may be ordered stricken out on motion. *Sehehan v. Malone*, 71 N. C. 440.

It has been held that a frivolous or sham reply may be stricken out on motion and its falsity may be established by an affidavit. *Barker v. Foster*, 29 Minn. 166, 12 N. W. 460; *Sheets v. Ramer*, 125 Minn. 98, 145 N. W. 787.

It has also been held that in an action on a promissory note an answer merely denying that the note was outstanding against the defendant, and that there was anything due on the note, should be stricken out, and that if it was not objected to by the plaintiff, the court should of its own motion order it stricken from the files. *Larimore v. Wells*, 29 Ohio St. 13.

In *Wisconsin*, by virtue of a statute, an answer whether by denial or avoidance, if sup-

ported by an affidavit, will not be stricken out on motion as sham; while an unverified answer in any case is open to such a motion but may be saved by the affidavit of one witness in opposition to the motion. *Pfister v. Wells*, 92 Wis. 171, 65 N. W. 1041. Compare *Black River Imp. Co. v. Holloway*, 85 Wis. 344, 55 N. W. 418, apparently decided without reference to statute.

SCARBOROUGH ET AL.

v.

AMERICAN NATIONAL INSURANCE COMPANY.

North Carolina Supreme Court—April 12, 1916.

171 N. Car. 353; 88 S. E. 482.

Life Insurance — Risks Included — Legal Execution of Insured.

An ordinary life policy, which contained a provision that it should be incontestable within two years after date of issue, provided premiums have been paid, and except for fraud, does not cover death of insured as the result of execution for crime, though such risk was not excepted.

[See 13 Ann. Cas. 133.]

Effect of Incontestable Clause.

A clause in an ordinary life policy, providing that it should be "incontestable" after two years from its date, except for fraud, providing premiums have been paid, merely means that the provisions of the policy will not be contested, and is not a waiver by the insurance company of the right to defend against a risk, as that of execution of insured for crime, which was never assumed.

[See note at end of this case.]

Appeal from Superior Court, Durham county: ALLEN, Judge.

Action by J. C. Scarborough et al., plaintiffs, against American National Insurance Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. REVERSED.

McLendon & Hedrick for appellant.

Manning, Everett & Kitchin for appellees.

[353] BROWN, J.—The defendant insured the life of Willie Bell, payable to his mother, Kitty Bynum, with right to change the beneficiary. The plaintiffs are the beneficiaries and are entitled to recover if the policy is in force. Willie Bell, the insured, was electro-

cuted on 8 July, 1915, in accordance with the sentence of the law, for the crime of murder. The policy contains no provision stipulating either for or against the liability of the company in the event the insured's life was taken in punishment for the violation of the laws of the State. The policy does, however, contain this provision: "This policy shall be incontestable after two years from its date of issue for the amount due, provided premiums have been duly paid, except for fraud."

[354] Upon the facts stated, the only question presented on this appeal is, Does an ordinary life insurance policy, in the absence of any provision in regard thereto, insure against death by act of the law administered as a punishment for the commission of a capital felony?

We do not think that the parties to the contract contemplated such an extraordinary risk, or that the terms of the policy include it. If such a stipulation had been inserted in the policy, it would be insurance against the commission of crime, and void as against sound principles of public policy.

This identical case, as far as our researches show, was first decided by the House of Lords in the case of *Amicable Soc. etc. v. Bolland*, 2 Dow. & Cl. page 1, known as the *Fauntleroy* case. It was then held by the House of Lords that though the policy did not contain an exception of the liability of the insurer, in the event the assured came to his death by the hands of the law the exception would be implied, for the reason that an express contract for liability in such event would contravene sound principles of public policy as well as good morals.

The doctrine asserted in the *Fauntleroy* case, that death by the hands of public justice for the commission of crime avoids a contract of life insurance, is said by the Supreme Court of Alabama never to have been questioned, though the case itself may have led to the very general introduction of the exception into policies. *Supreme Commandery, etc. v. Ainsworth*, 71 Ala. 447, 46 Am. Rep. 332.

As is said in that case: "The extinction of life by disease or by accident, not by suicide voluntary and intentional by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime." *Bliss on Life Ins. secs. 242, 243; Vance on Life Ins. p. 524.*

This question was decided by the Supreme Court of the United States in the well known case of *Northwestern L. Ins. Co. v. McCue*, 223 U. S. 234, 32 S. Ct. 220, 56 U. S. (L. ed.) 419, 38 L.R.A.(N.S.) 57, and in the case of *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 23 S. Ct. 139, 47 U. S. (L. ed.) 216.

In the former case it is stated: "The question was before this Court in *Burt v. Union*

Cent. L. Ins. Co. In the policy passed on, as in the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: 'Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?' And, answering, after discussions, we said: 'It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce [355] crime, and as it forbids the introduction of such stipulation, it also forbids the enforcement of the contract under circumstances which cannot be lawfully stipulated for.'

In *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 18 S. Ct. 300, 42 U. S. (L. ed.) 603, it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not, and the conclusion was based, among other considerations, upon public policy, the Court saying: "A contract the tendency of which is to endanger the public interest or injuriously affect the public good, and which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment." *Ritter v. Mutual L. Ins. Co. supra; Supreme Commandery, etc. v. Ainsworth, supra; Plunkett v. Supreme Conclave, etc.* 105 Va. 643, 55 S. E. 9; *Hartman v. Keystone Ins. Co.* 21 Pa. St. 466; *Hopkins v. Northwestern L. Ins. Co.* 94 Fed. 729; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 49 Am. Rep. 469.

The incontestable clause in this policy does not prevent the defendant from setting up the defense interposed in this action.

By the use of the term "incontestable" the parties must necessarily mean that the provisions of the policy will not be contested, and not that the insurance company agrees to waive the right to defend itself against a risk which it never contracted to assume. In *Collins v. Metropolitan L. Ins. Co.* 27 Pa. Super. Ct. 353, the Court in a case precisely like the one at bar, in construing the incontestable clause, used the following language: "By its terms it is not the claim presented by the insured, irrespective of the cause of death, which is made incontestable; it is merely the validity of the policy as an obligation binding upon the company."

The only case that at all militates against our conclusion is *Collins v. Metropolitan L.*

Ins. Co. 232 Ill. 37, 13 Ann. Cas. 129, 83 N. E. 542, 122 Am. St. Rep. 54, 14 L.R.A. (N.S.) 356; but that decision seems to be based upon a provision of the State Constitution declaring that no conviction shall work a corruption of blood or forfeiture of estate. It is not necessary that we should discuss that case except to say that we do not regard it as a precedent to be followed. Those cases which are based upon statutes of descent and dower and the like, such as the *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794, have no application where the liability grows out of contract of insurance.

Upon the agreed statement of facts, the judgment of the Superior Court is reversed. Let judgment be entered in the court below in favor of the plaintiff against the defendant for the sum of \$11.40, the sum tendered by the defendant and refused by the plaintiff. All the costs of this Court and the Superior Court will be taxed against the plaintiff.

Reversed.

NOTE.

Effect of Incontestable Clause in Life Insurance Policy in Case of Legal Execution of Insured.

The reported case holds that an incontestable clause in a life insurance policy has no application to a defense based on the fact that the death of the insured was occasioned by his legal execution for crime, that not being a risk contemplated by the policy. In *Collins v. Metropolitan L. Ins. Co.* 27 Pa. Super. Ct. 353, the same rule was laid down, the court saying: "Had the policy expressly insured against this risk: that is, that in consideration of the insured paying a certain sum of money, year by year, the company would, in the event of his committing capital felony, and being tried, convicted and executed for that felony, pay to his legal representatives a certain sum of money; such a contract could not be sustained. It must be held to be void upon principles of public policy. 'Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that

condition went at least, altogether void?' *Amicable Soc. v. Bolland*, 4 Bligh N. S. (Eng.) 194. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. As a life policy which expressly covenanted against a legal execution of the insured for crime would be void as against public policy, so an ordinary policy, containing no applicable special provisions, is not to be construed as insuring against such a risk. Public policy forbids the insertion in the contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for: *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550; *Wells v. New England Mut. L. Ins. Co.* 191 Pa. St. 207; *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 18 S. Ct. 300 [42 U. S. (L. ed.) 693]; *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 23 S. Ct. 139 [47 U. S. (L. ed.) 216]. The reason for the refusal of the courts to aid one who founds his cause of action upon his own criminal act is because of the public interests involved, which require that the laws against crime be enforced and that the courts aid no man to take a profit from their violation. The rule is enforced upon the ground of public policy alone, and not out of consideration for the defendant, to whom the advantage is incidental."

The view that an insurer may not contract for indemnity for a death so caused also finds support in *Northwestern Mut. L. Ins. Co. v. McCue*, 223 U. S. 234, 32 S. Ct. 220, 56 U. S. (L. ed.) 419, 38 L.R.A. (N.S.) 57, wherein the court said: "The main question in the case is, as we said, the liability of the company under the circumstances. Or, to put it more abstractly for the present purpose of our discussion, whether a policy of life insurance insures against death by a legal execution for crime? The question was before this court in *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362 [23 S. Ct. 139, 47 U. S. (L. ed.) 216]. In the policy passed on, as in the policy in the case at bar, there was no provision excluding death by the law. It was decided, however, that such must be considered its effect, though the policy contained nothing covering such contingency. These direct questions were asked: 'Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?' And answering, after discussion, we said (p. 365): 'It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to

wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would tend to induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.' Cases were cited, among others *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139 [18 S. Ct. 300, 42 U. S. (L. ed.) 603]. There it was held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when one of sound mind intentionally took his life, irrespective of the question whether there was a stipulation in the policy or not. And the conclusion was based, among other considerations, upon public policy, the court saying (p. 154) that 'a contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment.' These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend even by explicit declaration."

In *Collins v. Metropolitan L. Ins. Co.* 133 Ill. App. 326, a ruling in accord with the reported case was made, but that case was reversed (232 Ill. 37, 13 Ann. Cas. 129, 83 N. E. 542, 122 Am. St. Rep. 54, 14 L.R.A. (N.S.) 356) without specific reference to the incontestable clause.

As to the legal execution of the insured as a bar to an action on a life insurance policy, see the note to *Collins v. Metropolitan L. Ins. Co.* 13 Ann. Cas. 129.

KREBS ET AL.

v.

PHILADELPHIA LIFE INSURANCE COMPANY.

Pennsylvania Supreme Court—May 3, 1915.

249 Pa. St. 330; 95 Atl. 91.

Life Insurance — Incontestable Clause — Application to Suicide — Time from Which Incontestable Clause Operates.

Where a life insurance policy, dated October 1st, had an indorsement written thereon by the company's secretary, stating that the amount of the insurance would be carried as term insurance from August 1st to October

1st, all the provisions of the policy not inconsistent with that writing must be read into the contract for term insurance, since the writing was not a complete contract in itself, and, if any of the provisions are read into it, all consistent ones must be, so that the year during which by the terms of an incontestable clause the company did not assume the risk of suicide by the insured began to run from the date of the term insurance, not from October 1st, and after the lapse of one year from that date the suicide of the insured is no defense.

[See note at end of this case.]

Construction of Policy against Insurer.

Ambiguous provisions of a life insurance policy will be construed most strongly against the insurer and in favor of the insured.

[See 10 Am. St. Rep. 390.]

Appeal from Court of Common Pleas, Philadelphia county.

Action by William G. Krebs et al., plaintiffs, against Philadelphia Life Insurance Company, defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. **AFFIRMED.**

Russell Duane for appellant.

T. Henry Walnut for appellee.

[331] *FRAZER, J.*—The policy of insurance on which this action was brought was issued upon the application of plaintiffs' father, bearing date July 19, 1913. The policy is dated October 1, 1913, but contains on the top of the third page, written in ink and signed by the secretary of defendant company, the following memorandum: "In consideration of the payment of nine and 76-100 dollars in advance the amount insured by this policy will be carried as term insurance from August 1, 1913, to October 1, 1913. At the request of the insured the premiums hereon are changed to quarterly installments of forty-nine and 96-100 dollars each, payable on the first day of October, January, April and July in each year thereafter during the continuance in force of this policy."

It appears the policy was actually delivered on or before August 1, 1913, and the above clause incorporated for the purpose of protecting the insured in the meantime and until the actual date of the original policy, in accordance with the general practice among insurance companies, by which persons desiring insurance and not having the funds on hand to pay the premium immediately are enabled to take out the policy and protect themselves for a short time at a lower rate which provides "term insurance." This arrangement [332] is advantageous to both the company and the insured, as it closes the transaction immediately which might other-

wise not be finally completed. The policy also contains a provision that "self-destruction while sane or insane, within one year of the date hereof, is a risk not assumed by the company under this policy;" and, a further provision that "this policy shall be incontestable, except for nonpayment of premiums after one year from its date." The insured committed suicide on August 24, 1914, and the question now arises whether this action on his part avoided the policy under the above provisions. The question depends upon whether or not the date of the policy is to be counted from the date of the printed form or from that of the written clause. If the former is accepted, the company is not liable, but if the latter is adopted, then the required year had expired before the death of the insured, and the beneficiaries are entitled to recover. The court below held the policy was effective from August 1, 1913, and that the year began to run at that time.

It will be noted the written stipulations do not constitute a complete contract of insurance, nor does the written part attempt to incorporate in its provisions enough of the terms of the printed contract to make it a completed agreement under the rule of incorporation by reference. If, however, it should be construed to do so, then it must be held to incorporate all the provisions of the original policy not expressly changed by the written part. Whether the contract be considered as the written part with the printed policy incorporated by reference, or the printed policy supplemented by the change made in the written part, in either case it is necessary that both written and printed parts be construed as a whole to make a complete and valid contract of insurance within the provisions of the Act of June 1, 1911, P. L. 581, requiring such contracts to contain certain provisions therein stated.

Considering the printed policy and written part as [333] one contract, the effect is to change the time at which the policy is to take effect from October 1st, to August 1st, also to change the method of payment of premiums to quarterly instalments instead of yearly payments. In all other respects the contract was in full force on August 1st, unless the phrase "term insurance" must be construed as meaning something further than a mere expression governing the duration of the existence of the policy. The question, therefore, is whether by this expression, it must necessarily have been understood by the parties that the insurance in force during the period from August 1st to October 1, 1913, meant something different from the terms of the policy on which the written stipulations were transcribed.

As pointed out above, it was necessary, in order to constitute a complete contract

of insurance, that at least some terms of the printed policy should be incorporated in the insurance stipulation for the two months' term. If any of these were necessary, why not all, except such as were expressly excluded? Where can the line be drawn? It certainly cannot be contended that only those provisions favorable to the company should be incorporated, while those beneficial to the insured should be excluded. The language used by this court in *Francis v. Prudential Ins. Co.* 243 Pa. St. 280, 90 Atl. 205, is applicable. The policy there provided that if it were allowed to lapse and not be surrendered, the company would write a paid-up policy for the full amount for a certain term, and it was contended by the company that the insured was not entitled to a paid-up policy for the full term specified without deduction for such time as would cancel actual loans made by the company to the insured. In that case Justice Elkin said (p. 589): "It is argued, earnestly and forcefully, that the insured was only entitled to an extended term of five years and seventy-eight days on condition of his being free from indebtedness to the company on account of the policy at the date of the lapse. The answer to this contention is [334] that the policy contains no such provision, and in order to reach such a conclusion it is necessary, not only to ignore the plain words of the contract, but to read into it, by way of construction, the ex parte understanding of the insurer without anything in the policy to indicate what that understanding was and without notice to the insured that the true intent of the parties was not fully expressed in the clear language of their contract. If the plain and unambiguous terms of the contract in the present case mean anything, it is, as held by the learned court below, that the insured was entitled to an extended term of five years and seventy-eight days. . . . We cannot agree that the term of extended insurance is affected by the loan provisions of the policy, which do not in terms, nor as we view it by necessary implication, have reference to the table of extended insurance. If appellant intended to reduce the term of extended insurance on account of loans to the insured, it would have been an easy matter to have so provided in the policy, and the inference from its failure to do so is that it did not so intend. The policy is in the language of the insurance company and the presumption is that its express provisions contain all the conditions intended to be imposed. Certainly the insured had the right to assume that the policy meant what it said, and that conditions not expressed did not exist."

The above language is particularly applicable here. It would have been an easy matter for the insurer to insert a provision to the

effect that the date of the original policy should apply so far as the suicide clause was concerned, or that there was no exemption from suicide in the term policy. This was not done and neither is there anything to show that a term policy meant something different from the contract, which was set forth in the printed form. The burden of showing this was on defendant under the well settled rule that where there is an ambiguity in the conditions of a policy of insurance [335] its provisions will be construed most strongly against the insurer and in favor of the insured.

There was no error in holding the policy was in force with all its provisions from August 1, 1913.

The assignments of error are overruled and the judgment affirmed.

NOTE.

Effect of Incontestable Clause in Life Policy on Provision against Suicide.

The earlier cases passing on the effect of an incontestable clause in a policy of life insurance on the liability of the insurer in case of suicide by the insured are reviewed in the notes to *Supreme Court of Honor v. Updegraff*, 1 Ann. Cas. 309, and *Supreme Conclave, etc. v. Miles*, 84 Am. St. Rep. 528, 554. The present note is designed to collate the more recent decisions.

It has been held that an incontestable clause in a life insurance policy is applicable to preclude a defense based on the commission of suicide by the insured notwithstanding a clause in the policy excluding liability in case of suicide. *Goodwin v. Provident Sav. L. Assur. Assoc.* 97 Ia. 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L.R.A. 473, wherein the court said: "Now, by the terms of the policy it was incontestable, after two years from its date, except for fraud in procuring it,—subject, however, to the stipulations regarding payment of premiums, and extrahazardous occupations. That is to say, claims under the policy by reason of the death of the assured, were not to be controverted or disputed, except for some of the reasons stated, and death by suicide is not one of them. It will be observed that the clause on which the defendant relies is not found in the policy in suit, but in the application which preceded it, in point of time, and there is significance in the fact that the words used in the application were not carried forward into the policy. Another rule for interpretation may well be used here, which is that when there is a conflict between the provisions of the policy and the statements contained in the application, the former controls. Defendant's counsel con-

tend with much plausibility that death by suicide was a risk not contemplated by the parties, nor covered by the policy. But we think such a holding would import into the terms of a policy something not found therein, and not contemplated by the parties,—at least, not by the assured,—at the time the policy was issued. . . . The proper construction of this policy, taken in connection with the application, we think, is that the policy does not cover death by suicide, occurring within two years from the date of its delivery, but that after two years it is incontestable, except upon the grounds stated therein."

So in *Mutual L. Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295, an incontestable clause was held to waive the benefit of a statute (Civ. Code 1910, § 2500) providing that "death by suicide . . . releases the insurer from the obligation of his contract." The court said: "Where the policy contained the clause, 'the company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of the policy,' the benefit of code section 2500 was waived, unless such waiver was against public policy. If it is established that the insured came to his death by his own intentional act, nothing else appearing, it is presumed that the act was that of a sane man. Consequently, it becomes necessary to determine what effect the clause just quoted has upon Civil Code (1910) § 2500, which itself has reference only to intentional self-destruction by one who is sane. The clause referred to may be divided into two parts, one having reference to the act of one when sane, and the other having reference to the act of one when insane; and, eliminating that part which has reference to an insane act, for present purposes, the clause would read as follows: 'The company shall not be liable hereunder in the event of insured's death by his own act during the period of one year after the issuance of the policy.' Thus it will be seen that the company was dealing directly and specifically in the policy itself with the matter of self-destruction by one sane at the time, for its own protection, and presumably for the purpose of securing business, and entered into a contract which provided that the company should not be liable if the insured died by his own act within a period of one year. The company is presumed to have been aware of the provision of the Civil Code (1910) § 2500, and, unless it was the purpose of the company in this contract to waive the benefit of said code section, the language employed would have been redundant."

In *North American Union v. Trenner*, 138 Ill. App. 586, it was held that an incontestable

testable clause has no application to a policy providing for a diminution of payment in case of suicide. The court said: "The provision as to suicide is set out in the declaration, and also in the plea, and provides that 'should said member die by his own hand or act, sane or insane, and while he is a member of this association, his beneficiary or beneficiaries shall in such case receive only one-half of the amount herein agreed to be paid as a mortuary benefit.' On the admitted fact averred in the plea that Herman W. Trenner, the insured member, died by his own hand or act, considered in connection with the other provisions of the contract, appellee is entitled to receive from appellant \$500 and no more. . . . The suicide clause in the contract before us is a part of the contract to pay, providing how much shall be due and payable under the circumstances named therein. Insisting upon this clause and offering to comply with it, and pay one-half of the amount named in the contract, and tendering the same to appellee, is not contesting the validity of the contract. On the contrary, it is admitting its validity, and is doing all that appellant is required to do to perform and fulfil the contract on its part. Each and all of the above named provisions following the agreement to pay \$1,000 to appellee are modifications of that agreement, and define the rights of the parties in the several contingencies specified therein. The agreement to pay the sum specified to appellee is contingent upon the subsequent conditions, and by express provision is made subject thereto. The incontestable clause does not waive or supersede any of them. It relates to the contract of membership entered into by the insured, and not to the terms of payment provided in the contract."

In *Security Life Ins. Co. v. Dillard*, reported immediately following, the court refused to determine whether suicide was a risk contemplated by the policy in suit or to discuss the effect of an incontestable clause, saying that public policy forbade a recovery on an insurance policy in a case of voluntary self-destruction by the insured, without regard to the terms of the policy. A different view was expressed in *Silliman v. International Ins. Co.* 131 Tenn. 303, 174 S. W. 1131, L.R.A.1915F 767, wherein the court, referring to a clause making the policy incontestable for suicide after the lapse of a year, said: "It is equally commendable that the limit should be brief, as being, on the one hand, sufficient to enable the company to satisfy itself of the honest purposes of the insured, while protecting itself against possible fraud on his part; and at the same time it is desirable that the insured should not feel that he should, during the whole life of the policy, be unprotected against the pos-

sibility of bringing death to himself by his own hand through the blameless misfortune of losing his mental faculties. The insured in the case before us had the right to guard against such a contingency, as we believe he did, by confining that contingency to the first year of his insurance."

In the reported case it is assumed that an incontestable clause applies to preclude a defense based on a suicide clause, and the court gives to the policy a construction favorable to the insured in determining the time when the year after which the policy was incontestable began to run. See to the same effect *Harrington v. Mutual L. Ins. Co.* 21 N. D. 447, 131 N. W. 246, 34 L.R.A.(N.S.) 373; *American Nat. Ins. Co. v. Thompson* (Tex.) 186 S. W. 264.

SECURITY LIFE INSURANCE COMPANY OF AMERICA

v.

DILLARD.

Virginia Supreme Court of Appeals—March 11, 1915.

117 Va. 401; 84 S. E. 656.

Life Insurance—Effect of Suicide of Insured.

Suicide of insured while sane defeats a recovery on the policy by the beneficiary, his wife, whether the suicide was or was not in contemplation of, or in any way dealt with by, the parties as a risk covered by the policy. [See note at end of this case.]

Same.

The defense of suicide of insured while sane is based on public policy, and cannot be waived intentionally or unintentionally by stipulations or defects in pleadings. [See note at end of this case.]

Suicide While Insane.

Where insurer, when sued on a life policy, proved the suicide of insured while sane, the beneficiary could prove that insured was insane when committing suicide, and thereby defeat the defense of suicide.

[See 7 Ann. Cas. 659; 84 Am. St. Rep. 546.]

Error to Circuit Court, City of Lynchburg.

Action by Mrs. Gertrude Dillard, plaintiff, against Security Life Insurance Company of America, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. REVERSED.

Coleman, Easley & Coleman, Caskie & Caskie and F. W. Bull for plaintiff in error.

A. E. Strode and Harrison & Long for defendant in error.

[402] KELLY, J.—Mrs. Gertrude Dillard brought suit against the Security Life Insurance Company of America in the Circuit Court of the city of Lynchburg, upon an insurance policy issued on the life of her husband, and recovered a judgment which is now before us for review.

The proceeding was by motion, and the only pleading on the part of the defendant was a statement of its grounds of defense, which will be hereinafter briefly noticed.

A number of questions are presented by the record, all of which were argued orally and in the briefs, but in our view of the case the controlling question arises out of the fact that the insured committed suicide.

It seems to be conceded, and from the record it is clear, that the insured while sane took his own life on the night of the very last day on which, without a further payment of premium, his policy could, in the most liberal interpretation of its terms, have been considered in force.

At the conclusion of the evidence the defendant requested a number of instructions, including the following: "The court further instructs the jury, that even if the policy on which this action is founded had not lapsed at the time of the death of the insured but was then in force, nevertheless, if the jury believe from the evidence that the death of the insured was the result of suicide or self-destruction, they must find for the defendant."

The trial court refused to give this instruction, and its refusal is the basis of one of the defendant's exceptions.

We are aware that the question thus arising is one upon which the authorities are not in unison, but we are of opinion that upon the soundest considerations of public policy there ought not to be, and under the principles and authorities already adopted and endorsed by this court [403] there cannot be, any recovery upon the case as made out in the record before us.

In *Plunkett v. Supreme Conclave, etc.* 105 Va. 648, 55 S. E. 11, the president of the court, delivering the opinion, said:

"The case presented to us upon the pleadings is that of a sane man who takes his own life. In other words, as was said in *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 23 S. Ct. 139, 47 U. S. (L. ed.) 216, do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?

"In *Amicable Soc. v. Bolland*, 4 Bligh N. S. (Eng.) 194, decided by the House of Lords,

the Lord Chancellor said: 'It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy?

"Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim?"

"In *Burt v. Union Cent. L. Ins. Co.* supra, it is held, upon grounds of public policy, that a policy of life insurance does not insure against the legal execution of the insured [404] for crime, even though he may in fact have been innocent, and therefore unjustly convicted and executed.

"And in *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 18 S. Ct. 300, 42 U. S. (L. ed.) 693, Mr. Justice Harlan, delivering the opinion, said: 'There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests, or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns—expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. Is the case any different in principle if such policy is silent as to sui-

vide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind?"

The view approved by the opinion just referred to in the Plunkett Case, and in the authorities cited therein, has been reiterated and emphasized by the Supreme Court of the United States in the comparatively recent case of *Northwestern Mut. L. Ins. Co. v. McCue*, 228 U. S. 246, 32 S. Ct. 221, 56 U. S. (L. ed.) 419, 38 L.R.A. (N.S.) 57. In that case Mr. Justice McKenna, delivering the unanimous opinion [405] of the court, after reviewing with approval the case of *Burt v. Union Cent. L. Ins. Co.* supra, and *Ritter v. Mutual L. Ins. Co.* supra, says: "These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend, even by express declaration, much less be held to transcend by omission or implication;" and further, on page 249 of 223 U. S. on p. 223 of 32 S. Ct. (56 U. S. (L. ed.) 419, 38 L.R.A. (N.S.) 57): "The question before us and the only question is, What rights did McCue's estate and children get by his policy? And we are brought back to the simple dispute as to whether the policy covers death by the hand of the law. This court has pronounced on that dispute, and its ruling must prevail in the Federal courts of Virginia, in which State the contract was made. And it is consonant with the ruling in the State courts." The opinion then proceeds to cite the case of *Plunkett v. Supreme Conclave*, etc. as showing that the Supreme Court of Appeals of Virginia had expressly approved the consideration of public policy expressed in the *Burt* Case and the *Ritter* Case and other cases of that character.

There are authorities holding that when the policy is payable, not to the estate of the insured, but to his wife or other expressly designated beneficiary, the rule announced in the *Ritter* Case and others of like kind does not apply; but the principle of this distinction is rejected, and we think properly so, in the *McCue* Case in the following language: "One other contention of respondents remains to be noticed. It is contended that if the *McCue* estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above, the policy is the measure of the rights of everybody under it, and as it does not cover death by the law there cannot be recovery either by *McCue's* estate or by his children."

[406] It is contended by the defendant that the original policy, properly constructed, as well as the terms of a certain application for reinstatement made less than a year before the death of the insured, contained stipula-

tions against self-destruction which defeat the recovery. The plaintiff, on the other hand, denies that she was bound by the application for reinstatement, and contends that the original policy, though containing a provision against self-destruction, limited that provision to one year from the issuance of the policy, and claims therefore that the provision against self-destruction had no other effect than to show that suicide was one of the risks contemplated by the parties at the time the policy was issued.

We have not deemed it necessary or pertinent to go into a discussion of these contentions, for the patent reason that under the authorities which we have already cited the result must be the same, whether suicide was or was not in contemplation of, or in any manner dealt with, by the parties as a risk covered by the policy.

Counsel for plaintiff rely upon the case of *Knights of Pythias v. Weller*, 93 Va. 605, 25 S. E. 891, as supporting their contention that suicide, when shown to have been in contemplation as a risk, cannot be availed of as a defense. In that case the judgment was reversed and the cause remanded for a new trial upon a specific ground, namely, that the trial court erred in refusing to sustain the defendant's motion to strike out the plaintiff's evidence because there was a variance between the allegations and the proof, and it is manifest from the opinion that the question of public policy was not considered by the court.

In the brief of counsel for the plaintiff it is said, that "in the grounds of defense filed by the defendant in the court below the question of public policy involved in the defense of suicide was not raised, but as there stated this defense was rested upon the alleged agreement of the insured that [407] self-destruction was not a risk assumed, made in the original application." This is true, but the fact of suicide was proved and the question of public policy was necessarily raised by the instruction hereinbefore set out as well as by the motion to set aside the verdict. Our decision of this case rests entirely upon the considerations of public policy above adverted to and fully discussed in the foregoing authorities. These considerations have to do, not with the interests of the parties litigant, but with the public weal, and they overreach, in a case shown by the record to call for their exercise, all mere formal rules of procedure. They can no more be waived, either intentionally or unintentionally, by stipulations or defects in the pleadings than by provisions or omissions in the contract in litigation. As was said by Mr. Justice Field, in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 U. S. (L. ed.) 539, referring to a case in which a recovery was forbidden

by morality and public policy, "the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice."

If it should be suggested (as, however, it has not been) that the plaintiff relied on the grounds of defense, and, feeling confident that the construction of the policy contended for by defendant could not be upheld, introduced no proof in rebuttal of the evidence of suicide, the answer to any such suggestion is, first, that the proof of suicide in the record, which was not objected to, seems absolutely conclusive; and, second, that this cause will be, as it must be under our practice, remanded for a new trial. At such new trial, if the plaintiff shall be advised to avail herself of one, she will have the opportunity of combatting the claim, so well established by the evidence in the present record, that the insured while sane took his own life.

[408] The policy in this case was issued in 1905. There are indications in the record that for some time the insured had been having difficulty in meeting the premiums. The last premium falling due before his death was unpaid, but the evidence shows that he felt assured that he was entitled to a certain number of days of grace. It was on the night of the last day of grace, as he construed his policy, that he ended his life. We do not overlook the pathetic and appealing aspect which the case assumes if we indulge the natural presumption that he finally committed the act of self-destruction in order to secure a provision for his family. But the very fact that he probably took this false view of the trusteeship which he held in his own life, and of his duty to his family and to the public, illustrates the importance of establishing a known and settled public policy which will discourage this course of conduct on the part of others who might be similarly disposed.

It follows from what has been said that the circuit court erred in refusing the instruction above set out, and in declining to set aside the verdict of the jury. The judgment complained of will, therefore, be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

NOTE.

The reported case holds that a recovery on a life insurance policy when the insured while sane has committed suicide is so far

opposed to public policy that neither an incontestable clause nor any other language in the policy is effective to permit such a recovery. The holding in the reported case is of course opposed to the cases holding that an incontestable clause is applicable to preclude a defense based on a suicide clause, which are reviewed in the note to *Krebs v. Philadelphia Life Ins. Co.* reported ante, this volume, at page 1184, and the earlier notes therein referred to. It is also opposed to the cases which hold that where the policy is silent as to suicide, death by suicide is covered thereby, but is to a considerable extent supported by the cases which hold to the contrary view on that proposition. See the notes to *Grand Legion v. Beaty*, 8 Ann. Cas. 160; *Davis v. Supreme Council*, etc. 11 Ann. Cas. 777; and *Supreme Conclave*, etc. v. *Miles*, 84 Am. St. Rep. 528, 541.

The decision in the reported case is rested largely on the holding in *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 18 S. Ct. 300, 42 U. S. (L. ed.) 693, quoted at some length therein. In the recent case of *Harrington v. Mutual L. Ins. Co.* 21 N. D. 447, 131 N. W. 246, 34 L.R.A.(N.S.) 373, the court, after quoting from the *Ritter* case, said: "This opinion was written in 1897, and it is a sufficient answer to this dictum to say that almost all of the insurance companies now write policies where the possibility of self-destruction while sane is clearly taken into account, and is among the risks assumed: some companies making a time limit and others not. Many states have statutes similar to our section 6064. It is no defense to say that life insurance imports a mutual agreement, whereby the assured is to do all in his power to prevent liability. The company knew that, so far as the agreement with the insured was concerned, and so far as their risks assumed were concerned, he was at liberty to commit suicide while sane at any time after the period of limitation fixed by the contract. The morality of the fact is not involved in this case. The insured, by his self-destruction, has put himself beyond the realm of human law, and the morality of his act will be judged by a different court."

As was said in the case quoted in the preceding paragraph, in some jurisdictions statutes provide that recovery may be had on a life insurance policy notwithstanding the suicide of the insured and forbid any limitation of liability in such a case. Whatever view may be taken of the policy of permitting such a recovery it is clear that it is competent for the legislature so to provide. In *Whitfield v. Aetna L. Ins. Co.* 205 U. S. 480, 27 S. Ct. 578, 51 U. S. (L. ed.) 895, it was said: "That the statute is a legitimate exertion of power by the state cannot be successfully disputed. Indeed, the contrary is not asserted

in this case, although it is suggested that the statute 'seemingly encourages suicide and offers a bounty therefor, payable, not out of the public funds of the state, but out of the funds of insurance companies.' There is some foundation for this suggestion in a former decision of this court, in which it was held that public policy, even in the absence of a prohibitory statute, forbade a recovery upon a life policy, silent as to suicide, where the insured, when in sound mind, wilfully and deliberately took his own life. *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 164 [18 S. Ct. 300; 42 U. S. (L. ed.) 698]. But the determination of the present case depends upon other considerations than those involved in the *Ritter* case. An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot for that reason alone be disregarded; for, it is the province of the state, by its legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the constitution of the state or the Constitution of the United States. There is no such conflict here. The legislative will, within the limits stated, must be respected, if all that can be said is that, in the opinion of the court, the statute expressing that will is unwise from the standpoint of the public interests."

In *Head Camp Woodmen of World v. Sloss*, 40 Colo. 177, 112 Pac. 49, 31 L.R.A. (N.S.) 831, the court said: "By this statute the state, through the proper authority, has declared it to be against public policy to permit insurance companies to contract against the payment of their policies, in the event of loss, because the insured came to his death by suicide. The contract in suit was made subsequent to the passage of this act, and upon full notice as to the policy of the state in that behalf. The propriety and wisdom of the enactment was for the legislature alone, and is not properly for consideration or review here."

So in *Modern Brotherhood of America v. Lock*, 22 Colo. App. 409, 125 Pac. 556, it was said: "The statute of 1903 not only made void and of no effect that portion of the policy or agreement relative to death by suicide, thereby leaving the contract silent on that subject, but in legal contemplation the inhibition of the statute was substituted for the void clause and became an affirmative covenant, binding upon the parties, that as to that policy suicide could never be made a defense. . . . And it is clear that such

contract, with the statute so read into it, is not against sound morals, public policy, justice or right."

BALDAUF

v.

NATHAN RUSSELL ET AL.

New Jersey Court of Errors and Appeals—
November 15, 1915.

88 N. J. Law 303; 96 Atl. 96.

Actions — Parties — Nonexistence of Plaintiff as Defense.

Upon judgment for defendant on his plea in abatement that there was no such person as the alleged plaintiff in the suit, the proper judgment is to quash the writ.

[See note at end of this case.]

Same.

The defense that the plaintiff is a fictitious person attacks the capacity of the plaintiff to commence or continue the suit, and is properly the subject of a plea in abatement.

[See note at end of this case.]

Same.

As there are no formal pleadings in the district courts, a defense that the plaintiff is a fictitious person may, in the absence of statute providing otherwise, be raised *ore tenus*.

[See note at end of this case.]

Same.

In a suit for rent where the defendant in his specification of defenses set up that there was no such person as the alleged plaintiff in the suit, the evidence is held not to justify a finding that the plaintiff was a fictitious person.

[See note at end of this case.]

Same.

The burden of establishing the truth of a plea in abatement that the plaintiff was a fictitious person is upon the defendant.

[See note at end of this case.]

Appeal from Supreme Court.

Action by Ida Baldauf, plaintiff, against Nathan Russell, a corporation, et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Harry B. Brookhurst for appellant.

Barrett & Barrett for respondents.

[304] KALISCH, J.—Ida Baldauf brought her action in the East Orange District Court against Nathan Russell, a corporation, and

Alice M. Tucker to recover \$315 for rent claimed to be due her from them.

The plaintiff demanded of the defendants a specification of defences which was complied with and among other matters set up by the defendants in their specification was the following: "That there is no such person as Ida Baldauf, the alleged plaintiff in this suit."

From the state of the case, supplemented by certified facts found by the trial judge and returned by him in pursuance to the command of a rule issued out of the Supreme Court, it appears that the trial judge gave judgment for the defendants upon a finding by him that Ida Baldauf was a fictitious person.

Upon an appeal from this judgment to the Supreme Court that court affirmed the action of the trial judge in finding that the plaintiff, Ida Baldauf, was a fictitious person, but held that the judgment was not correct in form, and that the proper practice was to quash the writ and ordered that a judgment to that effect be entered and that the judgment as modified be affirmed.

The appellant now appeals to this court.

The judgment was properly reformed and in accordance with settled practice.

In 1 Tidd Pr. 642, the practice is laid down to be as follows: "The judgment for defendant, on a plea in abatement, whether it be on an issue in fact or in law is that the writ or bill be quashed."

2 Arch. Pr. 4 contains this declaration: "Judgment for the defendant, in all cases, whether upon verdict, demurrer or *multiel record*, is, that the writ or bill be quashed; Gilb. C. B. 52; unless where the matter pleaded in abatement is some temporary disability, such as excommunication, infancy, &c., in which case the judgment is, that the plaintiff remain without day until," &c. See also form in 1 Went. Pl. 50.

[305] A defence that the plaintiff is a fictitious person attacks the ability of the plaintiff of being capable of commencing or continuing his suit by denying his existence, and is properly the subject of a plea in abatement. 1 Chit. Pl. 447; 1 Went. Pl. 50.

Since there are no formal pleadings in the District Courts, a defence of the nature of the one in question may be raised *ore tenus*. This is the legally sanctioned course of proceeding in the courts for the trial of small causes. *Smith v. Van Houten*, 9 N. J. L. 381. In the absence of any statute providing otherwise the same practice obtains in the District Courts.

In the present case, however, the incapacity of the plaintiff to sue was raised in the defendants' specification of defences.

The fundamental attack upon the judgment under review is that there was no evidence before the trial judge which in law justified him in finding that the plaintiff was

a fictitious person and that therefore the Supreme Court erred in affirming the judgment.

Upon the issue raised by the defendants denying the existence of the plaintiff, the trial judge certified that the tax collector of the town of Bloomfield testified that at the tax sale of the property to the plaintiff, a young man representing himself to be the plaintiff's agent would not give her address; that the defendants denied the existence of the plaintiff; that Adolf L. Engelke testified that he represented Harry B. Brockhurst, the plaintiff's attorney of record, that he did not know nor had he ever seen the plaintiff and did not know where she lived; that one Antasio testified that he had twice seen the plaintiff; that he believed she lived in Brooklyn, but did not know her address; that after the cross-examination of the witness, the court deemed his testimony unworthy of belief; that the court not being satisfied that there was any such person as Ida Baldauf adjourned the trial of the action for one week to May 19th, 1914, and instructed Mr. Engelke that the plaintiff be produced in court on that day, and that at the request of Mr. Brockhurst on May 19th, he further adjourned the trial of the case until May 26th, and wrote to [306] him on May 20th that the plaintiff should be produced in court on May 26th; that Mr. Brockhurst wrote to both the court and the attorneys of the defendants that he would not comply with the court's request and that he would rely on the plaintiff's proof in the case, for a judgment in her favor upon the merits, provided that the court found that the proof warranted it; that on the 26th day of May, neither the plaintiff nor her attorney appeared in court, and there being no satisfactory proof of the existence of the plaintiff, that he found as a fact that there was no such person as Ida Baldauf and gave judgment for the defendants.

From this certificate of facts, which was made the basis of the finding of the trial judge, it appears that he adjudged that the burden of establishing that the plaintiff was not a fictitious person was upon the plaintiff.

This was an erroneous conception of the legal rule appertaining to a defence of the character interposed.

The burden of establishing the truth of a plea in abatement is upon the defendant. 1 Cyc. 134; 1 Encycl. Ev. 15; 4 Phil. Ev. 129.

Viewing the facts certified to by the trial judge in the most favorable light to the defendants, there is manifestly an utter absence of any proof that the plaintiff was not in existence.

The testimony of the witness Antasio that he had twice seen the plaintiff was at least some proof that she was not a fictitious

person. It is true that the trial judge certifies that after the cross-examination of the witness, he concluded that his testimony was unworthy of belief. But the testimony of a competent witness cannot be capriciously rejected. There must appear some good reason for such action, as, for example, that his story was inherently improbable, or that it was contradicted by some other testimony, or by some proven fact or circumstance, or by testimony impeaching his truth and veracity.

Even though the trial judge had properly rejected Anatasie's testimony, its only effect was to leave the case barren of any testimony on the defendant's allegation "that there was no such person as Ida Baldauf."

[307] This being the situation it was manifest error for the trial judge to find, as a fact, that no such plaintiff was existent.

The trial judge lent importance to the fact that the plaintiff's attorney refused to produce the plaintiff in court when ordered to do so. This refusal did not warrant any inference that the plaintiff was non-existent. It was a circumstance of no probative value whatever. The plaintiff was not legally bound to appear and prosecute her case. She had the right to prosecute her case by her attorney, and to produce such witnesses as were deemed necessary to establish her cause of action.

It is a strikingly novel proposition that a court may order a plaintiff to appear in court, no matter in what part of the world such plaintiff may be in or what the cause of absence may be, and that a failure or refusal to appear will justify an inference that such plaintiff is fictitious.

It is a matter of daily practice of cases being prosecuted in the District Courts and courts for the trial of small causes, in the absence of the plaintiffs, and it has never been suggested that the mere failure of a plaintiff to appear can be regarded as a sufficient basis to challenge his existence.

From the exhibits introduced in evidence it appears that the plaintiff's attorney notified the defendants' attorney of the residence of the plaintiff in Brooklyn, giving street and number. It was open to the defendants if they challenged the plaintiff's existence to have taken her testimony or that of her attorney *de bene esse*, under the Evidence act.

There being no evidence before the trial judge that the plaintiff was a fictitious person, there was no basis to his finding that she was.

The judgment of the Supreme Court affirming the judgment of the District Court will be reversed.

For affirmance: None.

For reversal: The Chancellor, Chief Justice, Garrison, Swayze, Parker, Minturn,

Kallsch, Vredenburg, White, Terhune, Heppenheimer, Williams, Taylor, JJ.—13.

NOTE.

Nonexistence of Plaintiff (Not Corporation) as Defense to Action.

In General, 1193.

Method of Raising Objection, 1195.

Burden of Proof, 1196.

Effect of Failure of Plaintiff to Appear, 1196.

Amendment of Pleading, 1196.

In General.

While the parties to an action may be either natural or artificial, they must be real and not fictitious. 15 Am. & Eng. Enc. Pl. & Pr. 476. Hence, the nonexistence of a natural person named as the party plaintiff in an action has been held to be the proper subject of a plea impugning the right to bring or continue the suit. *Anderson v. Brumby*, 115 Ga. 444, 42 S. E. 77; *The Kentucky v. Hine*, 1 G. Greene (La.) 379; *The Pambinaw v. Wilson*, 11 La. 479; *Doe v. Penfield*, 19 Johns. (N. Y.) 308; *Campbell v. Galbreath*, 5 Watts (Pa.) 423. And see the reported case. See also *Ogilby v. Wallace*, 2 Hall (N. Y.) 553.

In *Anderson v. Brumby*, 115 Ga. 444, 42 S. E. 77, in holding that the mayor of a city did not have the power to institute an action on a bond which failed to conform to the statutory requirements, it was said: "This court is fully committed to the proposition that no suit can be lawfully prosecuted save in the name of a plaintiff having a legal entity either as a natural or as an artificial person."

In *The Kentucky v. Hine*, 1 G. Greene (La.) 379, it appeared that the proceedings were commenced under "an act to provide for the collection of demands against boats and vessels," the twentieth section of which provided that, in all cases arising under the act, "if judgment shall have been rendered in favor of the plaintiff the master, owner, agent, or consignee of the boat or vessel, or other person interested, may appeal from the judgment by giving bond and security in double the amount sued for; or sue out a writ of error, as if they or either of them had been sued." The court held that the act authorized any plaintiff to institute suit against any boat or vessel by name, but did not authorize any boat or vessel by its name to proceed as plaintiff in any case, or to sue out any process. Hence it dismissed a writ of error sued out in the name of the steamboat *Kentucky* which did not show by whose complaint or on whose responsibility

it was issued, as not appearing to have been brought by any party authorized under the statute. See also the *Pembinaw v. Wilson*, 11 Ia. 479, wherein the court said: "The note sued on was given by the defendant to the 'S. B. Pembinaw and owners,' and the suit was brought in the name of the Steamboat Pembinaw and owners, without any allegation in the petition that plaintiff was a partnership or corporation doing business under that name and style. . . . There is a special provision of our statute under which suits may be brought against boats by their name when a lien is sought to be enforced; but there is no special authority given under which a boat or the owners thereof may sue in the name of such boat. Civil actions are required to be brought in the names of the real parties in interest. Section 1676, Code of 1851. 'Pembinaw and Owners' is not alleged to be a corporation or partnership, and is not a party within the meaning of this section. . . . We cannot think that the legislature intended by the enactment of this section to provide that a suit could be brought in the name of a steamboat, hotel, tollgate or racehorse, although each may have a name and may be made the payee of a note. Suits must be brought in the name of the real parties in interest; and 'name,' as here used, does not refer to something inanimate, or having no legal existence but to something that can sue or be sued, as persons, or corporations, and that, as such, can have an interest in a suit."

There are a number of cases wherein the court has impliedly held that the lack of a real, natural plaintiff was a bar to the proceeding. But it should be noted that those holdings are merely dicta, inasmuch as it appeared in each case that the plaintiff was a corporation or an unincorporated association and had failed to plead its incorporation or authority to sue in its common or business name. Thus it has been said that in every suit brought there must be a real plaintiff, but that the plaintiff may be a natural or an artificial person, such as a partnership; and that if the suit is brought in a name which is not that of a natural person, or of a corporation, or of a partnership, it is a mere nullity. *New York Mut. L. Ins. Co. v. Inman Park Presbyterian Church*, 111 Ga. 677, 36 S. E. 880; *Western, etc. R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978; *Haynes v. Armour Fertilizer Works*, 146 Ga. 832, 2 S. E. 648; *Collins v. Armour Fertilizer Works*, 18 Ga. App. 533, 89 S. E. 1054; *St. Mark's Methodist Church v. Georgia Power Co.* 19 Ga. App. 633, 91 S. E. 1047; *Mexican Mill v. Yellow Jacket, etc.* Min. Co. 4 Nev. 40, 97 Am. Dec. 510. See also *Thurmond v. Cedar Spring Baptist Church*, 110 Ga. 816, 36 S.

E. 221; *Hill v. Armour Fertilizer Works*, 14 Ga. App. 106, 80 S. E. 294.

Hence, in pursuance of the holding that where an action has been instituted by one not having a legal entity, and so not having capacity to sue, the proceeding is a mere nullity, it has been held that there can be no amendment, as there is nothing to amend by. *New York Mut. L. Ins. Co. v. Inman Park Presbyterian Church*, 111 Ga. 677, 36 S. E. 880; *Western, etc. R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978; *St. Mark's Methodist Church v. Georgia Power Co.* 19 Ga. App. 633, 91 S. E. 1047; *Mexican Mill v. Yellow Jacket, etc.* Min. Co. 4 Nev. 40, 97 Am. Dec. 510. See also *Hill v. Armour Fertilizer Works*, 14 Ga. App. 106, 80 S. E. 294. Compare *Roberts v. Tift*, 136 Ga. 901, 72 S. E. 234, set out at length *infra* in the subdivision *Amendment of Pleading*:

In *Western, etc. R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978, the court said: "The name 'Dalton Marble Works' cannot be fairly said to import a corporation or a partnership, without further description of its legal entity. Even if it is probable that the court might have construed this name as one that imports a corporation or a partnership, the amendment offered and allowed by the court negatives such a construction, for the reason that the amendment, which was simply 'Dalton Marble Works, H. P. Colvard, proprietor,' clearly shows, if it be true, that the 'Dalton Marble Works' was neither a partnership nor a corporation, but merely the name of Colvard's property. The 'Dalton Marble Works' then, being neither a natural person, a corporation, nor a partnership, could not legally institute an action; or, in other words, there was no plaintiff to the action, and, there being none, the suit was a mere nullity, and could not be amended by inserting the name of Colvard as proprietor, there being nothing to amend by." To the same effect see *Hill v. Armour Fertilizer Works*, 14 Ga. App. 106, 80 S. E. 294.

In *Mexican Mill v. Yellow Jacket, etc.* Min. Co. 4 Nev. 40, 97 Am. Dec. 510, it appeared that the proceedings originated with a complaint in which the plaintiffs were styled "The plaintiffs, the proprietors of the Mexican Mill, a copartnership doing business in that name in the county of Ormsby, State of Nevada." The court said: "The very first step towards the commencement of a civil action or proceeding is the filing of a complaint, in which it is indispensable that there be shown a plaintiff and a defendant, and without which it is an absolute nullity, and renders void all subsequent proceedings had under it. In this instance no person, natural or artificial, is named as

plaintiff; and if an amendment were allowed to supply the omission the effect of such amendment would necessarily be to make a plaintiff where there was none such at the inception of the action. The section just quoted establishes an exceedingly liberal rule respecting amendments, yet there is nothing in its terms which would authorize an amendment of the character suggested by the record before us. As there is no plaintiff in this case, there was no action in the court below and nothing to amend. So, too, there being no appellant in this court, there is really no appeal to be heard or determined."

In *St. Mark's Methodist Church v. Georgia Power Co.* 19 Ga. App. 633, 91 S. E. 1047, it was held that it followed from the refusal of the trial court to allow an amendment to the effect that *St. Mark's Methodist Church* "is not a corporation and has never in any way been authorized to sue in its own name," that the suit was a nullity. And so the court held that the statute (Civ. Code 1910, § 5689) providing "and when it becomes necessary for the purpose of enforcing the rights of such plaintiff, he may amend by substituting the name of another person in his stead, suing for his use," was inapplicable since the right given by the statute existed only where the suit was brought in the name of a real plaintiff and not where it was not brought in the name of any natural or artificial person.

Method of Raising Objection.

In the only cases passing directly on the question of the nonexistence of a plaintiff person as a defense to the action, it has been held that where an action is commenced in the name of a fictitious natural person, the defendant may plead in abatement that there never was any such person in *rerum natura*. *Doe v. Penfield*, 19 Johns. (N. Y.) 308; *Campbell v. Galbreath*, 5 Watts (Pa.) 423. And see the reported case.

Thus it has been held that in an action for ejectment, instituted in the name of a fictitious plaintiff, the defendant might plead in abatement that there never was any such person. *Campbell v. Galbreath*, 5 Watts (Pa.) 423.

In the reported case, an action for rent, it is held that a defense that the plaintiff is a fictitious person attacks the ability of the plaintiff to commence or continue his suit by denying his existence, and is properly the subject of a plea in abatement.

In *Doe v. Penfield*, 19 Johns. (N. Y.) 308, it was held that the defendant might plead in abatement that the plaintiff was not a real person in an action to recover costs adjudged against the defendant in an action of ejectment in the name of a fictitious person brought in a foreign jurisdiction.

There are also dicta to the effect that the defendant's proper plea is one in abatement. Thus, in *Leader Printing Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242, the court said: "We think the correct rule is that, when a suit is commenced under a fictitious name, no matter what that name may be, it will be presumed in law that the plaintiff is legally qualified to maintain it, until the contrary is made to appear; and, unless the petition shows upon its face that a plaintiff has no legal capacity to sue, the objection must be raised by a special plea in the nature of a plea in abatement." And in *Boston Type, etc. Foundry v. Spooner*, 5 Vt. 93, it was said: "It would seem from the principles on which pleas in abatement are founded, that the defense relied on by the defendant could only be taken advantage of by a plea in abatement, as it merely denies that there is any right in those claiming to prosecute, or that there is any such person as the plaintiff; leaving the contract to be enforced by those from whom the consideration proceeded. The authorities, however, show that it is a proper subject for a plea in abatement or bar. That there may be a plea in abatement, to the disability of a plaintiff, denying his existence, showing that there is no such person in *rerum natura*, as that at the commencement of the suit he was a fictitious person, is recognized in 1 Com. Dig. tit. Abatement E. 16; 1 Chitty Pleadings 435-6; *Guild v. Richardson*, 6 Pick. (Mass.) 370; *Doe v. Penfield*, 19 Johns. (N. Y.) 308. That the same matter may be plead in bar, we find in Bro. Abr. Misnomer, 93, as quoted in the case of *Stafford v. Bolton*, 1 B. & P. (Eng.) 40, 44. These authorities are decisive in favor of the present plea and against the position assumed by the counsel for the plaintiff, viz., that the defendant could only avail himself of this defense by plea in bar, unless a different rule should prevail when a suit is brought by a corporation, although there is nothing in the declaration in this case from which we can directly infer that the plaintiffs were suing as a corporation. That there is no difference however in this respect may be learned from Bro. Abr. & the case from B. & P. before mentioned where as it respects this plea in abatement, viz., that there is no such person in *rerum natura* or no such body politic, both corporations and natural persons are considered as equally entitled to the benefits of the same."

However, there is also a dictum to the effect that the defense that the plaintiff is not a real person may be pleaded in bar. Thus, it has been said: "In an action by a corporation or natural person, misnomer of the one or the other goes only to the writ, but to say that there is no such person in *rerum natura*, or no such body politic, this is in

bar; for if he is misnamed he can have a new writ by the right name, but if there be no such body politic, or no such person, then he cannot have the action." Year Book, 22 Edw. IV, 34. See also *Stafford v. Bolton*, 1 B. & P. 40, 128 Eng. Rep. (Reprint) 767; *Northumberland County Bank v. Eyer*, 60 Pa. St. 436; *Bacon Abr. tit. Abatement*, O. Com. Dig. tit. Abatement, E 16.

In the reported case it is held that the defense that the plaintiff is a fictitious person may be raised *o tenus*, since there are no formal pleadings in the district court, or any statute providing otherwise.

In *Spreckels v. Grace Darling Hospital Assoc.* 28 Cal. App. 646, 153 Pac. 718, the court applied a statute (California Civil Code, §§ 2466, 2468) providing that every person transacting business in that state under a fictitious name must file with the county clerk a certain certificate and publish the same for a specified length of time; and providing further that such a person should not maintain an action on any contract made or transaction had under the fictitious name, unless such filing had been done and such publication made. The court held that the plaintiff's want of legal capacity to sue might be raised by special demurrer on that ground when the fact that he was doing business under a fictitious name within the meaning of those sections appeared on the face of the complaint. But the court overruled the defendant's demurrer where the complaint affirmatively showed that the plaintiff was engaged in the business of publishing a newspaper having a real and not a fictitious name, that he was publishing the paper under the name of his agent, who was the ostensible publisher thereof and whose name was not fictitious; and that the contract on which the suit was brought showed that the agent was the publisher of the paper.

Burden of Proof.

The burden of sustaining a plea in abatement rests on the defendant. 1 Am. & Eng. Enc. Pl. & Pr. 32. And see the reported case, wherein it appeared that the nonexistence of the plaintiff was raised as one of the defendants' specifications of defense. The trial judge rejected the testimony of a witness that he had seen the plaintiff twice, on the ground that it was unworthy of belief, and, there being no other satisfactory proof of the existence of the plaintiff, gave judgment for the defendants on a finding by him that the plaintiff was a fictitious person. On appeal, the court holds that, inasmuch as the burden of establishing the truth of a plea in abatement is on the defendant, the trial judge erred in apparently thus adjudging that the burden of establishing that the plaintiff was a ficti-

tious person, was on the plaintiff. It is also held that even though the trial judge had properly rejected the witness's testimony, its only effect was to leave the case barren of any testimony on the defendants' allegation that there was no such person as the plaintiff.

In *Ogilby v. Wallace*, 2 Hall (N. Y.) 553, an action on a promissory note payable to order and indorsed in blank, the evidence tended to show that the plaintiff suing as trustee for the owner of the note was a fictitious person, whereupon the trial court granted a nonsuit. It was held that this was error, as the real inquiry ought to have been whether the owner of the note was the bona fide possessor of it, and that the proof that the plaintiff was a fictitious person might have been very material to show bad faith or fraud in the owner in prosecuting the note. The court also held that *prima facie* the plaintiff was to be deemed a real person, and whether the evidence showed him to be otherwise was for the jury and not for the court to determine; that the probability raised by the evidence that the plaintiff was fictitious could not properly be made the ground of a nonsuit.

Effect of Failure of Plaintiff to Appear.

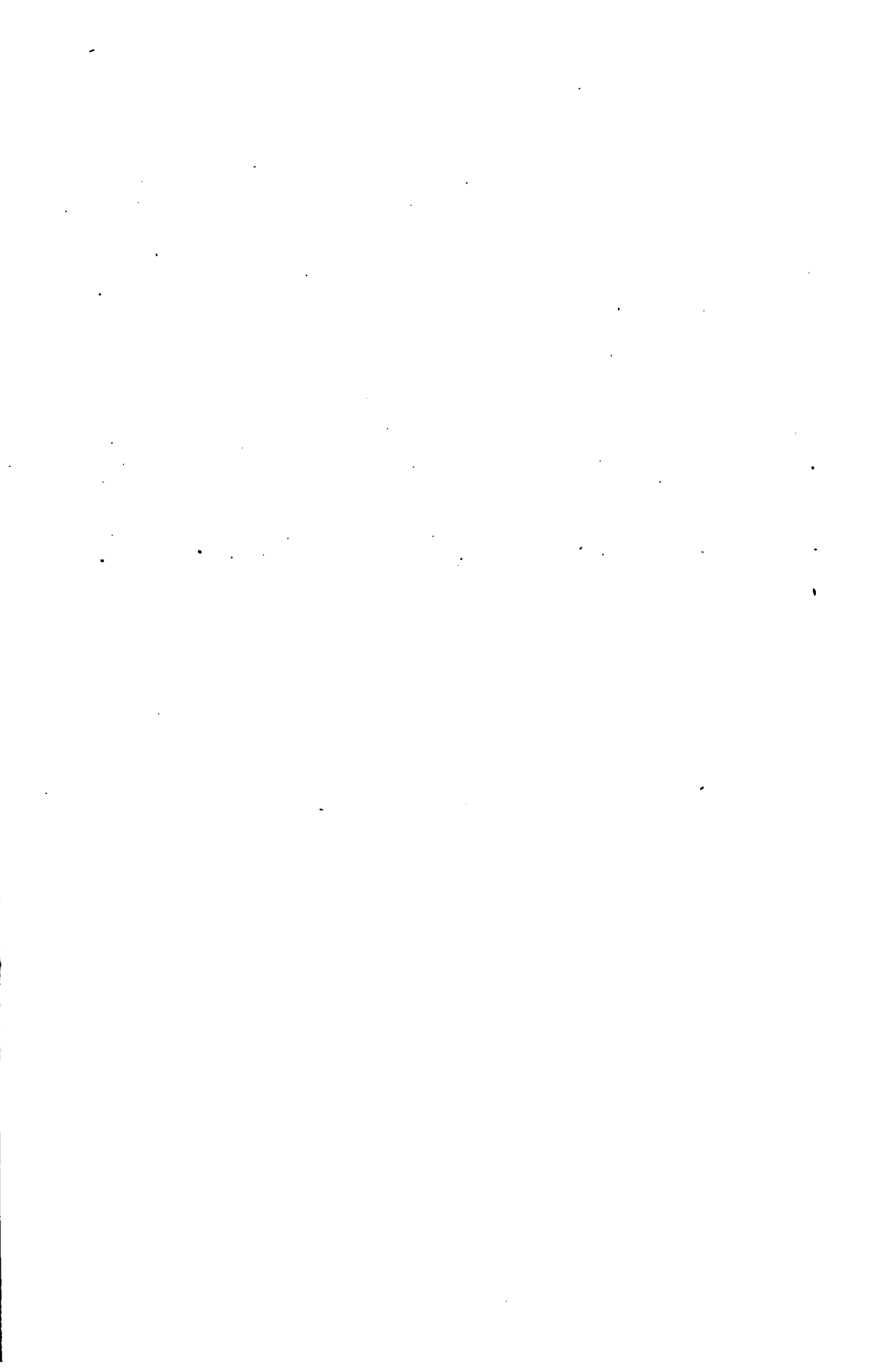
The failure or refusal of the plaintiff to appear in court will not justify an inference that he is fictitious. Thus, in the reported case, it appears that the defendants pleaded in defense of the action that the plaintiff was a fictitious person. The trial judge found as a fact that there was no such person as the plaintiff and gave judgment for the defendants, basing his judgment in part on the fact that the plaintiff's attorney refused to produce the plaintiff in court when ordered so to do. The court holds that the refusal did not warrant any inference that the plaintiff was nonexistent, as she was not legally bound to appear and prosecute her case in person, but had the right to prosecute it by her attorney.

Amendment of Pleading.

It has been held that a declaration in the fictitious form of ejectment, as used in the state of Georgia, might be amended by laying a new demise, where the only demise laid in the original declaration was in the name of a lessor who was dead at the time the suit was brought. *Roberts v. Tift*, 136 Ga. 901, 72 S. E. 284, wherein the court said: "Notwithstanding the doctrines, that no action can be maintained except in the name of a natural or artificial person; that there can be no recovery in ejectment where the sole lessor of the plaintiff was dead when the suit was brought, or at the date of the demise, or

had no title at the date of the demise or at the commencement of the action; and that no amendment is allowable at law which adds a new party or a new cause of action, it has ever been the practice in this state to allow, by amendment at any time before the trial, the introduction of a new lessor of the plaintiff in the action of ejectment proper. Although every demise of this character introduces a new party to the suit, as well as a new cause of action. . . . If the nominal plaintiff in the action of ejectment, proper, is a sufficient legal entity to authorize the continuance of the action in his name for the recovery of costs where his sole lessor dies pending the suit, and if the action may proceed in his name for the trespass, where his sole lessor was entitled to the possession of the premises at the time the demise was laid, although his right of possession be divested before trial, it would certainly seem to be true that the fictitious plaintiff is a sufficient legal entity to authorize a new demise to be laid by amendment, where the sole lessor in

the original declaration was dead at the commencement of the suit. Moreover, if a suit in ejectment, proper, can be well brought in the name of a fictitious plaintiff upon the demise of a living lessor who had no title at the time the demise was laid, or who had parted with the title prior to the commencement of the suit, and an amendment can be made upon the trial by laying a new demise from a lessor who had title at the time of the new demise, and at the time the suit was brought, which under our practice is certainly allowable, no good reason occurs to us why a new demise may not be laid by amendment in the name of a lessor having title and the right of possession at the time of the laying of such new demise and at the time of the commencement of the action, although the sole lessor in the original declaration was dead at the time the suit was brought. Our conclusion is that such an amendment as is last referred to is allowable." Compare the dicta with reference to amendments set out *supra* in the subdivision, *In General*.



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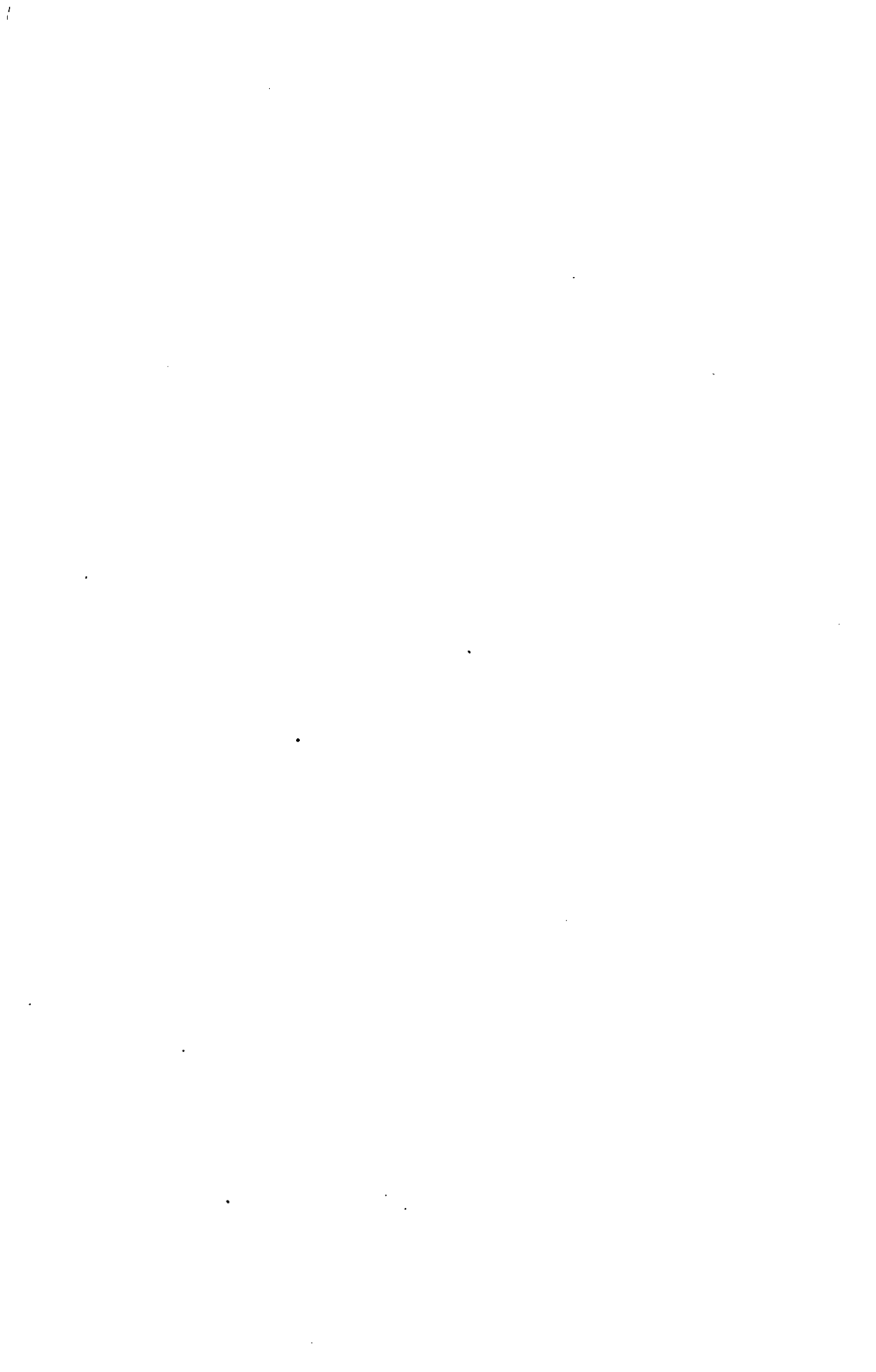
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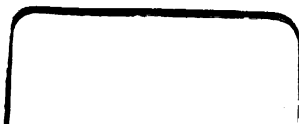
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